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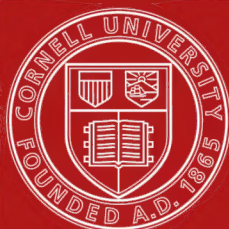
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CYCLOPEDIA

OF THE LAW OF

PRIVATE CORPORATIONS

By WILLIAM MEADE FLETCHER
Author of "Corporation Forms," "Illinois Corporations," "Equity
Pleading and Practice," etc.

VOLUME VI

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PRIVATE CORPORATIONS

VOLUME VI

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xxxv. ASSESSMENTS ON FULL PAID STOCK [See Vol. 7]

xxxvi. INDIVIDUAL LIABILITY AND RIGHTS ON FAILURE TO INCORPORATE [See Vol. 7]

XIV. PREFERRED STOCK

§ 3621. Definition, nature and distinctions. The ordinary stock of a corporation, or "common stock," as it is called, gives no stockholder

any greater rights than any other stockholder. There is no difference between the shares, but all the stockholders stand upon an equal footing, and each is entitled to share in the profits of the corporation, whenever they are distributed in the way of dividends, in proportion to the number of shares held by him.⁷⁶ Preferred stockholders, however, stand on a different footing. As the term implies, preferred stock is stock which gives the holder a preference over the holders of common stock with respect to the payment of dividends. Holders of preferred stock are entitled to receive dividends on their shares, to the extent agreed upon, before any dividends at all are paid to the holders of the common stock.⁷⁷

It is immaterial whether a stock given preference is called preferred or guaranteed or interest bearing; the terms having practically the same meaning.⁷⁸ Guaranteed stock, or stock on which dividends are in terms guaranteed, is preferred stock,—stock upon which the pay-

⁷⁶ See § 3652 et seq., *infra*.

⁷⁷ **United States.** *Storow v. Texas Consol. Compress & Manufacturing Ass'n*, 87 Fed. 612.

Georgia. *Jefferson Banking Co. v. Trustees of Martin Institute*, 146 Ga. 383, 91 S. E. 463; *Totten & Co. v. Tison*, 54 Ga. 139; *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

Indiana. *Grover v. Cavanagh*, 40 Ind. App. 340, 82 N. E. 104.

Kentucky. *Sumrall v. Commercial Bldg. Trust's Assignee*, 106 Ky. 260, 44 L. R. A. 659, 90 Am. St. Rep. 223, 50 S. W. 69.

Maine. *Belfast & M. Lake R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362.

Maryland. *Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327.

Minnesota. *Booth v. Union Fibre Co.*, 162 N. W. 677.

New Hampshire. *Jones v. Concord & M. R. R.*, 67 N. H. 234, 68 Am. St. Rep. 650, 30 Atl. 614.

New York. *People v. Miller*, 180 N. Y. 16, 72 N. E. 525, aff'g 94 App. Div. 564, 88 N. Y. Supp. 197; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *People v. New York Building-Loan Co.*, 50 Misc. 23, 100 N. Y. Supp. 459, aff'd 119 App. Div. 830, 104 N. Y.

Supp. 892, 189 N. Y. 547, 82 N. E. 1131.

Rhode Island. *Taft v. Hartford, P. & F. R. Co.*, 8 R. I. 310, 5 Am. Rep. 575.

South Carolina. *State v. Cheraw & C. R. Co.*, 16 S. C. 524.

Vermont. *Chaffee v. Rutland R. Co.*, 55 Vt. 110.

Virginia. *Kain v. Angle*, 111 Va. 415, 69 S. E. 355.

England. *Henry v. Great Northern Ry. Co.*, 4 Kay & J. 1.

Preferred stock represents a contribution of capital precisely the same as common stock, differing only as to the preferred right of the holder to share in dividends or interest. *People v. Miller*, 180 N. Y. 16, 72 N. E. 525, aff'g 94 N. Y. App. Div. 564, 88 N. Y. Supp. 197.

⁷⁸ *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g 120 Ill. App. 596. See also *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496; *Taft v. Hartford, P. & F. R. Co.*, 8 R. I. 310, 5 Am. Rep. 575; *Henry v. Great Northern Ry. Co.*, 4 Kay & J.

ment of a certain dividend at specified periods is guaranteed before payment of any dividend to other stockholders. But the guaranty is not absolute, so as to create the relation of debtor and creditor between the corporation and the holders of such stock, irrespective of whether there are profits. It is a guaranty of the specified dividends out of profits available for the payment of dividends.⁷⁹ If, however, there are no profits out of which the dividend can be paid at any time when it is payable according to the terms of the guaranty, the dividend is not necessarily lost, but the holders of the stock will be entitled to payment of all arrears before any payments can be made to the holders of common stock.⁸⁰

Dividends on preferred or guaranteed stock are called "preferred or guaranteed dividends."⁸¹

§ 3622. Power to issue preferred or guaranteed stock—In general.

If the charter of a corporation or the general law in force at the time of its creation expressly authorizes it to issue preferred or guaranteed stock, as is often the case, there can be no question as to its power in this respect, so long as it keeps within the power so conferred, and the power may be exercised by a vote of a majority of the stockholders, against the dissent of the minority.⁸² And it is well settled that,

1, 1 De Gex & J. 606, 3 Jur. (N. S.) 1133.

⁷⁹ See § 3752, *infra*.

⁸⁰ See § 3754, *infra*.

⁸¹ *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496; *Taft v. Hartford, P. & F. R. Co.*, 8 R. I. 310, 5 Am. Rep. 575; *Henry v. Great Northern Ry. Co.*, 4 Kay & J. 1, 1 De Gex & J. 606, 3 Jur. (N. S.) 1133.

A preferred dividend is a dividend paid to one class of stockholders in priority to that paid to another class. *Jefferson Banking Co. v. Trustees of Martin Institute*, 146 Ga. 383, 91 S. E. 463; *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156; *Kain v. Angle*, 111 Va. 415, 69 S. E. 355.

⁸² *Butler v. Beach*, 82 Conn. 417, 74 Atl. 748. See also *Ingraham v. National Salt Co.*, 130 Fed. 676, certiorari denied 201 U. S. 644, 50 L. Ed. 902 (mem. dec.); *Belfast & M. Lake R.*

Co. v. Belfast, 77 Me. 445, 1 Atl. 362; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

In Massachusetts prior to the enactment of Stat. 1902, c. 441, there was no general law authorizing manufacturing companies to issue preferred stock, although in some instances the right had been granted by special charter. *Page v. Whittenton Mfg. Co.*, 211 Mass. 424, 97 N. E. 1006; *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63.

The right to issue such stock originally or by amendment of the articles is conferred upon corporations by that statute. *Page v. Whittenton Mfg. Co.*, 211 Mass. 424, 97 N. E. 1006.

Under the Michigan statute (Pub. Acts 1903, No. 232, § 35) a vote of three-fourths of the stock is essential to an amendment providing for the issuing of preferred stock. This means three-fourths of the stock is-

even when no such power is expressly conferred upon a corporation at the time of its creation, it is implied, in the absence of prohibition or restriction, subject to the qualification that it must be exercised for a legitimate corporate purpose, and that the contract rights of shareholders cannot be impaired.⁸³ Such power clearly exists, notwithstanding the dissent of a minority of the stockholders, if it is authorized by the articles of association of the corporation, or by by-laws adopted by the corporation prior to the issuance of the common stock, for in such a case no rights of stockholders are impaired. And the power may be exercised after the issuance of common stock, at any

sued and outstanding and not three-fourths of that authorized. *Foot v. Greilick*, 166 Mich. 636, 132 N. W. 473.

Pub. Acts 1885, No. 232, c. 188, § 38, contained a similar provision. *Continental Varnish & Paint Co. v. Secretary of State*, 128 Mich. 621, 87 N. W. 901.

The Minnesota statute permits a corporation to issue preferred stock when its articles so authorize. *Booth v. Union Fibre Co.*, — Minn. —, 162 N. W. 677.

The New Jersey Corporation Act, § 18 (2 Comp. St. 1910, p. 1608) permits the issuance of preferred stock. *General Inv. Co. v. Bethlehem Steel Corporation* (N. J. Ch.), 100 Atl. 347.

In *Gordon's Ex'rs v. Richmond, F. & P. R. Co.*, 78 Va. 501, it was held that under certain statutes a railroad company had power to issue guaranteed stock.

The mere act of classifying stock into common and preferred, without changing the number of shares, is not tantamount to increasing or reducing such stock so as to require an observance of the statutory provisions as to the manner of increasing or reducing stock. *California Telephone & Light Co. v. Jordan*, 19 Cal. App. 536, 126 Pac. 598.

As to the right of building loan associations to issue preferred stock, see *Wilson v. Parvin*, 119 Fed. 652; *Hog-*

sett v. Aetna Building & Loan Ass'n, 78 Kan. 71, 96 Pac. 52; *Forwood v. Eubank*, 106 Ky. 291, 50 S. W. 255. And see works on building and loan associations.

⁸³ **United States.** *Wilson v. Parvin*, 119 Fed. 652; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g on other grounds 72 Fed. 92.

Georgia. *Hazlehurst v. Savannah, G. & N. A. R. Co.*, 43 Ga. 13.

Illinois. *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g 120 Ill. App. 596.

Kansas. *Hogsett v. Aetna Building & Loan Ass'n*, 78 Kan. 71, 96 Pac. 52.

New York. *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *People v. Koenig*, 133 App. Div. 756, 118 N. Y. Supp. 136.

Texas. See *Reagan Bale Co. v. Heuermann*, — Tex. Civ. App. —, 149 S. W. 228.

"The issuance of preferred stock, in the absence of statutory prohibition, violates no rule of public policy." *Hogsett v. Aetna Building & Loan Ass'n*, 78 Kan. 71, 96 Pac. 52.

"There is no objection to an agreement for preferred or guaranteed stock in the original organization of a corporation, where * * * all the parties agree to it." *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g 120 Ill. App. 596.

time, if all the stockholders consent.⁸⁴ "We know nothing in the constitution or the law," said Judge Folger in a leading New York case, "that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock, with peculiar privileges to one share over another, and thus offering its stock to the public for subscriptions thereto. No rights are got until a subscription is made. Each subscriber would know for what class of stock he put down his name, and what right he got when he thus became a stockholder. There need be no deception or mistake; there would be no trenching upon rights previously acquired; no contract, express or implied, would be broken or impaired."⁸⁵

Preferred stock, however, cannot be issued, against the dissent of a holder of common stock, if his contract with the corporation will be thereby broken or impaired. Therefore, if a corporation, when it issues common stock, is not expressly authorized to issue preferred stock either by its charter or by the general law, and if there is no provision for such stock in its articles of association, it cannot afterwards issue the same without the unanimous consent of the holders of the common stock.⁸⁶

84 United States. *Banigan v. Bard*, 134 U. S. 291, 33 L. Ed. 932; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826.

Georgia. *Hazlehurst v. Savannah, G. & N. A. R. Co.*, 43 Ga. 13.

Illinois. *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362; *Havemayer v. Bordeaux Co.*, 8 Nat. Corp. Rep. 127 (Ill. Cir. Ct. 1894).

Michigan. *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156.

New York. *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

England. *In re Bridgewater Nav. Co.*, 39 Ch. Div. 1; *In re South Durham Brewery Co.*, 31 Ch. Div. 261; *Andrews v. Gas Meter Co.*, [1897] 1 Ch. Div. 361, overruling *Hutton v. Scarborough Cliff Hotel Co.*, 2 Drew. & S. 514, 521, 4 De Gex, J. & S. 672; *Harrison v. Mexican Ry. Co.*, L. R. 19 Eq. 358.

85 Kent v. Quicksilver Min. Co., 78 N. Y. 159.

86 Kent v. Quicksilver Min. Co., 78 N. Y. 159; *Ernst v. Elmira Municipal*

Improvement Co., 24 N. Y. Misc. 583, 54 N. Y. Supp. 116; *Knoxville, C. G. & L. R. Co. v. Knoxville*, 98 Tenn. 1, 37 S. W. 883; *Moss v. Syers*, 32 L. J. Ch. 711. See also *Ingraham v. National Salt Co.*, 130 Fed. 676, certiorari denied 201 U. S. 644, 50 L. Ed. 902 (mem. dec.).

The relative value of the shares cannot be changed, so as to make some of them preferred, without the consent of all the stockholders, unless power to do so is conferred by statute or by the articles of incorporation. So where a corporation and all its registered stockholders signed an agreement whereby, in order to raise money to pay debts, forty per cent. of the stock was surrendered and canceled, and in place thereof new stock, entitled to a first lien upon the net profits for dividends of ten per cent. was issued and sold, it was held that such action was not within the powers of the corporation or stockholders, and therefore was not binding upon one who held stock under an unregis-

An assignee of stock takes it burdened with any equities in relation to the stock which existed as to it in the hands of his assignor,⁸⁷ and hence the assignee of common stock is bound by an agreement providing for the issuing of preferred stock to which his assignor was a party.⁸⁸

Consent by the assignor of stock after the assignment is not binding on the assignee,⁸⁹ even though the transfer has not been registered.⁹⁰ Nor will it be presumed as against the assignee that the assignor gave his consent before the transfer.⁹¹

In some jurisdictions there are constitutional or statutory provisions which expressly prohibit corporations from issuing preferred stock without the consent of all of the stockholders.⁹² And it has been held that such a provision which is general in its terms is not limited in its application to original issues of preferred stock, but that it applies to an issue of increased preferred stock as well, even though the statute permits a corporation to increase its stock with the consent of a majority of its stockholders.⁹³

tered assignment in blank as security for a debt, and that, upon default and a sale thereof, the purchaser was entitled to a new certificate giving the same rights as the old. *Campbell v. American Zylonite Co.*, 122 N. Y. 455, 11 L. R. A. 596, 25 N. E. 853, rev'g 55 N. Y. Super. Ct. 562, 3 N. Y. Supp. 822.

⁸⁷ See § 3768 et seq., *infra*.

⁸⁸ *In re Seneca Oil Co.*, 153 N. Y. App. Div. 594, 138 N. Y. Supp. 78, aff'd 208 N. Y. 545, 101 N. E. 1121.

⁸⁹ *Ernst v. Elmira Municipal Improvement Co.*, 24 N. Y. Misc. 583, 54 N. Y. Supp. 116.

⁹⁰ Though an assignment of stock is not registered a subsequent agreement by all of the other stockholders, including the assignor, whereby certain stock is given a preference in respect to dividends is not binding on the assignee if he is not a party to it. *Campbell v. American Zylonite Co.*, 122 N. Y. 455, 11 L. R. A. 596, 25 N. E. 853, rev'g 55 N. Y. Super. Ct. 562, 3 N. Y. Supp. 822.

That an unregistered transfer is good as between the parties, see § 3794 et seq., *infra*.

⁹¹ *Ernst v. Elmira Municipal Improvement Co.*, 24 N. Y. Misc. 583, 54 N. Y. Supp. 116.

⁹² The Constitution of Missouri contains such a provision. *Pollitz v. Wabash R. Co.*, 167 Fed. 145, judgment reversed for want of jurisdiction, 176 Fed. 333; *Pollitz v. Wabash R. Co.*, 150 N. Y. App. Div. 709, 135 N. Y. Supp. 785, 167 N. Y. App. Div. 669, 152 N. Y. Supp. 803, rehearing denied 170 N. Y. App. Div. 903, 154 N. Y. Supp. 1140.

Where the corporation is organized under the laws of both Missouri and Ohio, a plan to issue preferred stock without the consent of all of its stockholders is invalid, though the laws of Ohio contain no such requirement, and though the meeting at which the plan is adopted is held in the latter state. *Pollitz v. Wabash R. Co.*, 150 N. Y. App. Div. 709, 135 N. Y. Supp. 785, 167 N. Y. App. Div. 669, 152 N. Y. Supp. 803, rehearing denied 170 N. Y. App. Div. 903, 154 N. Y. Supp. 1140.

⁹³ Such provisions are not inconsistent, and even if they were, the provisions of the constitution would control. *Pollitz v. Wabash R. Co.*,

Where the consent of all of the stockholders is not obtained, the issuance of the stock cannot be validated by a ratification by a majority of the stockholders.⁹⁴

The legislature may confer upon a corporation the power to issue preferred stock by an amendment of its charter after the issue of common stock, if all the stockholders consent, but whether such an amendment can be accepted by a majority of the stockholders, so as to bind a dissenting minority, is not so clear. The weight of authority, however, is to the effect that the legislature may make such an amendment and authorize its acceptance by a majority of the stockholders, if there is no express provision in the charter against it, as the amendment does not change the character of objects of the corporation, but is in furtherance of the enterprise for which it was created.⁹⁵

Statutes in some states prohibit the issuing of preferred stock to an amount greater than a specified percentage of the capital paid in.⁹⁶

§ 3623. — Issue of preferred stock under power to borrow money.

An expressly granted or implied power to borrow money for the purposes of the corporation does not include the power to issue ordinary

150 N. Y. App. Div. 709, 135 N. Y. Supp. 785, 167 N. Y. App. Div. 669, 152 N. Y. Supp. 803, rehearing denied 170 N. Y. App. Div. 903, 154 N. Y. Supp. 1140. This case, at one stage, was removed to the federal court, where it was held that the constitutional provision did not apply to increases of preferred stock. *Pollitz v. Wabash R. Co.*, 167 Fed. 145. The decree of the circuit court was subsequently reversed, however, on the ground that there was no separable controversy between citizens of different states, and hence no right of removal, and the circuit court had no jurisdiction. See 176 Fed. 333.

⁹⁴ *Pollitz v. Wabash R. Co.*, 150 N. Y. App. Div. 709, 135 N. Y. Supp. 785, 167 N. Y. App. Div. 669, 152 N. Y. Supp. 803, rehearing denied 170 N. Y. App. Div. 903, 154 N. Y. Supp. 1140.

⁹⁵ See Chap. 57, *infra*.

⁹⁶ Ala. Code 1907, § 3479, provides that preferred stock may be issued in no case exceeding two-thirds of the

capital stock paid for in cash or property. Hence a corporation with an authorized capital of \$2,000, half common and half preferred, of which \$1,000 has been paid in, cannot legally authorize the issuance of \$100,000 of preferred stock. *Heide v. Capital Securities Co.*, — Ala. —, 76 So. 313.

The Delaware statute provides that "at no time shall the preferred stock exceed two-thirds of the actual capital paid in cash or property." *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

The Michigan statute prohibits the issue of preferred stock to an amount greater than two-thirds of the capital paid in. *Foote v. Greilick*, 166 Mich. 636, 132 N. W. 473.

Under this statute no preferred stock can be authorized beyond two-thirds of the amount actually paid in at the time of authorizing the issue. *Continental Varnish & Paint Co. v. Secretary of State*, 128 Mich. 621, 87 N. W. 901.

irredeemable preferred stock for the purpose of raising money, for, as was said by the New York Court of Appeals, "the idea of a borrowing is not filled out unless there is in the agreement therefor a promise or understanding that what is borrowed will be repaid or returned, the thing itself or something like it of equal value, with or without compensation for the use of it in the meantime," and the issue of preferred stock cannot be looked upon "as other than a preference of one class of stockholders to another; as giving to the first class a perpetual, inextinguishable prior right to a portion of the earnings of the company before the other class might have anything therefrom."⁹⁷

It seems, however, that the power to borrow money may be relied upon as authorizing the issue of preferred stock, where the stock is redeemable by repayment of the money, and is issued merely as security for such repayment.⁹⁸

§ 3624. — By-laws authorizing preferred stock. By-laws of a corporation may properly provide for the issue of preferred stock, if adopted by unanimous consent of the stockholders, or if adopted by a majority, provided, provision for the issue of such stock is made in the charter of the corporation, or in the general law in force at the time of its creation, or in its articles of association. But in the absence of such a provision, a majority cannot make a valid by-law authorizing the issue of preferred stock against the dissent of a common stockholder.⁹⁹

§ 3625. — Extent of power. When the charter or articles of association authorize the issue of preferred stock generally, and without limitations, it may be issued as a majority of the stockholders may determine, and there may be more than one issue, provided no contract rights are violated; but when the power is limited, the corporation cannot exceed the limitation. Thus, where the articles of a company authorized it to issue a certain number of shares each of preferred and common stock, specifying the amount of each, and then provided that additional stock might be issued, it was held that the corporation, on increasing its capital stock, could not issue the in-

⁹⁷ Kent v. Quicksilver Min. Co., 78 N. Y. 159.

⁹⁸ Totten v. Tison, 54 Ga. 139; Hazlehurst v. Savannah, G. & N. A. R. Co., 43 Ga. 13; West Chester & P. R. Co. v. Jackson, 77 Pa. St. 321. See also Ingraham v. National Salt

Co., 130 Fed. 676, certiorari denied 201 U. S. 644, 50 L. Ed. 902 (mem. dec.). And see Wilson v. Parvin, 119 Fed. 652, as to the power of a building loan association in this regard.

⁹⁹ See § 512, supra.

creased stock as second preferred, against the dissent of the common stockholders, even though the articles authorized the corporation to determine the conditions upon which stock should be issued, since to allow this would put it in the power of the corporation to utterly annihilate the interests of the common stockholders.¹

If the charter or articles of a corporation or a valid by-law provides that an increase of the capital stock may be made in such manner, and with such rules, regulations, privileges and conditions as the stockholders may determine at a corporate meeting, the capital stock may be increased by issuing preferred stock.² But it has been held that a constitutional provision prohibiting corporations from issuing preferred stock without the consent of all of the stockholders, which is general in its terms, applies to an issue of increased preferred stock, even though the statute permits an increase of stock with the consent of a majority of the stockholders.³

§ 3626. — Remedies in case of unauthorized issue. If the directors or a majority of the stockholders of a corporation threaten to issue or issue preferred stock without authority, a dissenting and nonparticipating stockholder, if he proceeds promptly, may maintain a suit in equity to enjoin the issue, or to cancel it, provided rights of innocent third persons have not intervened.⁴ But his right to such relief may be barred by laches.⁵ And holders of either common or pre-

¹ *Melhado v. Hamilton*, 28 L. T. (N. S.) 578, 29 L. T. (N. S.) 364. "If they could issue one share," said Vice Chancellor Malins in this case, "they could issue a thousand, and if at seven per cent., they might issue them at seventy per cent.; and thus, at a general meeting, they might pass resolutions which would have the effect of utterly annihilating the interests of the ordinary shareholders. That, upon every principle of right between man and man, I think ought not to be." 28 L. T. (N. S.) 580.

² *Harrison v. Mexican Ry. Co.*, L. R. 19 Eq. 358.

³ See § 3622, *supra*.

⁴ *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *Moss v. Syers*, 32 L. J. Ch. 711. Compare *Fielden v. Lancashire & Y. Ry. Co.*, 2 De Gex & S. 531.

A suit in equity will lie at the in-

stance of a common stockholder to enjoin an unauthorized or unlawful issue of preferred stock. *Ernst v. Elmira Municipal Improvement Co.*, 24 N. Y. Misc. 583, 54 N. Y. Supp. 116.

⁵ **United States.** *Branch v. Jesup*, 106 U. S. 468, 27 L. Ed. 279; *In re Sharood Shoe Corporation*, 192 Fed. 945; *Taylor v. South & North Alabama R. Co.*, 13 Fed. 152.

Georgia. *Hazlehurst v. Savannah, G. & N. A. R. Co.*, 43 Ga. 13.

Illinois. *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362.

New York. *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

England. *Andrews v. Gas Meter Co.*, [1897] 1 Ch. Div. 361, overruling *Hutton v. Scarborough Cliff Hotel Co.*, 2 Drew. & S. 514, 521, 4 De Gex, J. & S. 672.

ferred stock may be estopped to object to the validity of preferred stock by having participated or acquiesced in its issuance.⁶

Where a stockholder shows a legal right to question the validity of the act of the corporation in issuing preferred stock, and an interest in obtaining the judgment which he seeks, his motives in acquiring the stock which gives him the right to sue or in bringing the suit will not be considered.⁷

§ 3627. — Estoppel; ratification. As a general rule, a person who subscribes for or purchases preferred stock issued without authority,—at least where the issue does not amount to an overissue of stock,⁸—and who participated in the issue, or who has acted upon it as valid,—as by voting it, receiving dividends, etc.,—cannot afterwards assert its invalidity and recover what he paid therefor, or escape liability to creditors on the corporation becoming insolvent. He is estopped.⁹ So where a person subscribed for shares of preferred stock issued without authority, and was afterwards elected and acted as a director of the corporation, it was held that the stock might be treated as if it were common stock, and that he was liable upon it, as such, to creditors of the corporation.¹⁰ And where a corporation borrowed money and agreed to repay the loan in preferred stock, when it had

⁶ See § 3627, *infra*.

⁷ *Pollitz v. Wabash R. Co.*, 150 N. Y. App. Div. 709, 135 N. Y. Supp. 785.

⁸ If the issue of preferred stock increases the amount of the capital stock beyond the amount authorized by the charter of the corporation, it is subject to the same rules as any other overissue of stock. See § 3467 *et seq.*, *supra*.

⁹ *Banigan v. Bard*, 134 U. S. 291, 33 L. Ed. 932, *aff'g* 39 Fed. 13; *Branch v. Jesup*, 106 U. S. 468, 27 L. Ed. 279. See also *Leahy v. National Building & Loan Ass'n*, 100 Wis. 555, 69 Am. St. Rep. 945, 76 N. W. 625.

In *Branch v. Jesup*, *supra*, it was held that, where preferred stock was issued by a corporation, neither the holders thereof nor their assignees, after having accepted the same, and received dividends or interest thereon for several years, could question the power of the corporation to issue it.

And in *Banigan v. Bard*, *supra*, it

was held that an officer of a corporation who was a leader in its management, who was active in securing the passage of a resolution authorizing an issue of preferred stock, who subscribed for shares of the stock when issued, paid his subscription, took a certificate, and voted the stock at shareholders' meetings, and who induced others to take such stock, could not, on the corporation's becoming insolvent, recover back the money paid by him on his subscription, on the ground that the issue of the stock was unauthorized.

The contrary was held to be true of so-called special stock issued under a former Massachusetts statute. *Reed v. Boston Mach. Co.*, 141 Mass. 454, 5 N. E. 852; *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63.

¹⁰ *Tama Water-Power Co. v. Hopkins*, 79 Iowa 653, 44 N. W. 797.

no power to issue such stock, it was held that the lender might maintain an action to recover the money, but in this case the issue of the stock was unauthorized, not because it was to be preferred stock, but because the issue would increase the capital stock beyond the amount fixed by its charter, and would therefore be an overissue.¹¹

It has been held that stock issued in violation of a provision prohibiting the issuing of preferred stock to an amount greater than a specified percentage of the capital paid in is void, and confers no rights upon the holder and subjects him to no liabilities. A purchaser of such stock from the corporation may therefore rescind and recover back what he has paid on surrendering his certificate and restoring or offering to restore any dividends he may have received.¹² But it has also been held that this defense is not available, as against corporate creditors, to any holder of or subscriber to preferred stock who receives common stock, or voting trust certificates for common stock, as a bonus, since by taking such bonus stock he knows that the preferred stock is the only source from which the corporation may obtain capital.¹³ And also that, since the amount of capital paid in cash or property fluctuates and the proportion of classes of stock fluctuates accordingly, creditors will not be required to know whether the statutory proportion has been always maintained, but may look to subscriptions or holdings of common stock as payments in cash or property for the purpose of determining the proportion to be observed between common and preferred stock.¹⁴

If the corporation has power to issue preferred stock, stockholders taking it are estopped, as against creditors, to contend that such power was exercised ineffectively or informally.¹⁵

Holders of common stock may be estopped to question the validity of preferred stock where they have participated or acquiesced in its issuance;¹⁶ and when such is the case, they are also estopped to question the validity of an agreement which the common stockholders

¹¹ *Anthony v. Household Sew. Mach. Co.*, 16 R. I. 571, 5 L. R. A. 575, 18 Atl. 176.

¹² *Heide v. Capital Securities Co.*, — Ala. —, 76 So. 313.

As to the invalidity of illegally issued stock generally, see § 3467 et seq., supra.

¹³ *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

¹⁴ *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

¹⁵ *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

As to the effect of irregularities and informalities in the issuance of stock generally, see § 3467 et seq., supra.

¹⁶ *Wilson v. Parvin*, 119 Fed. 652; *Hogsett v. Aetna Building & Loan Ass'n*, 78 Kan. 71, 96 Pac. 52.

made upon its issuance as to the preferences to which it should be entitled.¹⁷

The fact that a stockholder objects on certain grounds to a plan involving the issuance of preferred stock at the time of its adoption and afterwards, does not preclude him from subsequently attacking its validity on other grounds.¹⁸

An issue of preferred stock without authority from the stockholders may be rendered valid by ratification by them at a subsequent meeting.¹⁹ But where the consent of all of the stockholders is required, a plan to issue stock without the consent of all cannot be validated by a ratification by a majority.²⁰

By the acceptance of stock certificates without objection the holder ratifies the provisions as to his rights and preferences contained therein and in a charter provision under which they were issued, although they differ in some respects from the terms of the agreement pursuant to which he received them.²¹

§ 3628. Preferred stockholders as creditors—General rule. In the absence of special provisions, the holders of preferred stock in a corporation are in precisely the same position, both with respect to the corporation itself and with respect to creditors of the corporation, as the holders of common stock, except only that they are entitled to receive dividends on their shares, to the extent guaranteed or agreed upon, before any dividends can be paid to the holders of common stock. They are stockholders in the corporation, with all the rights and liabilities of stockholders, and are not creditors of the corporation,²² unless made such by valid provisions in their contract, except

¹⁷ *In re Seneca Oil Co.*, 153 N. Y. App. Div. 594, 138 N. Y. Supp. 78, *aff'd* 208 N. Y. 545, 101 N. E. 1121.

¹⁸ *Pollitz v. Wabash R. Co.*, 150 N. Y. App. Div. 709, 135 N. Y. Supp. 785, 167 N. Y. App. Div. 669, 152 N. Y. Supp. 803, rehearing denied 170 N. Y. App. Div. 903, 154 N. Y. Supp. 1140.

¹⁹ *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *In re London & N. Y. Inv. Corporation*, [1895] 2 Ch. Div. 860.

²⁰ *Pollitz v. Wabash R. Co.*, 150 N. Y. App. Div. 709, 135 N. Y. Supp. 785, 167 N. Y. App. Div. 669, 152 N. Y. Supp. 803, rehearing denied 170 N. Y. App. Div. 903, 154 N. Y. Supp. 1140.

²¹ *Mellon v. Mississippi Wire Glass Co.*, 77 N. J. Eq. 498, 78 Atl. 710.

²² **United States.** *Warren v. King*, 108 U. S. 369, 27 L. Ed. 769, *aff'g* 2 Fed. 36; *National Elec. Signaling Co. v. Fessenden*, 207 Fed. 915; *Spencer v. Smith*, 201 Fed. 647, *rev'g* 190 Fed. 105; *Shaffer v. McCulloch*, 192 Fed. 801; *Ellsworth v. Lyons*, 181 Fed. 55; *Coltrane v. Blake*, 113 Fed. 785, *aff'g* 110 Fed. 272; *Guaranty Trust Co. v. Galveston City R. Co.*, 107 Fed. 311; *Mercantile Trust Co. v. Baltimore & O. R. Co.*, 82 Fed. 360; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, *rev'g* on other grounds 72 Fed. 92.

in a limited and peculiar sense in some degree assimilating that rela-

Georgia. *Jefferson Banking Co. v. Trustees of Martin Institute*, 146 Ga. 383, 91 S. E. 463; *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

Illinois. *People v. St. Louis, A. & T. H. R. Co.*, 176 Ill. 512, 35 L. R. A. 656, 52 N. E. 292; *Hamblock v. Clipper Lawn Mower Co.*, 148 Ill. App. 618.

Indiana. *Grover v. Cavanagh*, 40 Ind. App. 340, 82 N. E. 104; *Kidd v. Puritana Cereal Food Co.* (Mo. App.), 122 S. W. 784, construing the Indiana statute.

Iowa. *Morrill v. Bentley*, 150 Iowa 677, 130 N. W. 734; *Teller v. Wilcozen*, 110 Iowa 565, 81 N. W. 772.

Kansas. *Insecho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014; *Burk v. Ottawa Gas & Electric Co.*, 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857; *Abrahams v. Medicott*, 86 Kan. 106, 38 L. R. A. (N. S.) 137, 119 Pac. 375.

Kentucky. *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477; *Smith v. Southern Foundry Co.*, 166 Ky. 208, 209, 179 S. W. 205; *Fryer v. Wiedemann*, 148 Ky. 379, 39 L. R. A. (N. S.) 1011, 146 S. W. 752; *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S. W. 1011; *Sumrall v. Commercial Bldg. Trust's Assignee*, 106 Ky. 260, 44 L. R. A. 659, 90 Am. St. Rep. 223, 50 S. W. 69.

Maine. *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754; *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362.

Maryland. *Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327; *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

Massachusetts. *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833; *Boston Safe Deposit & Trust Co. v. Adams*, 219 Mass. 175, 106 N. E. 590; *Field v.*

Lamson & Goodnow Mfg. Co., 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126; *Williston v. Michigan Southern & N. I. R. Co.*, 13 Allen 400.

Minnesota. *Booth v. Union Fibre Co.*, 162 N. W. 677.

Missouri. *Hohenshell v. Home Savings & Loan Ass'n*, 140 Mo. 566, 41 S. W. 948; *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

New Jersey. See *Black v. Hobart Trust Co.*, 64 N. J. Eq. 415, 53 Atl. 826.

New York. See *People v. Miller*, 180 N. Y. 16, 72 N. E. 525, aff'g 94 App. Div. 564, 88 N. Y. Supp. 197.

North Carolina. *Farrish-Stafford Co. v. Charlotte Cotton Mills*, 157 N. C. 188, 72 S. E. 973; *Weaver Power Co. v. Elk Mountain Mill Co.*, 154 N. C. 76, 69 S. E. 747.

Ohio. *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

Pennsylvania. *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595; *Sternbergh v. Brock*, 225 Pa. 279, 24 L. R. A. (N. S.) 1078, 133 Am. St. Rep. 877, 74 Atl. 166.

Rhode Island. *Taft v. Hartford, P. & F. R. Co.*, 8 R. I. 310, 5 Am. Rep. 575.

South Carolina. *State v. Cheraw & C. R. Co.*, 16 S. C. 524.

Texas. *Reagan Bale Co. v. Heuermann*, — Tex. Civ. App. —, 149 S. W. 228.

Vermont. *Chaffee v. Rutland R. Co.*, 55 Vt. 110.

Virginia. *Drewry, Hughes Co. v. Throckmorton*, 92 S. E. 818; *Kain v. Angle*, 111 Va. 415, 69 S. E. 355.

England. *Birch v. Cropper*, 14 App. Cas. 525.

"The relation of a stockholder and a creditor to a corporation are not at all alike, but entirely different." *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595.

"The stockholder is still a stock-

tion.²³ Nor, as a rule, can they be regarded as both stockholders and creditors by virtue of owning stock.²⁴ But preferred stockholders may be made creditors of the corporation and may be given a lien which will be superior to the rights of subsequent creditors or mortgagees.²⁵

§ 3629. — May be creditors. If authorized by its charter or by statute, a corporation may, in order to raise money, issue certificates in the form of certificates of preferred stock, so-called, as security, making the holders creditors of the corporation, instead of mere stockholders, and even giving them a lien upon the property of the corporation, which will be superior to the rights of subsequent creditors or mortgagees.²⁶

holder and not a creditor. He makes a contribution to capital and not a loan. The corporation is not his debtor." *Booth v. Union Fibre Co.*, — Minn. —, 162 N. W. 677.

²³ In some respects their relation to the corporation is similar to that of creditors. *Spencer v. Smith*, 201 Fed. 647, rev'g 190 Fed. 105; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g on other grounds, 72 Fed. 92; *Insko v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014; *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

"There is a sense in which every shareholder is a creditor of the corporation to the extent of his contribution to the capital stock. In that sense every incorporation includes its capital stock among its liabilities. But that creditor relation is one which exists only between the corporation and its shareholders. It is a liability which is postponed to every other liability, and no part of the capital stock can be lawfully returned to the stockholders until all debts are paid or provided for." *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 671, 36 L. R. A. 826, rev'g on other grounds 72 Fed. 92, quoted with approval in *Guaranty Trust Co. v. Galveston City R. Co.*, 107

Fed. 311; *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156; *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S. W. 1011; *Weaver Power Co. v. Elk Mountain Mill Co.*, 154 N. C. 76, 69 S. E. 747.

"To be strictly accurate, we ought to say there is a sense in which a shareholder is a creditor. In that sense every corporation includes its capital stock amongst its liabilities, but it is a liability which is postponed to every other liability. And as to the matured and unpaid guaranteed dividends due on preferred stock, the relation of creditor undoubtedly exists." *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

The face value of the stock is in the nature of a debt. *Storrow v. Texas Consol. Compress & Manufacturing Ass'n*, 87 Fed. 612, 92 Fed. 5.

"As between him and the corporation, or the other stockholders in it, there does not appear any sufficient reason why he should not be treated as a creditor, where he has a demand against the corporation, which can only be enforced as a debt." *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477.

²⁴ See § 3630, *infra*.

²⁵ See § 3629, *infra*.

²⁶ *Cook v. Equitable Building & Loan*

Such stock, of course, is not ordinary preferred stock, nor, technically,

Ass'n, 104 Ga. 814, 30 S. E. 911. See also Fryer v. Wiedemann, 148 Ky. 379, 39 L. R. A. (N. S.) 1011, 146 S. W. 752; People v. Miller, 180 N. Y. 16, 72 N. E. 525, aff'g 94 N. Y. App. Div. 564, 88 N. Y. Supp. 197.

In Burt v. Rattle, 31 Ohio St. 116, where a manufacturing company issued certificates of preferred stock, so-called, certifying that it guaranteed to the holders the payment of certain semiannual dividends and the final payment of the entire amount at a specified time, with the right to convert such stock into common stock, and at the same time executed and delivered to a trustee its bond and mortgage to secure the holders of such certificates, it was held that the holders of such certificates did not become stockholders or members of the corporation, but its creditors only; and that, as such, they had a lien upon the mortgaged property superior to that of general creditors of the corporation, or of its assignees.

In Totten & Co. v. Tison, 54 Ga. 139, a manufacturing company was authorized to borrow money and secure the loan by a mortgage of its property. To effect the loan, certificates of stock were prepared, bearing an indorsement that they represented preferred stock, with a guaranty of fifteen per cent. annually, for two years, when they were to be redeemed or converted into common stock at the option of the holder, and also that they were to be secured by first-mortgage bonds of the same amount held as collateral in the hands of trustees. The loan was obtained by selling these certificates at par, secured by mortgage as stipulated. After the expiration of two years, the company being unable to pay the certificates, they were, by agreement with the company, exchanged by the holders for the mortgage bonds, which were delivered to the holders, and the scrip

for the stock surrendered and canceled. The holders of these certificates never took any part or voted in any of the meetings of the company, nor were they ever entered on the books as stockholders, and the amount of scrip issued to them did not make the stock of the company in excess of what it was authorized to issue. By all the resolutions of the directors, and of the stockholders, in reference to the transaction, it was recognized and ordered, as a means adopted to effect the loan which the company was authorized to effect, and there was nothing to show any fraud as against other creditors. Under these circumstances, it was held that, in a contest between creditors of the corporation on its insolvency over its assets, the holders of the mortgage bonds were entitled to claim as bona fide creditors.

An instrument purporting to entitle the holder to one share of preferred stock, but expressly depriving him of the right to vote at stockholders' meetings, providing that the amount specified therein should be paid by a certain day, with the right to pay before, and stipulating that the company might retire the entire issue, on or before a certain day, by giving notice, was held to be a certificate of indebtedness, and not a certificate of preferred stock, although it provided for a "dividend" of a certain per cent. before payment of any dividends to common stockholders. Savannah Real Estate, Loan & Building Co. v. Silverberg, 108 Ga. 281, 33 S. E. 908.

In Gordon's Ex'rs v. Richmond, F. & P. R. Co., 78 Va. 501, it was held that stock issued in payment of corporate indebtedness, pursuant to statutory authority, was guaranteed or preferred capital in the strictest sense, that the dividends thereon were payable out of gross earnings, and that the holders were entitled to a preference over the

is it preferred stock at all, and therefore it is not governed by the ordinary rules. It is *sui generis*, and the rights of the holders are determined by the statute.²⁷ And since they are not general creditors, they have no right to appropriate to the payment of their stock any assets other than those which the statute specifically subjects to their lien until the general and other creditors have been paid in full.²⁸

common stockholders on a division of assets.

In *Skiddy v. Atlantic, M. & O. R. Co.*, 3 Hughes 320, 355, Fed. Cas. No. 12,922, in which preferred stock was issued, reciting that the stipulated interest was a lien on all the property of the corporation after a first mortgage, the lien was upheld by the court as against subsequent mortgagees and general creditors, although it was not secured by any mortgage.

The Maryland Code, art. 23, § 408, formerly provided that any corporation having power to issue bonds as evidences of indebtedness, and to secure the same by a mortgage of its property, or having the power to obtain money upon mortgage, might, instead of doing so, issue a preferred stock, and execute an agreement under seal, acknowledged like conveyances of land, and recorded as therein provided, guaranteeing to the purchasers or subscribers for such stock a perpetual six per cent. dividend out of the profits of the corporation, payable before any dividends on other stock; that the holders of such stock should "have all the incidents, rights, privileges, and immunities, and liabilities, to which the capital stock of said corporation, or the holders thereof, may be entitled or subject"; and that "the said preferred stock shall be and constitute a lien on the franchises and property of such corporation, and have priority over any subsequently created mortgage, or other incumbrance." It was held that this statute was valid, and that by virtue thereof stock so created and issued made the holders

creditors, instead of ordinary preferred stockholders, and gave them, upon the insolvency of the corporation, a valid lien on the franchises and property of the corporation superior to any subsequent mortgage, and to any unsecured claims which mortgages would have preference over. *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

This holding was followed in *Leviness v. Consolidated Gas, Electric Light & Power Co.*, 114 Md. 559, Ann. Cas. 1913 C 649, 80 Atl. 304, where it was further held that the statute was not limited in its application to distributions of the corporate assets in cases of insolvency or dissolution, but that the lien was a fixed charge upon the property of the corporation during its active existence. And it was also held that the preferred stockholder, though he has a lien by way of special security, is a member of the corporation, and not a mere creditor.

This provision of the code was repealed by chapter 240 of the acts of 1908. *Leviness v. Consolidated Gas, Electric Light & Power Co.*, 114 Md. 559, Ann. Cas. 1913 C 649, 80 Atl. 304. ²⁷ *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

²⁸ *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800. In this case it was held that the preferred stock was a lien on the company's franchises and on property owned by it at the time when the stock was issued, but was not a lien on the proceeds of insurance policies covering buildings and

It has been held that a statute making the preferred stock a lien on the franchises and property of the corporation, and giving it priority over any subsequently created mortgage or incumbrance, also gives it priority over such other claims as a subsequent mortgage or incumbrance would have preference over, even though there is no such subsequent mortgage or incumbrance.²⁹

Even though there is no provision in the statute creating the lien for its discharge, it may be discharged as to any particular part of the corporate property which it may become necessary to sell, under a decree of a court of equity passed in a proceeding in which fairly selected representatives of the preferred stockholders are made parties, and in which the reasonable necessity for a sale is alleged and proved, and suitable provision is made for the protection of the lienors with reference to the appropriation of the proceeds.³⁰

If the holders of so-called preferred stock have a valid lien, they may sue in equity to preserve and protect it and the property to which it attaches.³¹

A Massachusetts statute formerly provided for the issuance of so-called "special stock," which differed from preferred stock in that the obligation to pay the dividends thereon did not depend upon there being net earnings or surplus profits, but was absolute, and rendered the corporation the debtor of the holders.³²

merchandise belonging to the company, which were subsequently destroyed by fire, or upon articles manufactured by it for sale, or the proceeds of their sale, or upon rents collected by the receivers of the company. This holding was followed in *Leviness v. Consolidated Gas, Electric Light & Power Co.*, 114 Md. 559, Ann. Cas. 1913 C 649, 80 Atl. 304.

²⁹ *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

³⁰ *Leviness v. Consolidated Gas, Electric Light & Power Co.*, 114 Md. 559, Ann. Cas. 1913 C 649, 80 Atl. 304.

The decree should ordinarily appoint a trustee to join in the deed to the purchaser for the purpose of releasing the lien of the stock and to receive the purchase money for application or reinvestment under direction of the court. *Leviness v. Consolidated*

Gas, Electric Light & Power Co., 114 Md. 559, Ann. Cas. 1913 C 649, 80 Atl. 304.

³¹ *Kent v. Honsinger*, 167 Fed. 619.

³² Mass. Rev. Laws 1902, c. 110, § 36 (Pub. St. Mass. 1882, c. 106, §§ 42, 61, cl. 3), provided that manufacturing and certain other corporations might, by a vote of three-fourths of the general stockholders, at a meeting duly called for the purpose, issue special stock, which should at no time exceed two-fifths of the actual capital, and which should be subject to redemption at par after a fixed time, to be expressed in the certificates; and that holders of such stock should be entitled to receive, and the corporation should be bound to pay thereon, a fixed half-yearly sum or dividend, to be expressed in the certificates, not exceeding four per cent., and should

§ 3630. — Relation both as stockholders and creditors. It has been said that a person cannot, by virtue of a certificate of preferred stock, be, at least as to the creditors of the corporation, both a stockholder and a creditor at the same time. And this is certainly true in the case of ordinary preferred stock.³³ “The relation of a holder of pre-

in no event be liable for the debts of the corporation beyond their stock.

Chap. 110 of the Revised Laws, of which this provision was a part, was expressly repealed by Laws 1903, c. 437, § 95, relating to business corporations, and apparently there now is authority for issuing stock of this character.

In issuing such stock, the statutory provisions must be substantially complied with. There must be a meeting of the stockholders, as required by the statute, called for the purpose of issuing such stock; and it must affirmatively appear from the records of the meeting that the issue was voted for by at least three-fourths of the general stockholders of the corporation, as required by the statute. *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63.

The obligation to pay the dividends guaranteed is not dependent, as in the case of preferred stock, upon there being net earnings or surplus profits, but is absolute, and renders the corporation the debtor of the holders. *Williams v. Parker*, 136 Mass. 204.

The special stock so authorized is not the same as preferred stock, but is *sui generis*,—“a peculiar kind of stock, distinctly provided for by statute,”—and a vote to issue such stock at a meeting called to consider whether “preferred stock” shall be issued is invalid. *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63.

A holder of certificates of special stock which is illegally issued cannot, by estoppel or otherwise, become a stockholder with respect to such shares, and if the stock is illegally issued, so that it is void, he may

rescind and recover what he has paid therefor. *Reed v. Boston Mach. Co.*, 141 Mass. 454, 5 N. E. 852; *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63.

In *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63, where special stock in a corporation was illegally issued to a creditor of the corporation, who subsequently received dividends thereon, and the corporation, at two subsequent meetings attempted, but failed, to cure the defect, and to make the issue of the stock valid, and twenty-seven months after the first issue, and two months after the last attempt to cure the defect, the creditor, shortly before the insolvency of the corporation, gave notice that he rescinded the contract, and tendered back the dividends received, it was held that he was entitled to rescind, that the rescission was in time, and that he could prove the amount of his debt against the insolvent estate of the corporation.

In *Reed v. Boston Mach. Co.*, 141 Mass. 454, 5 N. E. 852, where the plaintiffs had received special stock in a corporation, which was illegally issued, and which could not be rendered valid by the corporation, it was held that they might prove against the insolvent estate of the corporation for the amount paid by them for the stock, with interest, less dividends received by them, and that they need not return the certificates of stock, as they were of no value. And this was held to be true although they did not elect to rescind until after the filing of the petition in insolvency.

³³ **United States.** *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769, aff'g 2

ferred stock," it was said in an Ohio case, "is, in some of its aspects, similar to that of a creditor, but he is not a creditor save as to dividends after the same are declared. Nor does he sustain a dual relation to the corporation. He is either a stockholder or a creditor; he cannot, by virtue of the same certificate, be both. If the former, he takes a risk in the concerns of the company, not only as to dividends and a proportion of assets on the dissolution of the company, but as to the statutory liability for debts in case the corporation becomes insolvent; if the latter, he takes no interest in the company's affairs, is not concerned in its property, or profits as such, but his whole right is to receive agreed compensation for the use of money he furnishes, and the return of the principal when due. Whether he is one or the other depends upon a proper construction of the contract he holds with the company."³⁴

As we have seen, however, this may not be true under particular statutory provisions. The legislature may expressly authorize the issue

Fed. 36; *Spencer v. Smith*, 201 Fed. 647, rev'g 190 Fed. 105; *Ellsworth v. Lyons*, 181 Fed. 55; *Guaranty Trust Co. v. Galveston City R. Co.*, 107 Fed. 311; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g 72 Fed. 92.

Kansas. *Insecho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

Kentucky. *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S. W. 1011.

Maryland. *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

New Jersey. *Black v. Hobart Trust Co.*, 64 N. J. Eq. 415, 53 Atl. 826.

North Carolina. *Weaver Power Co. v. Elk Mountain Mill Co.*, 154 N. C. 76, 69 S. E. 747.

Ohio. *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

Pennsylvania. *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595.

Texas. *Reagan Bale Co. v. Heuermann*, — Tex. Civ. App. —, 149 S. W. 228.

Vermont. See *Chaffee v. Rutland R. Co.*, 55 Vt. 110.

"One cannot well be a creditor as

respects creditors proper, and a stockholder by virtue of a certificate evidencing his contribution to the capital of the corporation." *Ellsworth v. Lyons*, 181 Fed. 55; *Guaranty Trust Co. v. Galveston City R. Co.*, 107 Fed. 311; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g 72 Fed. 92; *Weaver Power Co. v. Elk Mountain Mill Co.*, 154 N. C. 76, 69 S. E. 747.

"He cannot, if he is simply an ordinary preferred stockholder, in the nature of things, so far as third persons are concerned, be at one and the same time and by force of the same certificate, both part owner of the property and creditor of the company for that portion of its capital which stands in his name." *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

³⁴ *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496, quoted with approval in *Spencer v. Smith*, 201 Fed. 647, rev'g 190 Fed. 105; *Insecho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014; *Reagan Bale Co. v. Heuermann*, — Tex. Civ. App. —, 149 S. W. 228.

of stock which will give the holders the rights of creditors, and a lien on the property of the corporation which will have priority over the claims of subsequent creditors, and at the same time give them all the incidents, rights, privileges and immunities, and subject them to all the liabilities, to which the ordinary stock of the corporation, or the holders thereof, are entitled or subject.³⁵

§ 3631. — Construction and effect of contract. Whether or not the holder of a particular instrument or certificate is to be regarded as a stockholder or a creditor is a question of interpretation,³⁶ and depends upon the terms of his contract as evidenced by such instrument and the corporate charter and the statutes of the state.³⁷

The nature of the transaction is to be determined by the real substance and effect of the contract rather than by the name given to the obligation, or its form,³⁸ and the fact that shares are denominated

³⁵ *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

See § 3629, *supra*.

³⁶ *United States*. *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769, *aff'g* 2 Fed. 36; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, *rev'g* on other grounds 72 Fed. 92.

Kentucky. *Smith v. Southern Foundry Co.*, 166 Ky. 208, 209, 179 S. W. 205.

Missouri. *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

Texas. *Reagan Bale Co. v. Heuermann*, — Tex. Civ. App. —, 149 S. W. 228.

Vermont. *Chaffee v. Rutland R. Co.*, 55 Vt. 110.

³⁷ *United States*. *Spencer v. Smith*, 201 Fed. 647, *rev'g* 190 Fed. 105; *Ellsworth v. Lyons*, 181 Fed. 55; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, *rev'g* on other grounds 72 Fed. 92.

Georgia. *Jefferson Banking Co. v. Trustees of Martin Institute*, 146 Ga. 383, 91 S. E. 463; *Savannah Real Estate, Loan & Building Co. v. Silverberg*, 108 Ga. 281, 33 S. E. 908; *Coggeshall v. Georgia Land & Investment*

Co., 14 Ga. App. 637, 82 S. E. 156.

Kansas. *Inscho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

Kentucky. *Smith v. Southern Foundry Co.*, 166 Ky. 208, 209, 179 S. W. 205.

Maryland. *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

Missouri. *Kid v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

Pennsylvania. *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595.

Texas. *Reagan Bale Co. v. Heuermann*, — Tex. Civ. App. —, 149 S. W. 228.

Vermont. *Chaffee v. Rutland R. Co.*, 55 Vt. 110.

The question depends upon the peculiar facts of each case. *Jefferson Banking Co. v. Trustees of Martin Institute*, 146 Ga. 383, 91 S. E. 463; *Savannah Real Estate, Loan & Building Co. v. Silverberg*, 108 Ga. 281, 33 S. E. 908; *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

³⁸ *United States*. *Spencer v. Smith*, 201 Fed. 647, *rev'g* 190 Fed. 105.

preferred stock either in the certificates or by the legislature is not conclusive.³⁹ However, the fact that they are so denominated is

Georgia. *Jefferson Banking Co. v. Trustees of Martin Institute*, 146 Ga. 383, 91 S. E. 463; *Savannah Real Estate, Loan & Building Co. v. Silverberg*, 108 Ga. 281, 33 S. E. 908; *Cook v. Equitable Building & Loan Ass'n*, 104 Ga. 814, 30 S. E. 911; *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

Maryland. *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

Minnesota. *Booth v. Union Fibre Co.*, 162 N. W. 677.

New York. *Cass v. Realty Securities Co.*, 148 App. Div. 96, 132 N. Y. Supp. 1074, aff'd 206 N. Y. 649, 99 N. E. 1105.

Ohio. *Burt v. Rattle*, 31 Ohio St. 116.

"What the parties to a contract may call it, of course, is not binding upon the courts if it is clearly something else." *Spencer v. Smith*, 201 Fed. 647, rev'g 190 Fed. 105.

³⁹**Georgia.** *Savannah Real Estate, Loan & Building Co. v. Silverberg*, 108 Ga. 281, 33 S. E. 908; *Cook v. Equitable Building & Loan Ass'n*, 104 Ga. 814, 30 S. E. 911; *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

Kentucky. See *Smith v. Southern Foundry Co.*, 166 Ky. 208, 209, 179 S. W. 205.

Maryland. *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

Minnesota. *Booth v. Union Fibre Co.*, 162 N. W. 677.

Missouri. *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

Ohio. *Burt v. Rattle*, 31 Ohio St. 116.

"Merely denominating shares 'preferred stock' in a legislative act does

not per se define the rights and character of the holder of such shares." *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

"To call a thing by a wrong name does not change its nature. A mortgage creditor, although denominated a 'preferred stockholder,' is a mortgage creditor nevertheless; and interest is not changed into a 'dividend' by calling it a dividend. Nothing is more common in the construction of statutes and contracts than for the court to correct such self-evident misnomers by supplying the proper words." *Burt v. Rattle*, 31 Ohio St. 116, quoted with approval in *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

"The use of the word stock or the words preferred stock is not controlling. * * * If the transaction resulted in the creation of a debt it should be so declared though the plaintiff and the defendant defined it in terms of stock." *Booth v. Union Fibre Co.*, — Minn. —, 162 N. W. 677.

"If you call it preferred stock and it is what you call it, then the law is clear that it has no priority over the contesting creditors. If you call it preferred stock, and it is not preferred stock, then, obviously, it is not governed by the principles applicable to preferred stock, but by those relating to the thing that it really is. The mere naming of it does not make it that which it is named, if, in fact, it is something else. Its properties and qualities determine what it is. If the statute calls it what its properties and qualities show that it is not, surely it does not thereby become what it is misnamed, and cease to be what it essentially is. Calling stock preferred

considered.⁴⁰ And instruments termed bonds are treated as preferred stock when having the characteristics of it, and no debt is thereby created.⁴¹ It has been held that declaring a certificate to be "a preferred debenture share of capital stock" involves a legal contradiction, "a debenture being the acknowledgment of a debt and a share of stock representing a contribution of capital to a corporate business equal to its face value, either in money or property."⁴²

It is immaterial how or where the holder obtained his stock, since the preference belongs to the stock and not to the stockholder.⁴³ So the fact that the holders of preferred stock were formerly creditors of the corporation gives them no greater rights as against creditors.⁴⁴

stock does not per se define the rights in such stock, but those depend on the contract or statute under which it was issued." *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

⁴⁰ See *Spencer v. Smith*, 201 Fed. 647, rev'g 190 Fed. 105; *Jefferson Banking Co. v. Trustees of Martin Institute*, 146 Ga. 383, 91 S. E. 463; *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595; *Reagan Bale Co. v. Heuermann*, — Tex. Civ. App. —, 149 S. W. 228.

"The name employed by the legislature to designate the shares is one badge of the legal character intended to be given them, for the words of a statute are to be taken in their ordinary sense unless a different one is called for by the context." *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

⁴¹ The fact that an instrument is called a bond is not determinative of its character. So instruments called bonds were held to be a species of preferred stock, where, though they contained a promise to pay a stated sum of money at a fixed time, and to pay meanwhile a stated rate of interest, they also provided that the holders were entitled to share in the surplus income after the payment of stated dividends on the preferred and

common stock, and that they were entitled to share in the surplus capital of the corporation on liquidation, and that the bonds should be satisfied on payment of a ratable proportion of the assets, whether more or less than the amount called for on its face. *Cass v. Realty Securities Co.*, 148 N. Y. App. Div. 96, 132 N. Y. Supp. 1074, aff'd 206 N. Y. 649, 99 N. E. 1105.

So-called debenture bonds were held to be in effect preferred stock in *In re Fechheimer Fishel Co.*, 212 Fed. 357.

See also *Booth v. Union Fibre Co.*, — Minn. —, 162 N. W. 677.

⁴² *People v. Miller*, 180 N. Y. 16, 72 N. E. 525, aff'g 94 N. Y. App. Div. 564, 88 N. Y. Supp. 197.

⁴³ *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126.

⁴⁴ *St. John v. Erie Ry. Co.*, 22 Wall. (U. S.) 136, 22 L. Ed. 743, aff'g 10 Blatchf. 271, Fed. Cas. No. 12,226; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g on other grounds 72 Fed. 92; *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126.

Where corporate creditors surrender the corporate notes and receive preferred stock in lieu thereof they cease to be creditors and must look to

It has been said that the most important inquiries are "whether a date is fixed within which the company is bound to pay the preferred shares, for all true debts must fall due sometime";⁴⁵ and "whether such shares are subject to losses of the business in the sense that the holders of them are postponed to creditors at large in case the company becomes insolvent, for such postponement is not easily reconcilable with the notion that the holders of what are nominally preference shares are in reality creditors."⁴⁶ But the circumstance that so-called dividends have a maturity date is not alone conclusive in favor of their being absolute obligations.⁴⁷

The use of the word "interest" in a certificate or statute instead of "dividends,"⁴⁸ or the use of the two terms interchangeably,⁴⁹ is not conclusive that the holder is a creditor rather than a stockholder, nor is the use of the word "dividends" conclusive that he is a stockholder.⁵⁰

The fact that the dividends are to be paid out of profits only is an indication that the holder is a stockholder,⁵¹ although it is not conclusive.⁵²

The fact that the statute provides that the holders shall be entitled

profits for interest on their stock. *National Elec. Signaling Co. v. Fessenden*, 207 Fed. 915.

In abandoning their position as creditors, and becoming preferred stockholders, they lose their rights as creditors, and they cannot be reinstated in their former position. *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769.

⁴⁵ *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

The certificate cannot create a debt where no time is fixed when the principal shall become due and payable. *Jefferson Banking Co. v. Trustees of Martin Institute*, 146 Ga. 383, 91 S. E. 463.

⁴⁶ *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

⁴⁷ *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

⁴⁸ *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769, aff'g 2 Fed. 36; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g 72 Fed. 92; *Teller v. Wilcoxon*, 110 Iowa 565, 81 N. W. 772; *Smith v. Southern Foundry*

Co., 166 Ky. 208, 209, 179 S. W. 205; *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

⁴⁹ *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

⁵⁰ The word "dividends" in a statute authorizing the issuance of so-called preferred stock may be taken in the sense of "interest." *Burt v. Rattle*, 31 Ohio St. 116.

"Interest is not changed into a dividend by calling it a dividend." *Burt v. Rattle*, 31 Ohio St. 116, quoted with approval in *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

⁵¹ *Jefferson Banking Co. v. Trustees of Martin Institute*, 146 Ga. 383, 91 S. E. 463; *Savannah Real Estate, Loan & Building Co. v. Silverberg*, 108 Ga. 281, 33 S. E. 908; *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156. See also *Ellsworth v. Lyons*, 181 Fed. 55.

⁵² *Savannah Real Estate, Loan & Building Co. v. Silverberg*, 108 Ga. 281, 33 S. E. 908.

to all the privileges of other members of the corporation, including the right to vote, shows an intention to make them stockholders.⁵³ On the other hand, it has been held that the fact that the holder of the certificate is deprived of the right to vote is an indication that he is not a stockholder.⁵⁴ But it does not conclusively establish that he is a creditor,⁵⁵ and there is authority to the effect that it indicates that he is a stockholder, since there would be no necessity for such a provision if he were a creditor.⁵⁶

It has been held that a certificate otherwise in the form of a certificate of preferred stock will not be regarded as a certificate of indebtedness because it contains a provision for the redemption of the stock.⁵⁷ On the other hand, a provision that the stock "shall be retired" on a certain date has been held to indicate that the holder is a creditor,⁵⁸ though it has been held that this would not be true of a provision merely giving the corporation the option to retire the stock, and not obligating it to do so.⁵⁹

Where the constitution makes all stockholders liable to creditors, the fact that a statute authorizing the issuance of so-called preferred stock provides that the holders thereof shall not be liable to creditors is an indication that it was the intention to make them creditors rather than stockholders.⁶⁰

The fact that preferred stockholders are given a preference over

⁵³ *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126.

⁵⁴ *Savannah Real Estate, Loan & Building Co. v. Silverberg*, 108 Ga. 281, 33 S. E. 908. See also *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156; *Burt v. Rattle*, 31 Ohio St. 116.

That preferred stockholders may be deprived of the right to vote, see § 3638, *infra*.

⁵⁵ *Savannah Real Estate, Loan & Building Co. v. Silverberg*, 108 Ga. 281, 33 S. E. 908; *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784; *Reagan Bale Co. v. Heuermann*, — Tex. Civ. App. —, 149 S. W. 228. See also *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

⁵⁶ *Inscho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

⁵⁷ *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595. See also *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784; *Culver v. Reno Real Estate Co.*, 91 Pa. St. 367.

Such a provision does not make the holder a creditor. *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477; *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S. W. 1011.

As to the redemption of preferred stock generally, see § 3644 *et seq.*, *infra*.

⁵⁸ *Savannah Real Estate, Loan & Building Co. v. Silverberg*, 108 Ga. 281, 33 S. E. 908. See also *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

⁵⁹ *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

⁶⁰ *Burt v. Rattle*, 31 Ohio St. 116.

common stockholders in relation to capital is not inconsistent with their being stockholders. Nor is a provision that nonvoting noncumulative four per cent. stock shall become preferred four per cent. noncumulative stock in the event that an option to convert it into common stock is not exercised indicative that it was not preferred stock before the rejection of the option.⁶¹

A provision that the stock shall be a preferred lien on the assets of the company does not necessarily make the holder a creditor.⁶² And a provision that it shall "be and remain a first claim upon the property of the company after its indebtedness," gives the holders no lien or claim on the property of the corporation as against subsequent mortgages, nor as against existing or subsequent unsecured creditors, but merely gives them a lien as against common stockholders.⁶³ Similarly, a provision that, in the event of a dissolution of the corporation or a distribution of its assets, the preferred stock shall first be paid a specified sum per share, plus all accumulated unpaid dividends, and that the remainder of the assets shall then be divided ratably among the holders of the common stock, will be construed as referring only to the distribution of assets as between stockholders and as having no reference to the distribution of assets for the payment of corporate debts; or, in other words, as giving the preferred stockholders a preference over the common stockholders only, and

⁶¹ *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g 72 Fed. 92.

That preferred stockholders may be given such a preference, see § 3640, *infra*.

⁶² The fact that the certificates provide that they "shall be a preferred lien on the assets of the company" does not make the holder a creditor, when it is manifest from the certificate construed as a whole that the corporation never intended to make him one, but merely to give him a preferred lien on the assets of the corporation when in liquidation over the common stockholders. *Weaver Power Co. v. Elk Mountain Mill Co.*, 154 N. C. 76, 69 S. E. 747.

It was so held in respect to a provision that, "This stock constitutes a lien on the property and net earnings

of the company next after the company's existing first mortgage." *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 531, aff'g 86 Fed. 929; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 26 L. R. A. 826, rev'g 72 Fed. 92.

⁶³ *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769, aff'g *King v. Ohio & M. R. Co.*, 2 Fed. 36. See also *Mercantile Trust Co. v. Baltimore & O. R. Co.*, 82 Fed. 360; *St. John v. Erie Ry. Co.*, 10 Blatchf. 271, Fed. Cas. No. 12,226, aff'd 22 Wall. 136, 22 L. Ed. 743.

Such a provision will be construed to include future as well as existing indebtedness, and will give the holders thereof no priority over subsequent creditors. *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769, aff'g *King v. Ohio & M. R. Co.*, 2 Fed. 36.

not over corporate creditors.⁶⁴ And the fact that the provision giving the holders of preferred stock a lien or claim on the property of the corporation is coupled with a provision giving them a lien on or a preferential right to the net earnings to the extent of the preferred dividends is an indication of an intention to merely give them a preference over the common stockholders in respect to the capital rather than to give them a preference over creditors.⁶⁵ A provision in the certificates of preferred stock that no mortgage or lien of any nature shall be placed upon the property of the corporation without the unanimous consent of the preferred stockholders does not include claims of general creditors, and does not give them a preference over common stockholders who are also creditors and whose debts were incurred without their consent.⁶⁶

Where the articles of incorporation declare that the money represented by the certificates constitutes a part of the capital stock of the corporation, and their proper construction is clearly a debatable one, the corporation is estopped to assert that the certificates represent a debt in a proceeding to determine their liability to a franchise tax.⁶⁷

§ 3632. Rights and remedies of preferred stockholders—In general. The relation between a corporation and the holders of preferred stock therein is a contract relation, and the rights and remedies of the holders of such stock depend upon the express and implied terms of their contract.⁶⁸ Aside from that contract they stand on

⁶⁴ *Spencer v. Smith*, 201 Fed. 647, rev'g 190 Fed. 105.

⁶⁵ *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769, aff'g *King v. Ohio & M. R. Co.*, 2 Fed. 36; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g on other grounds 72 Fed. 92.

⁶⁶ *Fryer v. Wiedemann*, 148 Ky. 379, 39 L. R. A. (N. S.) 1011, 146 S. W. 752.

⁶⁷ *People v. Miller*, 180 N. Y. 16, 72 N. E. 525, aff'g 94 N. Y. App. Div. 564, 88 N. Y. Supp. 197.

⁶⁸ *United States. Spencer v. Smith*, 201 Fed. 647, rev'g 190 Fed. 105; *Hackett v. Northern Pacific Ry. Co.*, 140 Fed. 717; *Weidenfeld v. Northern Pac. Ry. Co.*, 129 Fed. 305; *Storow v. Texas Consol. Compress & Manufac-*

turing Ass'n, 87 Fed. 612; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g 72 Fed. 92.

Georgia. *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

Kansas. *Burk v. Ottawa Gas & Electric Co.*, 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857.

Maine. *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754; *Hazeltine v. Belfast & M. L. R. Co.*, 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328.

Maryland. *Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327; *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

Massachusetts. *Lee v. Fisk*, 222

no better footing than any other stockholders,⁶⁹ and from it must be determined the extent of their right to share in the corporate profits and the nature and extent of their preferential right to the payment of dividends.⁷⁰ Except as to preference in the payment of dividends and, in some instances, in the distribution of assets on dissolution or insolvency, and except in so far as the corporate charter or general statutes provide otherwise, they have the same rights and are subject to the same liabilities as common stockholders.⁷¹

Mass. 418, 109 N. E. 833; *Page v. Whittenton Mfg. Co.*, 211 Mass. 424, 97 N. E. 1006.

New Jersey. *Lloyd v. Pennsylvania Elec. Vehicle Co.*, 75 N. J. Eq. 263, 21 L. R. A. (N. S.) 228, 138 Am. St. Rep. 557, 20 Ann. Cas. 119, 72 Atl. 16, rev'g 73 N. J. Eq. 269, 67 Atl. 834; *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 233; *McGregor v. Home Ins. Co. of Newark*, 33 N. J. Eq. 181.

New York. *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13, rev'g 102 App. Div. 118, 92 N. Y. Supp. 387; *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157; *Equitable Life Assur. Soc. of United States v. Union Pac. R. Co.*, 162 App. Div. 81, 147 N. Y. Supp. 382, aff'd 212 N. Y. 360, L. R. A. 1915 D 1052, 106 N. E. 92; *Utica Trust & Deposit Co. v. Charles C. Kellogg & Sons Co.*, 126 App. Div. 176, 110 N. Y. Supp. 1048; *Hackett v. Northern Pac. R. Co.*, 36 Misc. 583, 73 N. Y. Supp. 1087.

Virginia. *Drewry, Hughes Co. v. Throckmorton*, 92 S. E. 818.

The classification of stock into common and preferred involves merely a contract between the stockholders as to how they shall divide the profits and assets of the corporation after the payment of the corporate obligations. *California Telephone & Light Co. v. Jordan*, 19 Cal. App. 536, 126 Pac. 598.

Where the rights of third parties do not intervene, the parties to the con-

tract are bound to carry it out according to its terms and the courts will enforce it. *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g 120 Ill. App. 596.

⁶⁹ *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

⁷⁰ See § 3751 et seq., *infra*.

⁷¹ *Smith v. Southern Foundry Co.*, 166 Ky. 208, 179 S. W. 205; *Knight v. Alamo Mfg. Co.*, 190 Mich. 223, 157 N. W. 24; *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595; *Sternbergh v. Brock*, 225 Pa. 279, 24 L. R. A. (N. S.) 1078, 133 Am. St. Rep. 877, 74 Atl. 166; *Reagan Bale Co. v. Heuermann*, — Tex. Civ. App. —, 149 S. W. 228.

"Preferred stock makes the holders thereof stockholders, and not creditors; and, except as to the preference in the payment of dividends, 'gives them the same rights, and no greater, and subjects them to the same liabilities, as the holders of common stock, except in so far as they may be given other rights, or relieved from liabilities, by the charter or by statute.'" *Fryer v. Wiedemann*, 148 Ky. 379, 39 L. R. A. (N. S.) 1011, 146 S. W. 752.

A preferred stockholder "may do and perform such things and be subject to such obligations as the common stockholders are subject to, except as the terms under which his preferred stock was issued may preclude." *Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327.

"His rights are those of a common stockholder, except as those rights are limited by the statute and the con-

Preferred stock takes a multiplicity of forms.⁷² In the absence of statutory restrictions or limitations, the company may attach such conditions as it pleases, and the holders may be made subject to any special provisions that are not inconsistent with the charter or articles of association, nor contrary to law or public policy.⁷³ The term preferred stock, standing alone, "means only a stock that differs from other stock in having a preference of some sort attached to it, without expressing the special nature of the preference,"⁷⁴ and it follows that the rights of the holders thereof cannot be determined solely from the fact that their stock is called preferred.⁷⁵

The terms of the contract are generally set forth in the certificates of the preferred stock issued to the holders as evidence of their shares, but they are not the only evidence of the contract. They must be read in connection with the provisions of the charter or articles of

tract, and the additional right to have his dividends paid out of the earnings and his stock redeemed out of the assets in preference to the common shareholder." *Grover v. Cavanagh*, 40 Ind. App. 340, 82 N. E. 104.

As to preference in the payment of dividends, see § 3751 et seq., *infra*.

As to the right of preferred stockholders to share in distributions of capital, see § 3640, *infra*.

⁷² *Storrow v. Texas Consol. Compress & Manufacturing Ass'n*, 87 Fed. 612; *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156; *Scott v. Baltimore & O. R. Co.*, 93 Ind. 475, 49 Atl. 327; *Gordon's Ex'rs v. Richmond, F. & P. R. Co.*, 78 Va. 501.

⁷³ *Campbell v. American Alkali Co.*, 125 Fed. 207; *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156; *Abraham v. Medlicott*, 86 Kan. 106, 38 L. R. A. (N. S.) 137, 119 Pac. 375; *Utica Trust & Deposit Co. v. Charles C. Kellogg & Sons Co.*, 126 N. Y. App. Div. 176, 110 N. Y. Supp. 1048; *Hackett v. Northern Pac. R. Co.*, 36 N. Y. Misc. 583, 73 N. Y. Supp. 1087.

"Where the corporation has authority to issue preferred stock, it

may attach such conditions, not violative of law or contrary to public policy, as it deems best." *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

Within reasonable limits the extent of the preference is for the corporations to determine. *Butler v. Beach*, 82 Conn. 417, 74 Atl. 748.

⁷⁴ *Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327.

"The expression 'preference shareholder' is equivocal. It by no means clearly indicates what are the rights of those to whom it applies. * * * All which the language imports is that some preference is given to the person to whom the language applies." *Henry v. Great Northern Ry. Co.*, 1 De G. & J. 606, 636, quoted with approval in *Hackett v. Northern Pac. R. Co.*, 140 Fed. 717.

⁷⁵ *Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327; *Lloyd v. Pennsylvania Elec. Vehicle Co.*, 75 N. J. Eq. 263, 21 L. R. A. (N. S.) 228, 138 Am. St. Rep. 557, 20 Ann. Cas. 119, 72 Atl. 16, rev'g 73 N. J. Eq. 269, 67 Atl. 834; *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 233; *Henry v. Great Northern Ry. Co.*, 1 De G. & J. 606, 636.

association, the general law, the by-laws in force at the time the stock was issued, except in so far as they may have been excluded, and the vote or proceedings by or under which the stock was issued. All these enter into and form a part of the contract.⁷⁶

It has been held that the right of preferred stockholders to preference in the payment of dividends and in the distribution of the corporate assets in case of dissolution or insolvency may be secured by mortgage.⁷⁷ But their rights under such a mortgage are subordinate to the claims of corporate creditors.⁷⁸

76 United States. *Spencer v. Smith*, 201 Fed. 647, rev'g 190 Fed. 105; *Hackett v. Northern Pac. R. Co.*, 140 Fed. 717.

Georgia. *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

Maine. *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362.

Maryland. *Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327; *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

Massachusetts. *Page v. Whittenton Mfg. Co.*, 211 Mass. 424, 97 N. E. 1006.

New Jersey. *Lloyd v. Pennsylvania Elec. Vehicle Co.*, 75 N. J. Eq. 263, 21 L. R. A. (N. S.) 228, 138 Am. St. Rep. 557, 20 Ann. Cas. 119, 72 Atl. 16, rev'g 73 N. J. Eq. 269, 67 Atl. 834; *McGregor v. Home Ins. Co. of Newark*, 33 N. J. Eq. 181.

New York. *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13, rev'g 102 App. Div. 118, 92 N. Y. Supp. 387; *Rogers v. New York & T. Land Co.*, 134 N. Y. 197, 32 N. E. 27; *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157; *Equitable Life Assur. Soc. of United States v. Union Pac. R. Co.*, 162 App. Div. 81, 147 N. Y. Supp. 382, aff'd 212 N. Y. 360, L. R. A. 1915 D 1052, 106 N. E. 92.

Virginia. *Gordon's Ex'rs v. Rich-*

mond, F. & P. R. Co., 78 Va. 501.

Provisions for preferred stock in amended articles constitute a contract between all the stockholders and the corporation for the division of profits and assets. *Page v. Whittenton Mfg. Co.*, 211 Mass. 424, 97 N. E. 1006.

Provisions on the back of preferred stock certificates as to preferential rights and obligations, placed there upon the authority of and in compliance with the statute, are, as between the stockholders and the company, obligatory, and constitute a contract governing the division of profits and assets. *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833.

A by-law of a corporation is a contract between the corporation and its stockholders when it states the conditions upon which dividends are to be paid as between preferred and unpreferred stock. *Hazeltine v. Belfast & M. L. R. Co.*, 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328; *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362.

77 *Spencer v. Smith*, 201 Fed. 647, rev'g 190 Fed. 105; *Fitch v. Wetherbee*, 110 Ill. 475; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496; *Gordon's Ex'rs v. Richmond, F. & P. R. Co.*, 78 Va. 501.

A corporation may lawfully give security to one class of stockholders over another class. *Spencer v. Smith*, 201 Fed. 647, rev'g 190 Fed. 105.

78 See § 3634, *infra*.

§ 3633. — Change of contract or impairment of rights. The contract between a corporation and the holders of its preferred stock cannot be changed, or their rights in any way impaired, without their consent, by any subsequent action of the corporation.⁷⁹ Changes, however, may be made with the consent, express or implied, of the preferred stockholders, just as any other contract may be changed by mutual consent of the parties, and if a new arrangement is made by a majority of the stockholders, a preferred stockholder who accepts the benefit thereof impliedly consents.⁸⁰

A preferred stockholder may waive his right to a preference and consent that the stock shall thereafter be regarded as common stock, and he may do this notwithstanding he has previously pledged the stock, although such arrangement will be subject to the pledgee's lien. A subsequent purchaser of the stock who recognizes the validity of the agreement changing the character of the stock will be estopped to contend that the corporation had no authority to make it.⁸¹

§ 3634. — Rights subordinate to those of creditors. As against creditors of the corporation, preferred stockholders have no greater rights than common stockholders.⁸² They have no preference over them, either in respect to dividends or capital,⁸³ and have no lien upon the property of the corporation to their prejudice, except where the statute provides otherwise.⁸⁴ On the contrary, their rights, both in

⁷⁹ See *Hazeltine v. Belfast & M. L. R. Co.*, 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328; *McLaughlin v. Detroit & M. Ry. Co.*, 8 Mich. 100; *Willcox v. Trenton Potteries Co.*, 64 N. J. Eq. 173, 53 Atl. 474; *Pronick v. Spirits Distributing Co.*, 58 N. J. Eq. 97, 42 Atl. 586; *West Chester & P. R. R. v. Jackson*, 77 Pa. St. 321; *Ashbury v. Watson*, 30 Ch. Div. 376. See also *Martin v. Remington-Martin Co.*, 95 N. Y. App. Div. 18, 88 N. Y. Supp. 573.

⁸⁰ *Compton v. The Chelsea*, 13 N. Y. Supp. 722, 128 N. Y. 537, 23 N. E. 662.

⁸¹ *Pendleton v. Harris-Emery Co.*, 124 Iowa 361, 100 N. W. 117.

⁸² *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477; *Smith v. Southern Foundry Co.*, 166 Ky. 208, 209, 179 S. W. 205; *Fryer v. Wiedemann*, 148 Ky. 379, 39 L. R. A. (N. S.)

1011, 146 S. W. 752; *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S. W. 1011; *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595; *Reagan Bale Co. v. Heuermann*, — Tex. Civ. App. —, 149 S. W. 228. And see cases cited in the following notes:

⁸³ *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769, aff'g *King v. Ohio & M. R. Co.*, 2 Fed. 36; *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156; *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477; *Fryer v. Wiedemann*, 148 Ky. 379, 39 L. R. A. (N. S.) 1011, 146 S. W. 752; *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S. W. 1011.

⁸⁴ *Jefferson Banking Co. v. Trustees of Martin Institute*, 146 Ga. 383, 91 S. E. 463; *Smith v. Southern Foundry*

respect to dividends and capital are subordinate to the rights of such creditors,⁸⁵ and consequently they are not entitled to any part of the corporate assets until the corporate debts are fully paid.⁸⁶ Nor can

Co., 166 Ky. 208, 179 S. W. 205; *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S. W. 1011.

That preferred stockholders are not creditors, see § 3628 et seq., supra.

That the statute may make them creditors and give them a lien, see § 3629, supra.

85 United States. *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769; *Mercantile Trust Co. v. Baltimore & O. R. Co.*, 82 Fed. 360.

Indiana. *Reagan v. First Nat. Bank*, 157 Ind. 623, 62 N. E. 701, 61 N. E. 575.

Kentucky. *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477; *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S. W. 1011.

Maine. *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

Pennsylvania. *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595.

Texas. *Reagan Bale Co. v. Heuermann*, — Tex. Civ. App. —, 149 S. W. 228.

Vermont. *Chaffee v. Rutland R. Co.*, 55 Vt. 110.

In the absence of some express provision, holders of preferred stock have no rights against the corporation, by way of lien or otherwise, superior to the lien of mortgage bondholders. *Mercantile Trust Co. v. Baltimore & O. R. Co.*, 82 Fed. 360.

86 United States. *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769, aff'g *King v. Ohio & M. R. Co.*, 2 Fed. 36.

Kansas. *Insecho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

Kentucky. *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477; *Fryer v. Wiedemann*, 148 Ky. 379, 39

L. R. A. (N. S.) 1011, 146 S. W. 752; *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S. W. 1011.

Maryland. *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

Texas. *Reagan Bale Co. v. Heuermann*, — Tex. Civ. App. —, 149 S. W. 228.

“The law is perfectly well settled that as between creditors and ordinary preferred stockholders, the latter, as owners of the property of an insolvent corporation, are, upon a distribution of its assets, entitled to nothing until its creditors are first fully paid. There is a palpable difference between the relation of a stockholder and a creditor to the corporate property. Stock, whether preferred or common, is capital; and generally speaking, a certificate of stock merely evidences the amount which the holder has contributed to or ventured in the enterprise. Such a certificate, representing nothing more than the extent of his ownership in the capital, cannot well be treated as indicating that he is, by virtue of it alone, also to the same extent a creditor who may compete with other creditors in the distribution of the fund arising from a conversion of the corporation's assets into money. He cannot, if he is simply an ordinary preferred stockholder, in the nature of things, so far as third persons are concerned, be at one and the same time and by force of the same certificate, both part owner of the property and creditor of the company for that portion of its capital which stands in his name. His certificate, therefore, in such circumstances, merely measures the quantum of his ownership. As his chance of gain

the corporation give them any preference, either in respect to the payment of principal or dividends, which will be superior to the rights of creditors, unless by virtue of express statutory authority. In the absence of such authority, any attempt to so prefer them is contrary to public policy and void.⁸⁷ It is only in cases where the corporation

throws on the stockholder, as respects creditors, the entire risk of the loss of his contribution to the capital, it is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of repaying the principal of the capital until the debts of the corporation are satisfied." *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

87 United States. *Spencer v. Smith*, 201 Fed. 647, rev'g 190 Fed. 105; *Ellsworth v. Lyons*, 181 Fed. 55; *Guaranty Trust Co. v. Galveston City R. Co.*, 107 Fed. 311; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g 72 Fed. 92.

Georgia. *Jefferson Banking Co. v. Trustees of Martin Institute*, 146 Ga. 383, 91 S. E. 463.

Indiana. *Reagan v. First Nat. Bank*, 157 Ind. 623, 62 N. E. 701, 61 N. E. 575.

Kentucky. *Smith v. Southern Foundry Co.*, 166 Ky. 208, 209, 179 S. W. 205; *Fryer v. Wiedemann*, 148 Ky. 379, 39 L. R. A. (N. S.) 1011, 146 S. W. 752; *Sumrall v. Commercial Bldg. Trust's Assignee*, 106 Ky. 260, 44 L. R. A. 659, 90 Am. St. Rep. 223, 50 S. W. 69.

Missouri. *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

New York. *Cass v. Realty Securities Co.*, 148 App. Div. 96, 132 N. Y. Supp. 1074, aff'd 206 N. Y. 649, 99 N. E. 1105.

North Carolina. *Weaver Power Co. v. Elk Mountain Mill Co.*, 154 N. C. 76, 69 S. E. 747.

Pennsylvania. *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595.

Texas. *Reagan Bale Co. v. Heuer-*

mann, — Tex. Civ. App. —, 149 S. W. 228.

Preferred stockholders cannot have a lien superior to the claims of creditors though the stock in terms is accorded a lien. *Cass v. Realty Securities Co.*, 148 N. Y. App. Div. 96, 132 N. Y. Supp. 1074, aff'd 206 N. Y. 649, 99 N. E. 1105.

"A corporation has no right to make any rules by which the holder of stock, common or preferred, may be preferred in the liquidation of its assets over the creditors of the company." *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595.

A provision that if the company fails to pay the dividends on the preferred stock for two years the owners may mature the stock into an obligation of the company to pay on demand the par value thereof with interest, is contrary to public policy and void in so far as the rights of creditors are concerned. *Reagan Bale Co. v. Heuermann*, — Tex. Civ. App. —, 149 S. W. 228.

A corporation cannot lawfully, as against its prior or subsequent creditors, secure the retirement of preferred stock by an appropriation of the assets of the company otherwise available to creditors. For example, it cannot do so by paying for an endowment policy of insurance out of the assets of the corporation, and providing that the proceeds thereof shall be used for the purpose of redeeming and retiring the preferred stock. And such an arrangement is invalid as to subsequent creditors although there is no showing that they extended credit to the company on the assumption that the policy was a corporate asset for

is solvent and where the rights of creditors will not be injuriously affected thereby that agreements among the stockholders as to preferences may be enforced.⁸⁸

Statutes in some states specifically provide that in case of insolvency or the dissolution of the corporation the debts or liabilities of the corporation shall be paid in preference to the preferred stock.⁸⁹ And where such is the case a mortgage given to secure preferred stockholders as to dividends and principal will not give them a preference over unsecured creditors in case of dissolution or insolvency, even though their claims arose after the recording of the mortgage.⁹⁰ And especially is this true where the mortgage itself provides that the preferred stockholders shall be entitled to priority after the payment of the corporate debts and liabilities.⁹¹ Nor is it material that the postponement of the claims of the preferred stockholders to those of the general creditors may render the security of the preferred stockholders of little or no value and may enable the promoters of the corporation to perpetrate a fraud on persons who become preferred stockholders on the strength of the mortgage.⁹² Under such a statute a mortgage given by an insolvent corporation securing preferred stock-

the payment of debts. *Ellsworth v. Lyons*, 181 Fed. 55.

In *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g on other grounds 72 Fed. 92, where certificates of preferred stock recited that they were a lien on the company's property, it was held that the holders were stockholders, and not creditors. "If the purpose," said the court, "in providing for these peculiar shares was to arrange matters so that under any circumstances a part of the principal of the stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby." Quoted with approval in *Spencer v. Smith*, 201 Fed. 647, rev'g 190 Fed. 105; *Weaver Power Co. v. Elk Mountain Mill Co.*, 154 N. C. 76, 69 S. E. 747; *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595.

⁸⁸ *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477; *Smith v.*

Southern Foundry Co., 166 Ky. 208, 209, 179 S. W. 205; *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S. W. 1011.

⁸⁹ *Reagan v. First Nat. Bank*, 157 Ind. 623, 62 N. E. 701, 61 N. E. 575; *Lloyd v. Pennsylvania Elec. Vehicle Co.*, 75 N. J. Eq. 263, 21 L. R. A. (N. S.) 228, 138 Am. St. Rep. 557, 20 Ann. Cas. 119, 72 Atl. 16, rev'g 73 N. J. Eq. 269, 67 Atl. 834; *Black v. Hobart Trust Co.*, 64 N. J. Eq. 415, 53 Atl. 826.

The effect of such a provision is to give the creditors an absolute and unqualified preference in the payment of their claims over the payment of the preferred stock in case the company becomes insolvent or is dissolved. *Reagan v. First Nat. Bank*, 157 Ind. 623, 62 N. E. 701, 61 N. E. 575.

⁹⁰ *Black v. Hobart Trust Co.*, 64 N. J. Eq. 415, 53 Atl. 826.

⁹¹ *Black v. Hobart Trust Co.*, 64 N. J. Eq. 415, 53 Atl. 826.

⁹² *Black v. Hobart Trust Co.*, 64 N. J. Eq. 415, 53 Atl. 826.

holders, and thus giving them a preference over unsecured creditors, is a fraud on the latter and void, even though it is executed by the corporate officials in the honest belief that they have the right to so secure the preferred stockholders.⁹³

§ 3635. — Right to certificate. A purchaser of or a subscriber for preferred stock has the same right as a holder of common stock to a certificate of stock as evidence of his rights, and he is entitled to a certificate showing that his stock is preferred.⁹⁴ And he is entitled to the same remedies as a common stockholder to compel the corporation to issue it.⁹⁵

§ 3636. — Right to dividends. The holders of preferred stock are entitled to be paid dividends, in accordance with the terms of their contract, before any dividends can be paid to the holders of common stock.⁹⁶

§ 3637. — Rights as to management of corporation. Preferred stockholders have the same rights with respect to the management of the corporation as the common stockholders,⁹⁷ except in so far as they may be excluded by their contract.⁹⁸ Their contract may give them greater rights;⁹⁹ but, in the absence of express provision to the contrary, their rights are the same. With the exception that they may interfere and maintain proper suits against and on behalf of the corporation, in a proper case, to protect their rights as preferred stockholders, they cannot interfere in any case in which a holder of common stock would have no right to interfere.¹ "Holders of 'preferred stock,' have no special control over the corporation or its management.

⁹³ *Reagan v. First Nat. Bank*, 157 Ind. 623, 62 N. E. 701, 61 N. E. 575. In this case the mortgage secured both the preferred stockholders and certain creditors, and it was held that the contract was inseparable and wholly void as to the unsecured creditors.

⁹⁴ *State v. Cheraw & C. R. Co.*, 16 S. C. 524.

As to whether the issuance and tender of a certificate is a condition precedent to the right of the corporation to recover on a subscription for preferred stock, see § 596, *supra*.

⁹⁵ See § 3484, *supra*.

⁹⁶ The subject of dividends on pre-

ferred stock will be considered at length in subsequent sections. See § 3751 *et seq.*, *infra*.

⁹⁷ *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Thompson v. Erie Ry. Co.*, 42 How. Pr. (N. Y.) 68, 11 Abb. Pr. N. S. (N. Y.) 188.

⁹⁸ *Morrell v. Geo. Brooks & Son Co.*, 164 Fed. 501; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

⁹⁹ *Mackintosh v. Flint & P. M. R. Co.*, 32 Fed. 350, 34 Fed. 582.

¹ *Mackintosh v. Flint & P. M. R. Co.*, 32 Fed. 350, 34 Fed. 582; *Thompson v. Erie Ry. Co.*, 42 How. Pr. (N. Y.) 68, 11 Abb. Pr. N. S. (N. Y.) 188.

Stockholders are the constituent elements of a corporation, and in this case there is no other difference between the two classes than this: one is to be paid interest out of a certain fund, if raised, to the exclusion of the other, if such fund is inadequate to pay both. The corporation is in no sense the trustee for the holders of preferred stock. Its duty is to each alike according to the conditions attached to the stock of each."²

Preferred stockholders have a right to question the legality of the issue of common stock,³ particularly where the control of the company is in the holders of common stock to whom alone voting powers are given.⁴

It is sometimes provided by statute that the corporation shall not have authority to convey its real estate or to mortgage its property without the consent of the holders of a majority of the shares of the preferred stock.⁵

§ 3638. — Right to vote at corporate meetings. In the absence of charter or statutory provision or valid stipulation to the contrary, holders of preferred stock have the same right as holders of common stock to vote at stockholders' meetings.⁶ And their contract may even give them the right to vote to the exclusion, for a time, of the holders of common stock, so as to place the management of the corporation entirely in their hands for the time specified.⁷

On the other hand, in the absence of a constitutional or statutory provision to the contrary, it is within the power of a corporation,

² *Thompson v. Erie Ry. Co.*, 42 How. Pr. (N. Y.) 68, 11 Abb. Pr. N. S. (N. Y.) 188.

³ *Howard v. National Tel. Co.*, 182 Fed. 215; *Scully v. Automobile Finance Co.*, — Del. Ch. —, 101 Atl. 908.

⁴ *Scully v. Automobile Finance Co.*, — Del. Ch. —, 101 Atl. 908.

⁵ See *Reagan v. First Nat. Bank*, 157 Ind. 623, 62 N. E. 701, 61 N. E. 575.

⁶ **United States.** See *Morrell v. Geo. Brooks & Son Co.*, 164 Fed. 501.

Georgia. *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

Maryland. See *Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327.

Michigan. *Lockhart v. Van Alstyne*,

31 Mich. 76, 18 Am. Rep. 156.

New Hampshire. See *Jones v. Concord & M. R. R.*, 67 N. H. 234, 68 Am. St. Rep. 650, 30 Atl. 614, 67 N. H. 119, 38 Atl. 120.

New Jersey. See *General Inv. Co. v. Bethlehem Steel Corporation*, — N. J. Eq. —, 100 Atl. 347; *Morganstern v. American Malting Co.*, — N. J. Eq. —, 100 Atl. 166.

As to the right to vote generally, see § 1656 et seq., supra.

⁷ *Mackintosh v. Flint & P. M. R. Co.*, 32 Fed. 350, 34 Fed. 582. See also *In re Sharood Shoe Corporation*, 192 Fed. 945; *General Inv. Co. v. Bethlehem Steel Corporation*, — N. J. Eq. —, 100 Atl. 347.

when it issues preferred stock, to provide expressly that it shall give no right to vote, and when the articles of incorporation or stock certificates contain such a provision, it will be binding upon all persons who accept the same.⁸ Such a provision does not violate any rule of the common law,⁹ nor of public policy,¹⁰ but is a mere matter of agreement between the two classes of stockholders which does not affect the public.¹¹ Nor is it unreasonable, since the common stockholders are not entitled to share in the profits until the preferred dividends have been paid, the burden of making the business a success is on them, and therefore the power to manage may fairly be left with them, their interest in the success of the corporation and their

⁸ **United States.** *Morrell v. Geo. Brooks & Son Co.*, 164 Fed. 501; *Wilson v. Parvin*, 119 Fed. 652. See also *Storrow v. Texas Consol. Compress & Manufacturing Ass'n*, 87 Fed. 612, 92 Fed. 5; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g on other grounds 72 Fed. 92.

Delaware. *Scully v. Automobile Finance Co.*, — Del. Ch. —, 101 Atl. 908.

Georgia. See *Savannah Real Estate, Loan & Building Co. v. Silverberg*, 108 Ga. 281, 33 S. E. 908.

Kansas. *Incho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

Missouri. *State v. Swanger*, 190 Mo. 561, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563, 89 S. W. 872.

New Hampshire. See *Kidd v. New Hampshire Traction Co.*, 74 N. H. 160, 66 Atl. 127.

New Jersey. *General Inv. Co. v. Bethlehem Steel Corporation*, — N. J. Eq. —, 100 Atl. 347.

New York. *People v. Koenig*, 133 App. Div. 756, 118 N. Y. Supp. 136.

Ohio. *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

England. *In re Barrow Haematite Steel Co.*, 39 Ch. Div. 582.

This is particularly true where the statute gives the corporation power to issue preferred stock and to fix its preferences, priorities and character.

State v. Swanger, 190 Mo. 561, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563, 89 S. W. 872.

See *Synnott v. Cumberland Bldg. Loan Ass'n*, 117 Fed. 379, as to the effect of an amendment of the by-laws of a building and loan association so as to give preferred stockholders the right to vote.

⁹ *State v. Swanger*, 190 Mo. 561, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563, 89 S. W. 872; *People v. Koenig*, 133 N. Y. App. Div. 756, 118 N. Y. Supp. 136.

¹⁰ *State v. Swanger*, 190 Mo. 561, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563, 89 S. W. 872; *People v. Koenig*, 133 N. Y. App. Div. 756, 118 N. Y. Supp. 136; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496. See also *General Inv. Co. v. Bethlehem Steel Corporation*, — N. J. Eq. —, 100 Atl. 347.

¹¹ **Kansas.** See *Incho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

Missouri. *State v. Swanger*, 190 Mo. 561, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563, 89 S. W. 872.

New Jersey. See *General Inv. Co. v. Bethlehem Steel Corporation*, — N. J. Eq. —, 100 Atl. 347.

New York. *People v. Koenig*, 133 App. Div. 756, 118 N. Y. Supp. 136.

Ohio. *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

liability to first satisfy the preferred stockholders being a sufficient guaranty that they will manage the corporate affairs to the best advantage.¹²

According to the weight of authority such a provision is not in conflict with a constitutional or statutory provision to the effect that each stockholder shall be entitled to one vote for each share of stock held by him,¹³ although there is authority to the contrary.¹⁴

In California it is provided by statute that no preference shall be granted nor shall any distinction be made as to voting power between common and preferred stock.¹⁵

In Indiana there is a statute to the effect that preferred stockholders shall not be entitled to vote unless the right to do so is conferred upon them in the articles of incorporation or by the unanimous consent of the common stockholders.¹⁶

Of course a by-law which restricts or alters the voting power of the stock as established by the corporate charter is void. And the same is true of a charter provision giving the stock a voting power different from that contemplated by the statute under which it was created, or of a statute which authorizes the corporation to give it a voting power different from that prescribed by the constitution.¹⁷

The holder of preferred stock may waive a right to vote it given

¹² *State v. Swanger*, 190 Mo. 561, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563, 89 S. W. 872; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496. See also *Insko v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

¹³ *State v. Swanger*, 190 Mo. 561, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563, 89 S. W. 872; *People v. Koenig*, 133 N. Y. App. Div. 756, 118 N. Y. Supp. 136.

¹⁴ In *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790, rev'g 1 Boyce (Del.) 129, 74 Atl. 599, it was held that a statute authorizing restrictions on the voting privilege of preferred stock, and provisions of a charter and by-laws, adopted pursuant thereto, depriving such stock of the right to vote, were in conflict with a constitutional provision that each shareholder

should be entitled to one vote for each share of stock he might hold. In the course of the opinion attention is called to the fact that the provision of the constitution in question has been repealed.

¹⁵ Civ. Code, § 290, subd. 6. This provision is violated by dividing the capital stock of \$1,000,000 into 50,000 shares of common stock of the par value of \$1 each, and 47,500 shares of preferred stock of the par value of \$20 each. *Film Producers v. Jordan*, 171 Cal. 664, 154 Pac. 605.

¹⁶ *Burns' Ann. St.* 1914, § 5097. See *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784, citing an earlier Indiana statute.

¹⁷ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790, rev'g 1 Boyce (Del.) 129, 74 Atl. 599.

See generally Chap. 39

him by the constitution in the sense that he may use it or refrain from using it, as he chooses, but he cannot, by any act of his, change the character of the stock so as to rob it of the voting power while it is in his hands or in those of any subsequent holder.¹⁸

§ 3639. — Rights on increase or reduction of capital stock. When a corporation increases its capital stock, holders of preferred stock have the same privilege as holders of common stock to subscribe for or purchase a proportionate amount of the new stock, unless there is some provision to the contrary in their contract; and it makes no difference that the amount of dividends is limited.¹⁹

In like manner, on a reduction of the capital stock because of losses, preferred stock must be reduced proportionately with common stock unless there is some special provision in the statute or contract of the parties fixing a different rule.²⁰ It has been held that this rule does not apply, where the stock is preferred, not merely as to dividends,

¹⁸ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790, rev'g 1 Boyce (Del.) 129, 74 Atl. 599.

¹⁹ *Page v. Whittenton Mfg. Co.*, 211 Mass. 424, 97 N. E. 1006; *Jones v. Concord & M. R. R.*, 67 N. H. 234, 68 Am. St. Rep. 650, 30 Atl. 614, 67 N. H. 119, 38 Atl. 120; *Page v. American & B. Mfg. Co.*, 129 N. Y. App. Div. 346, 113 N. Y. Supp. 734.

Where a corporation proposed to issue certain of its authorized but unissued common stock and to permit its common stockholders to subscribe for the same at par, it was held that a preferred stockholder was not entitled to an injunction pendente lite to restrain such action unless the preferred stockholders were given the right to subscribe for such stock on the same terms, since his right was doubtful, and if it existed he had an adequate remedy by an action for damages. *Russell v. American Gas & Electric Co.*, 152 N. Y. App. Div. 136, 136 N. Y. Supp. 602.

In *Morganstern v. American Malting Co.*, — N. J. Eq. —, 100 Atl. 166, it was held that individual preferred stockholders could not object to a pro-

posed reduction on the ground that it would result in their receiving less than their full proportion of a proposed new issue of stock, where the corporation, at the hearing, offered to turn over to them so much of the new issue as would make their proportionate share thereof equal to their proportionate share of the old, and in addition was required to give a bond indemnifying them against assessments on the new stock.

As to the right of existing stockholders to subscribe for new stock generally, see § 3462 et seq., supra.

²⁰ *Page v. American & B. Mfg. Co.*, 129 N. Y. App. Div. 346, 113 N. Y. Supp. 734; *In re Gatling Gun*, 43 Ch. Div. 628; *In re Quebrada Railway, Land & Copper Co.*, 40 Ch. Div. 363; *In re Barrow Haematite Steel Co.*, 39 Ch. Div. 582; *Bannatyne v. Direct Spanish Tel. Co.*, 34 Ch. Div. 287. See also *Morganstern v. American Malting Co.*, — N. J. Eq. —, 100 Atl. 166; *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13, rev'g 102 N. Y. App. Div. 118, 92 N. Y. Supp. 387.

but also as to capital,²¹ and that in such case the common stock must be first resorted to even to the point of extinction before the preferred stock can be compelled to contribute.²² But there is authority to the contrary.²³

§ 3640. — Right to share in distributions of capital. When the assets of a corporation are distributed among its stockholders, not by way of dividend, but on a dissolution and winding up, the holders of preferred stock have the same, and no greater, right to share in the assets as the holders of common stock,²⁴ unless, by statute or by their

As to the reduction of stock generally, see § 3470 et seq., *supra*.

²¹ *In re Quebrada Railway, Land & Copper Co.*, 40 Ch. Div. 363; *In re London & N. Y. Inv. Corporation*, [1895] 2 Ch. Div. 860; *In re Agricultural Hotel Co.*, [1891] 1 Ch. Div. 396.

²² This is true when, by reason of the shrinkage of quick assets or of working capital, it becomes necessary to raise new capital by first reducing and then increasing the outstanding capital. *Page v. Whittenton Mfg. Co.*, 211 Mass. 424, 97 N. E. 1006.

²³ *Page v. American & B. Mfg. Co.*, 129 N. Y. App. Div. 346, 113 N. Y. Supp. 734.

²⁴ *United States Guaranty Trust Co. v. Galveston City R. Co.*, 107 Fed. 311; *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 531, *aff'd* 86 Fed. 929; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, *rev'd* 72 Fed. 92.

Iowa. Teller v. Wilcozen, 110 Iowa 565, 81 N. W. 772.

Kentucky. Westerfield-Bonte Co. v. Burnett, 176 Ky. 188, 195 S. W. 477; *Forwood v. Eubank*, 106 Ky. 291, 50 S. W. 255; *Sumrall v. Commercial Bldg. Trust's Assignee*, 106 Ky. 260, 44 L. R. A. 659, 90 Am. St. Rep. 223, 50 S. W. 69.

Massachusetts. Hale v. Cheshire R. Co., 161 Mass. 443, 37 N. E. 307.

Missouri. Hohenshell v. Home Savings & Loan Ass'n, 140 Mo. 566, 41 S. W. 948.

New Hampshire. Jones v. Concord & M. R. R., 67 N. H. 234, 68 Am. St. Rep. 650, 30 Atl. 614, 67 N. H. 119, 38 Atl. 120.

New Jersey. Lloyd v. Pennsylvania Elec. Vehicle Co., 75 N. J. Eq. 263, 21 L. R. A. (N. S.) 228, 138 Am. St. Rep. 557, 20 Ann. Cas. 119, 72 Atl. 16, *rev'd* 73 N. J. Eq. 269, 67 Atl. 834; *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181.

New York. People v. New York Building-Loan Co., 50 Misc. 23, 100 N. Y. Supp. 459, *aff'd* 119 App. Div. 830, 104 N. Y. Supp. 892, 189 N. Y. 547, 82 N. E. 1131.

Virginia. Drewry, Hughes Co. v. Throckmorton, 92 S. E. 818; *Gordon's Ex'rs v. Richmond, F. & P. R. Co.*, 78 Va. 501.

Wisconsin. Leahy v. National Building & Loan Ass'n, 100 Wis. 555, 69 Am. St. Rep. 945, 76 N. W. 625.

England. Birch v. Cropper, 14 App. Cas. 525.

"After liquidation commences, preferred stockholders and common stockholders are, in the eyes of the law, upon the same plane, both being mere stockholders excepting in so far as their participation in the assets of the company had been agreed upon between them." *Drewry, Hughes Co. v. Throckmorton*, — Va. —, 92 S. E. 818.

It was held, for this reason, where the property of a corporation was transferred to a new corporation, on

agreement with the corporation, they are given a preference, not only in the payment of dividends, but also in the distribution of capital, which is often the case.²⁵

a reorganization, and preferred and common stock of the new company was taken in payment, that the preferred stockholders of the old company had no greater right than the common stockholders in the distribution of such stock, and that they had no greater right than the common stockholders, therefore, to preferred stock in the new company. *Simpson v. Palace Theatre*, 69 L. T. (N. S.) 70.

In *Coltrane v. Blake*, 113 Fed. 785, aff'g 110 Fed. 272, it was held that the holders of full paid stock in a building and loan association were not entitled to any preference over the other stockholders on the insolvency and winding up of the company. And there was a similar holding in *Alexander v. Southern Home Bldg. & Loan Ass'n*, 110 Fed. 267.

²⁵ **United States.** *Spencer v. Smith*, 201 Fed. 647, rev'g 190 Fed. 105; *Shaffer v. McCulloch*, 192 Fed. 801; *Kent v. Honsinger*, 167 Fed. 619; *Wilson v. Parvin*, 119 Fed. 652; *Guaranty Trust Co. v. Galveston City R. Co.*, 107 Fed. 311; *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 531, aff'g 86 Fed. 929; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g 72 Fed. 92.

Indiana. *Jennings v. Dark*, 175 Ind. 332, 92 N. E. 778; *Grover v. Cavanagh*, 40 Ind. App. 340, 82 N. E. 104.

Kansas. *Hogsett v. Aetna Building & Loan Ass'n*, 78 Kan. 71, 96 Pac. 52.

Kentucky. *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477; *Sumrall v. Commercial Bldg. Trust's Assignee*, 106 Ky. 260, 44 L. R. A. 659, 90 Am. St. Rep. 223, 50 S. W. 69.

Maryland. *Heller v. National Marine Bank*, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212, 43 Atl. 800.

Massachusetts. *Page v. Whittenton Mfg. Co.*, 211 Mass. 424, 97 N. E. 1006; *Hale v. Cheshire R. Co.*, 161 Mass. 443, 37 N. E. 307.

Missouri. *Hohenshell v. Home Savings & Loan Ass'n*, 140 Mo. 566, 41 S. W. 948.

New Hampshire. *Jones v. Concord & M. R. R.*, 67 N. H. 234, 68 Am. St. Rep. 650, 30 Atl. 614, 67 N. H. 119, 38 Atl. 120.

New Jersey. *Mellon v. Mississippi Wire Glass Co.*, 77 N. J. Eq. 498, 78 Atl. 710; *McGregor v. Home Ins. Co. of Newark*, 33 N. J. Eq. 181.

New York. In re *Seneca Oil Co.*, 153 App. Div. 594, 138 N. Y. Supp. 78, aff'd 208 N. Y. 545, 101 N. E. 1121; *People v. New York Building Loan Co.*, 50 Misc. 23, 100 N. Y. Supp. 459, aff'd 119 App. Div. 830, 104 N. Y. Supp. 892, aff'd 189 N. Y. 547, 82 N. E. 1131.

North Carolina. See *Farrish-Stafford Co. v. Charlotte Cotton Mills*, 157 N. C. 188, 72 S. E. 973.

Ohio. *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

Rhode Island. *Emerson v. New York & N. E. R. Co.*, 14 R. I. 555.

Virginia. *Drewry, Hughes Co. v. Throckmorton*, 92 S. E. 818; *Gordon's Ex'rs v. Richmond, F. & P. R. Co.*, 78 Va. 501.

In the absence of a statutory or charter provision to the contrary they may be given a preference in respect of both capital and dividends. *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 531, aff'g 86 Fed. 929; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g 72 Fed. 92.

"Such an agreement is nothing more than a contract between stockholders as to how they shall divide

Since the holders of ordinary preferred stock are stockholders, and not creditors of the corporation,²⁶ they are not entitled, any more than the holders of common stock, to receive any portion of the assets of the corporation, on its insolvency or dissolution, until the creditors of the corporation are fully paid.²⁷

As we have seen, however, the holders of preferred stock, so called, may be given a prior lien by or under express statutory provision.²⁸ And when a dividend upon preferred stock has been lawfully declared out of profits, but not paid, the holders have the rights of creditors, as distinguished from stockholders, to the extent of such dividend.²⁹

§ 3641. Liabilities of preferred stockholders. In the absence of express provision to the contrary, the holders of preferred stock in a corporation are subject to the same liabilities as the holders of the common stock. Thus they are liable on the same principles upon their subscriptions for shares. And creditors, if the corporation becomes insolvent, may in equity compel subscribers to pay the full amount of their subscriptions, irrespective of any secret agreements with the corporation.³⁰ So, where a statute makes the stockholders of a cor-

the corporate property and profits, and, if not prohibited, is clearly within the general powers of such corporations. It is difficult to see how such an arrangement is of the slightest consequence to the public or to the creditors of the corporation. It does not withdraw the property from the demands of creditors, and provides only for the division among those who are the beneficial owners of the corporate property, after the payment of corporate obligations." *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 531, aff'g 86 Fed. 929.

The rule that common and preferred stockholders stand on the same footing does not apply to a consolidation on different terms pursuant to statutory authority. *Hale v. Cheshire R. Co.*, 161 Mass. 443, 37 N. E. 307.

Where the statute gives preferred stockholders a preference in the distribution of the assets on the winding up of the corporation, they are en-

titled to it where the corporation is being wound up by its officers and not under the direction of the court. *McGregor v. Home Ins. Co. of Newark*, 33 N. J. Eq. 181.

A delay of more than ten years on the part of common stockholders in asserting that such a provision was inserted in the certificates without authority amounts to acquiescence or ratification and precludes them from subsequently objecting. *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 531, aff'g 86 Fed. 929.

²⁶ See § 3628, *supra*.

²⁷ See § 3634, *supra*.

²⁸ See § 3629, *supra*.

²⁹ See § 3757, *infra*.

And see generally § 3653, *infra*.

³⁰ That their liability is the same, see *Kirkpatrick v. American Alkali Co.*, 140 Fed. 186; *Campbell v. American Alkali Co.*, 125 Fed. 207.

As to the liability of stockholders on their subscriptions generally, see Chap. 17, *supra*.

poration individually liable to creditors beyond the par value of their shares, it applies to the holders of preferred stock.³¹ And it is specifically provided by statute in at least one state that no preference shall be granted nor shall any distinction be made between the two classes of stockholders in this regard.³²

On the other hand, by statute in some states preferred stockholders are expressly exempted from such liability.³³ But it has been held that such a statute does not exempt them from liability for calls or assessments for unpaid portions of their subscriptions when the money is needed for the payment of debts,³⁴ or from a statutory liability to refund to creditors dividends paid to them out of capital.³⁵ This subject will be more fully considered in subsequent sections.³⁶

§ 3642. Rights of common stockholders with respect to preferred stock. The rights and remedies of common stockholders where an issue of preferred stock is unauthorized have been shown in a previous section.³⁷ When the issue of preferred stock is valid as against them, any rights which they would ordinarily have as stockholders are subordinated to the rights given to the preferred stockholders by their contract.³⁸ So they have no right to dividends until the stipulated dividend has been paid on the preferred stock.³⁹ They may be given

As to the right of creditors to enforce such liability, see subd. xxxiii, *infra*.

³¹ *Railroad Co. v. Smith*, 48 Ohio St. 219, 31 N. E. 743; *Burt v. Rattle*, 31 Ohio St. 116.

As to the statutory liability of stockholders generally, see subd. xxxiv, *infra*.

³² Cal. Civ. Code, § 290, subd. 6. The division of capital stock of one million dollars into fifty thousand shares of common stock of the par value of one dollar and forty-seven thousand five hundred shares of preferred stock of the par value of twenty dollars violates this provision. *Film Producers v. Jordan*, 171 Cal. 664, 154 Pac. 605.

³³ *Jennings v. Dark*, 175 Ind. 332, 92 N. E. 778.

The Michigan statute provides that preferred stockholders shall not be liable for corporate debts, except labor debts. *American Steel & Wire*

Co. v. Eddy, 130 Mich. 266, 89 N. W. 952.

The New Jersey statute provides that in no event shall a holder of preferred stock be personally liable for the debts of the company. *Kirkpatrick v. American Alkali Co.*, 140 Fed. 186.

³⁴ The New Jersey statute does not exempt preferred stockholders from personal liability in a suit by a corporation or its receiver for unpaid capital due to the corporation. *Kirkpatrick v. American Alkali Co.*, 140 Fed. 186.

³⁵ *American Steel & Wire Co. v. Eddy*, 130 Mich. 266, 89 N. W. 952.

As to the liability of stockholders generally to refund under such circumstances, see § 3733 et seq., *infra*.

³⁶ See subd. xxxiv, *infra*.

³⁷ See § 3626, *supra*.

³⁸ See § 3632, *supra*.

³⁹ See § 3751, *infra*.

the right to vote at corporate meetings, to the exclusion of the preferred stockholders, or, on the other hand, they may be deprived of the right to vote.⁴⁰

Holders of common stock cannot prevent contracts or leases, etc., by the corporation, which are within the powers conferred upon it, expressly or impliedly, by its charter, although the result of such contracts, leases, etc., may be to leave nothing for them after the payment of the dividends on the preferred stock.⁴¹ But they can object to and prevent any arrangement or transaction entered into or threatened by the company for the purpose of putting the preferred stockholders on a more favorable footing than is secured to them by their contract.⁴² Under some statutes their consent is necessary to the issuance of preferred stock.⁴³

Holders of common stock issued gratuitously to holders of preferred stock have no right of recovery inter se by reason of the fact that the proportions of the holdings of the common stock thus donated are unequal in amount. They are in *pari delicto*, and unless the existence of some special facts or circumstances tantamount to fraud be shown, there can be no recovery by those whose ownership of such stock is proportionately less against their fellow stockholders whose ownership is proportionately greater.⁴⁴

§ 3643. Exchange of preferred stock for common stock, or common stock for preferred. When a corporation is authorized to issue preferred stock, and there is no charter or statutory provision in the way, it may lawfully exchange preferred stock for common stock, provided all the stockholders are given the same right and opportunity to make the exchange.⁴⁵ When the corporation offers to make such an exchange, stockholders must exercise the option, and notify the corporation within the time, if any, specified in the offer, or within a reasonable time, if no time is specified.⁴⁶

The holders of preferred stock may be given the option to convert it into common stock.⁴⁷ And the corporation may also be given the

⁴⁰ See § 3638, *supra*.

⁴¹ *Town of Middletown v. Boston & N. Y. Air Line R. Co.*, 53 Conn. 351, 5 Atl. 706; *In re Buenos Ayres Water Supply & Drainage Co.*, 66 L. T. (N. S.) 408.

⁴² *Phillips v. Eastern R. Co.*, 138 Mass. 122.

⁴³ See § 3621 et seq., *supra*.

⁴⁴ *Hoffard v. Williams Shoe Co.*, — Ohio St. —, 117 N. E. 17.

⁴⁵ *Holland v. Cheshire R. Co.*, 151 Mass. 231, 24 N. E. 206; *Pearson v. London & C. Ry. Co.*, 14 Sim. 541. See also *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826, rev'g 72 Fed. 92.

⁴⁶ *Holland v. Cheshire R. Co.*, 151 Mass. 231, 24 N. E. 206; *Pearson v. London & C. Ry. Co.*, 14 Sim. 541.

⁴⁷ See *Totten & Co. v. Tison*, 54 Ga. 139.

right to convert its preferred stock into common stock.⁴⁸ If it has the right to do so, and also the right to retire its preferred stock and to issue certificates of indebtedness convertible into stock, it may effect the conversion of its preferred stock into common stock by providing for the retirement of the preferred, issuing certificates of indebtedness for the purpose of obtaining funds with which to make such retirement, providing for the issuance of new common stock, and making such certificates of indebtedness immediately convertible into common stock, and giving the common stockholders the right to subscribe to the new common stock.⁴⁹ Under such circumstances the various steps taken will not be regarded as isolated acts, but rather as steps to one ultimate act, that is to the conversion of the preferred stock into common, and hence the retirement of the preferred stock will not be deemed to have reduced the capital of the company nor the issuance of the new common stock to have increased it.⁵⁰ A common stockholder cannot object that the holders of preferred stock are not given a right to subscribe to such new common stock.⁵¹ And where the preferred stockholders acquire their stock under a contract giving the company a right to retire it, they cease to be stockholders on such retirement, and hence have no right to such new common stock in the absence of a provision in their contract to the contrary.⁵²

§ 3644. Redemption and retirement—Right of corporation to redeem or retire. Corporations are frequently given the right to retire or redeem preferred stock either by statute⁵³ or by provisions to that

⁴⁸ Weidenfeld v. Northern Pac. R. Co., 129 Fed. 305; Hackett v. Northern Pac. R. Co., 36 N. Y. Misc. 583, 73 N. Y. Supp. 1087.

In Lazear v. American Steel Foundries, 86 N. J. Eq. 21, 98 Atl. 642, it was held that a corporation had a right, as part of a plan to reduce its stock, to provide for the retirement of all of its preferred stock and for the issuance of common stock in part payment therefor.

⁴⁹ Weidenfeld v. Northern Pac. R. Co., 129 Fed. 305; Hackett v. Northern Pac. R. Co., 36 N. Y. Misc. 583, 73 N. Y. Supp. 1087.

⁵⁰ Weidenfeld v. Northern Pac. R. Co., 129 Fed. 305; Hackett v. Northern Pac. R. Co., 36 N. Y. Misc. 583, 73 N. Y. Supp. 1087.

⁵¹ Weidenfeld v. Northern Pac. R. Co., 129 Fed. 305.

⁵² Weidenfeld v. Northern Pac. R. Co., 129 Fed. 305; Hackett v. Northern Pac. R. Co., 36 N. Y. Misc. 583, 73 N. Y. Supp. 1087.

⁵³ Burns' Ind. Ann. St. 1914, § 5096. See Kidd v. Puritana Cereal Food Co., 145 Mo. App. 502, 122 S. W. 784, quoting the statute.

P. L. 1896, p. 285, § 27 (Comp. St. 1910, p. 1612, § 27) authorizes the retirement of stock by a vote of two-thirds in interest of each class of stockholders (1) by retiring or reducing any class of stock; (2) by lot; (3) by surrender of shares and the issue of a less number of shares pro rata; (4) by the purchase, at not above par, of certain shares for retirement;

effect in the articles of incorporation, or the stock certificates, or the

(5) by retirement of shares owned by the corporation; or (6) by reducing the par value of the shares. The first and second of the above methods are compulsory on the shareholder. *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14; *Allen v. Francisco Sugar Co.*, 193 Fed. 825. See also *Lazear v. American Steel Foundries*, 86 N. J. Eq. 252, 100 Atl. 1030, 98 Atl. 642.

In *Lazear v. American Steel Foundries*, 86 N. J. Eq. 252, 100 Atl. 1030, 98 Atl. 642, it was held that by a delay of three years a preferred stockholder had lost his right to object that the method adopted for retirement was not compulsory on him.

Under the power conferred by §§ 27 and 29 of the Act of 1896 any class of the stock of companies organized under such act may be retired in toto. *Lazear v. American Steel Foundries*, 86 N. J. Eq. 252, 100 Atl. 1030, 98 Atl. 642.

Since the act provides that its provisions shall be a part of the charter of every corporation organized under it, a preferred stockholder of such a corporation has no right to retain his shares in opposition to any lawful method thereby provided for retiring them. *Lazear v. American Steel Foundries*, 86 N. J. Eq. 252, 100 Atl. 1030, 98 Atl. 642; *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

As a part of a plan for reducing its stock, a corporation may provide for the retirement of its preferred stock in toto, to be paid for partly in cash, partly in debentures and partly in common stock. *Lazear v. American Steel Foundries*, 86 N. J. Eq. 252, 100 Atl. 1030, 98 Atl. 642. See also *American Steel Foundries v. Lazear*, 204 Fed. 204.

Under the fourth method a corporation has authority to retire shares of preferred stock purchased with bonds or the proceeds of bonds issued for that purpose. *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 607, 60 L. R. A. 742, 54 Atl. 1, rev'g 64 N. J. Eq. 90, 53 Atl. 601; *Raymond v. United States Steel Corporation*, 63 N. J. Eq. 830, 53 Atl. 1125; *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14; *C. H. Venner Co. v. United States Steel Corporation*, 116 Fed. 1012.

And it also has the right to retire shares of its common stock purchased in the same manner. *Allen v. Francisco Sugar Co.*, 193 Fed. 825.

Under this method of retirement it is optional with the shareholder to sell his stock to the corporation or to retain it. The offer to purchase pro rata must be made to all of the stockholders, but if the like option is given to all, it is not necessary that shares in fact be purchased pro rata from each. *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

Such a purchase and retirement of preferred stock does not deprive a stockholder who does not elect to sell of any vested right. *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

A holder of common stock cannot question the legality of the retirement of preferred stock by this method. *Raymond v. United States Steel Corporation*, 63 N. J. Eq. 830, 53 Atl. 1125.

P. L. 1902, p. 217, 2 Comp. St. 1910, p. 1616, § 29a, authorizing corporations to retire preferred stock out of bonds or the proceeds of bonds is not special legislation, but applies alike to all corporations, and is general in its operation, requiring the existence of condi-

contract under which the stock is issued.⁵⁴ And it has been held that when a corporation is authorized to issue preferred stock it may attach a provision for its redemption.⁵⁵

Valid provisions for redemption are binding upon the holders of

tions which all corporations have equal opportunity under the law to conform to, and to which all may attain. *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

It is a restraining and not an enlarging act, and its provisions must be observed to render the retirement by purchase out of bonds or the proceeds of bonds legal. *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14; *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1, rev'g 64 N. J. Eq. 90, 53 Atl. 601; *Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co.*, 197 Fed. 347; *Allen v. Francisco Sugar Co.*, 193 Fed. 825.

It changes the mere form of accomplishing that which the Act of 1896 permits to be done, and affects no vested right of a stockholder in a corporation organized under that act, in view of the reserved power of the legislature to amend it. *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

In view of the reserved power of amendment and the fact that a corporation had authority under the Act of 1896 to issue bonds for the purpose of retiring preferred stock, it does not impair the contract rights of preferred stockholders. *C. H. Venner Co. v. United States Steel Corporation*, 116 Fed. 1012.

By its terms it applies exclusively to preferred stock and does not repeal the provisions of the Act of 1896 in so far as it concerns the retirement of common stock. *Allen v. Francisco Sugar Co.*, 193 Fed. 825.

See further as to the Act of 1902, § 3648, *infra*.

The Ohio statute provides that a railroad corporation which issues preferred stock shall reserve the privilege of redeeming and canceling the same at par, at any time after three years from the date of its issue. *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133.

The Act of April 28, 1873, P. L. 79, authorizes the corporation to provide for the redemption of preferred stock. *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595.

54 United States. *Weidenfeld v. Northern Pac. R. Co.*, 129 Fed. 305.

Georgia. *Savannah Real Estate, Loan & Building Co. v. Silverberg*, 108 Ga. 281, 33 S. E. 908; *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

Iowa. See *Pendleton v. Harris-Emery Co.*, 124 Iowa 361, 100 N. W. 117.

Kansas. *Abrahams v. Medlicott*, 86 Kan. 106, 38 L. R. A. (N. S.) 137, 119 Pac. 375.

Kentucky. *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477; *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S. W. 1011.

New York. *Hackett v. Northern Pac. R. Co.*, 36 Misc. 583, 73 N. Y. Supp. 1087.

Pennsylvania. *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595.

55 Coggeshall v. Georgia Land & Investment Co., 14 Ga. App. 637, 82 S. E. 156; *Abrahams v. Medlicott*, 86 Kan. 106, 38 L. R. A. (N. S.) 137, 119 Pac. 375; *Hackett v. Northern Pac. R. Co.*, 36 N. Y. Misc. 583, 73 N. Y. Supp. 1087.

the stock.⁵⁶ Nor can creditors complain where such provisions appear in the articles of incorporation, since the recitals therein are notice to them of the reserved right to redeem,⁵⁷ and creditors whose claims accrue after the redemption will be held to have given credit upon the amount of the stock then outstanding.⁵⁸

The right, when it exists, can only be exercised in conformity with the terms of the contract,⁵⁹ and in the manner, if any, prescribed by the statute.⁶⁰ But where retirement is specifically authorized by the statute, statutory requirements as to the manner in which stock may be reduced do not apply.⁶¹ All arrears of dividends must be paid when the contract so provides.⁶² And it has been held that where the preferred dividends are required to be paid in cash, the corporation cannot deduct from or set off against the arrears a stock dividend declared and paid to the preferred and common stockholders alike during the period of default.⁶³

The retirement or redemption is not an organic or fundamental change in the composition or business of the corporation, when unanimously agreed upon by the stockholders and authorized by the statute, but is rather a part of the corporate business which devolves upon the board of directors.⁶⁴ Even if the assent of the stockholders is

⁵⁶ Preferred stockholders are bound by the provisions as to retirement in the contract under which the stock is issued and which are embodied in the stock certificates. *Weidenfeld v. Northern Pac. R. Co.*, 129 Fed. 305.

A provision in the statute under which the corporation was formed expressly giving it power to retire shares by purchase must be read into the certificate of incorporation under and by virtue of which the stockholders hold their stock. *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

A valid provision for redemption inserted in the articles of incorporation and the stock certificates pursuant to a requirement of the statute becomes a part of the contract between the corporation and its stockholders, and each preferred stockholder by his purchase and acceptance of his stock, assents to such provision and becomes

bound by it. *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133.

⁵⁷ *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133.

⁵⁸ *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133.

⁵⁹ *Sterling v. H. F. Watson Co.*, 241 Pa. 105, 88 Atl. 297.

⁶⁰ *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1, rev'g 64 N. J. Eq. 90, 53 Atl. 601; *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

⁶¹ *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133.

⁶² *Sterling v. H. F. Watson Co.*, 241 Pa. 105, 88 Atl. 297.

⁶³ *Sterling v. H. F. Watson Co.*, 241 Pa. 105, 88 Atl. 297.

⁶⁴ *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133; *Hackett v. Northern Pac. R. Co.*, 36 N. Y. Misc. 583, 73 N. Y. Supp. 1087.

necessary, it may be given at any time and in any manner which will show that they approve of the exercise of the option.⁶⁵

"The manner in which a duly authorized plan" for retiring the stock "is to be carried through is part of the business of the corporation, and in the absence of fraud or bad faith, is not the subject of judicial control to any greater extent than other business of the corporation. The court cannot substitute its judgment for that of the directors and majority stockholders and say that a less expensive plan could be successfully adopted."⁶⁶ Nor can the preferred stockholders question the manner in which the corporation proposes to raise the money with which to effect the retirement so long as they are assured of the par value of their stock.⁶⁷

§ 3645. — Right of stockholders to compel redemption. A right to require the corporation to redeem their stock is sometimes given to the preferred stockholders by the terms of their contract.⁶⁸ Provisions of this character are valid and enforceable as between the stockholders and the corporation.⁶⁹ It is generally held that they do not make the

⁶⁵ *Hackett v. Northern Pac. R. Co.*, 36 N. Y. Misc. 583, 73 N. Y. Supp. 1087.

⁶⁶ *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1, rev'g 64 N. J. Eq. 90, 53 Atl. 601; *Berger v. United States Steel Corporation*, 63 N. J. Eq. 509, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

⁶⁷ *Hackett v. Northern Pac. R. Co.*, 36 N. Y. Misc. 583, 73 N. Y. Supp. 1087.

⁶⁸ *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477; *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S. W. 1011; *Booth v. Union Fibre Co.*, —Minn. —, 162 N. W. 677; *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595. See also *Davis v. Second Universalist Meetinghouse*, 49 Mass. 321; *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

⁶⁹ *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477; *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S.

W. 1011; *Booth v. Union Fibre Co.*, —Minn. —, 162 N. W. 677. See also *Davis v. Second Universalist Meetinghouse*, 49 Mass. 321.

The corporation may be compelled to redeem the stock at the time and under the conditions named in the contract. *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595.

Such a provision in the articles of incorporation is valid and not contrary to public policy, where the statute provides that the corporation may divide its stock into classes, and may give to each class such priority of right in the redemption of shares as may be prescribed in the rules and regulations prescribed by the shareholders. *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477.

A provision in a certificate of incorporation of a grocery company, which succeeded to the business of a partnership, whereby creditors of the latter, who took preferred stock in payment of their claims, were to be permitted to trade out the amount of their stock to a specified amount each

stockholder a creditor, although there is authority to the effect that they may indicate that he is one.⁷⁰ As a rule, the stockholder's right to compel a redemption is subordinate to the rights of creditors.⁷¹ And statutes authorizing redemption sometimes specifically provide that the right shall exist only when no injustice shall thereby be done to the existing rights of other stockholders or creditors.⁷² But it has been held that a provision in a certificate of incorporation permitting holders of preferred stock to trade out the amount of the same in purchasing commodities from the corporation and requiring it, on request of the holder of such stock, to call it in at par to the amount to which the holder should be indebted to it at the time of any annual meet-

year in buying groceries, it being provided that the stock should be called in at its par value to the extent of the stockholder's indebtedness at the time of any annual meeting and that the stockholder should thereby be released and discharged from such indebtedness, was held to be valid in *Butler v. Beach*, 82 Conn. 417, 74 Atl. 748.

Where the statute provides only that preferred stock may be made subject to redemption at par at a fixed time to be expressed in the certificate thereof, and stock is issued which is redeemable at par on three months' notice on a vote of a majority of the common stock, mandamus will not lie to compel a redemption in accordance with such a vote, even though all persons interested acquiesced in the issuance of the stock in that form, and its issuance may have had the effect of a contract. *Smith v. Ferracute Mach. Co.*, 68 N. J. L. 237, 52 Atl. 231.

⁷⁰ See § 3631, *supra*.

⁷¹ *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477; *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S. W. 1011; *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595; *Culver v. Reno Real Estate Co.*, 91 Pa. St. 367.

It is not lawful for a corporation, as against its creditors, to secure the retirement of preferred stock by an appropriation of the assets of the com-

pany otherwise available to creditors. *Ellsworth v. Lyons*, 181 Fed. 55.

The rights of the preferred stockholders in this regard are subordinate to the rights of the corporate creditors, and no part of the capital or assets of the corporation can lawfully be used to redeem the stock until the corporate debts have been paid or provided for. *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477.

A provision for redemption which permits payment of the preferred stockholders in preference to creditors is contrary to public policy and void. *Spencer v. Smith*, 201 Fed. 647, rev'g 190 Fed. 105.

While the preferred stockholder is not a creditor in his relations to the creditors of the corporation, and cannot as against them enforce any right he may have against the corporation, he may be treated as a creditor as against the corporation where he has a demand against it which can only be enforced as a debt. *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477.

See also § 3634, *supra*.

⁷² Under such a statute a preferred stockholder cannot demand a redemption of his stock in preference to the claims of creditors, or where their rights would thereby be impaired. *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595.

ing for goods so purchased is valid as against subsequent creditors and a receiver appointed on the company becoming insolvent after the accrual of such an indebtedness on the part of a stockholder to the corporation, and that such indebtedness was discharged by a tender of stock to the amount thereof and its acceptance at an annual meeting of the corporation held after the appointment of the receiver, and that it could not be subsequently collected by the receiver.⁷³

Whether the corporation is only obligated to redeem when there are net earnings or surplus available for that purpose, or whether it is obliged to appropriate a portion of its capital or assets to redeem the stock when there is no such surplus depends upon the terms of the contract.⁷⁴ A contract binding the corporation to appropriate a portion of its capital for redemption purposes is valid and enforceable, provided its enforcement will not affect the collection of the claims of corporate creditors,⁷⁵ even though it will result in the winding up and dissolution of the corporation.⁷⁶ So such an agreement may be en-

⁷³ *Butler v. Beach*, 82 Conn. 417, 74 Atl. 748. In this case it was further held that if the dissolution of the corporation by a decree of court after the indebtedness had been contracted rendered it impossible to redeem the stock in the manner contemplated, the same object could be attained by directing the receiver to refrain from attempting to collect the debt which had been equitably discharged by a tender of the necessary amount of stock.

⁷⁴ In *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477, it was held that, where the articles of incorporation provided for the payment of cumulative preferred dividends out of profits, and gave the holders of preferred stock a preference in the distribution of assets on the dissolution of the corporation, and unequivocally required the corporation to redeem the preferred stock on demand without providing from what source the funds for redemption were to be obtained, it was not limited to the use of surplus or net profits in redeeming stock but could be compelled to appropriate a portion of its

capital to that purpose, where the rights of creditors would not be impaired thereby.

Where the contract under which preferred stock was issued by a real estate company provided that the company should at all times be bound to apply any funds remaining in its treasury or resulting from the sale of real estate to the redemption of any such stock upon demand of the holder, and the charter authorized it to provide for the redemption of such stock provided no injustice should thereby be done to the existing rights of other stockholders or creditors, it was held that no holder had a right to redemption out of any specific assets other than the proceeds of sales of real estate, nor out of moneys in the treasury when such payments would work injustice to creditors or stockholders, as where it would result in crippling or breaking down the business of the corporation. *Culver v. Reno Real Estate Co.*, 91 Pa. St. 367.

⁷⁵ *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477.

⁷⁶ *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477.

forced where it appears that after the redemption of the preferred stock and the payment of all the creditors there will be a surplus remaining for distribution among the stockholders.⁷⁷

In the absence of a statutory or contract provision to the contrary, the corporation is under no obligation to establish a sinking fund for the redemption of the preferred stock on the dissolution of the company, although the preferred stockholders are entitled to a preference in the distribution of the assets in the event of dissolution, and though the capital of the company is largely invested in property of a wasting nature, such as patents.⁷⁸

Upon a valid retirement of the stock, the stockholder thereby becomes a stranger to the company, without further voice or right of participation in its intracorporate acts and relations.⁷⁹ And hence he has no concern with what may be done with the stock of the company after that time,⁸⁰ and no right to subscribe to common stock issued after that time to take the place of the retired preferred stock unless his contract gives him that right.⁸¹

§ 3646. — Matters elsewhere considered. The redemption or retirement of preferred stock necessarily involves a reduction of the capital stock of the corporation,⁸² or a conversion of such stock into common stock,⁸³ and may also involve a conversion of such stock into bonds,⁸⁴ and reference should therefore be had to the sections dealing specifically with these subjects. The right of the corporation to purchase shares of its own stock for the purpose of retiring it is considered in the sections dealing with the right of a corporation to purchase shares of its own stock.⁸⁵

§ 3647. Interest bearing stock. A corporation has the same power to issue stock under an agreement to pay a certain rate of interest

⁷⁷ *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477.

⁷⁸ *Mellon v. Mississippi Wire Glass Co.*, 77 N. J. Eq. 498, 78 Atl. 710.

⁷⁹ *Weidenfeld v. Northern Pac. R. Co.*, 129 Fed. 305.

See also § 3472, *supra*.

⁸⁰ *Hackett v. Northern Pac. R. Co.*, 36 N. Y. Misc. 583, 73 N. Y. Supp. 1087.

⁸¹ *Weidenfeld v. Northern Pac. R. Co.*, 129 Fed. 305; *Hackett v. Northern Pac. R. Co.*, 36 N. Y. Misc. 583, 73 N. Y. Supp. 1087.

Even if he has such a right, injunction will not issue to prevent the carrying out of the plan of retirement on the ground that it has been denied them, where the corporation is solvent, since he has an adequate remedy by an action for damages. *Hackett v. Northern Pac. R. Co.*, 36 N. Y. Misc. 583, 73 N. Y. Supp. 1087.

⁸² See § 3470, *supra*.

⁸³ See § 3643, *supra*.

⁸⁴ See § 3648, *infra*.

⁸⁵ See § 1134 *et seq.*, *supra*.

thereon as it has to issue ordinary preferred stock.⁸⁶ Such stock, called "interest bearing stock," is in effect preferred stock entitling the holders to the payment of the stipulated interest before payment of dividends to common stockholders, and gives the holders the same rights as stockholders, and renders them subject to the same liabilities as stockholders, as ordinary preferred stock would.⁸⁷ The interest cannot be lawfully made payable or paid except out of net earnings or surplus profits available for the payment of dividends.⁸⁸ As we have seen, a corporation may agree to pay subscribers interest on sums paid in by them on their subscriptions before the time when they are bound to pay by the terms of their contract, or prior to the commencement of regular business, or until it commences to pay dividends, provided such an agreement is not prohibited by the charter or general law, and creditors and other stockholders are not prejudiced thereby.⁸⁹

XV. CONVERTIBLE STOCK

§ 3648. **Exchange of stock for bonds or property.** A right to convert stock into bonds may be given to the stockholder by the contract under which he acquires the stock.⁹⁰ If no time is specified within which such an option must be exercised, a reasonable time is implied, for it is a general principle that, "where an option to be exercised or a condition to be performed is not limited by the agreement, such option must be acted upon and the condition performed or abandoned within a reasonable time."⁹¹

⁸⁶ *Barnard v. Vermont & M. R. Co.*, 7 Allen (Mass.) 512; *McLaughlin v. Detroit & M. Ry. Co.*, 8 Mich. 100; *Miller v. Pittsburgh & C. R. Co.*, 40 Pa. St. 237; *Richardson v. Vermont & M. R. Co.*, 44 Vt. 613. See also *Ohio College of Dental Surgery v. Rosenthal*, 45 Ohio St. 183, 12 N. E. 665; *Ohio v. Cleveland & T. R. Co.*, 6 Ohio St. 489.

⁸⁷ *McLaughlin v. Detroit & M. Ry. Co.*, 8 Mich. 100.

⁸⁸ *Massachusetts. Barnard v. Vermont & M. R. Co.*, 7 Allen 512; *Cunningham v. Vermont & M. R. Co.*, 12 Gray 411.

Michigan. Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156.

Ohio. Painesville & H. R. Co. v. King, 17 Ohio St. 534.

Pennsylvania. Pittsburgh & C. R. Co. v. County of Allegheny, 63 Pa. St. 126.

Vermont. Richardson v. Vermont & M. R. Co., 44 Vt. 613.

England. In re National Funds Assur. Co., 10 Ch. Div. 118.

As to compelling a corporation to pay an interest dividend according to a vote to pay the same when it should be able, and the discretion of the directors in such a case, see *Barnard v. Vermont & M. R. Co.*, 7 Allen (Mass.) 512.

⁸⁹ See § 605, *supra*, and § 3680, *infra*.

⁹⁰ *Catlin v. Green*, 120 N. Y. 441, 24 N. E. 941.

⁹¹ *Catlin v. Green*, 120 N. Y. 441, 24 N. E. 941. In this case, it was held that the owners of stock convertible

Preferred stock secured by a mortgage, issued for the purpose of obtaining a loan, and providing for its redemption or conversion into common stock at the option of the holder, may, by agreement of the parties, be exchanged for bonds, and the holders of such bonds thereupon become entitled to claim as bona fide creditors of the corporation.⁹²

Stock issued by land companies is sometimes made convertible into land at the option of the holder, and when such is the case, and the corporation refuses to perform its contract, the stockholder may maintain a suit in equity for specific performance.⁹³

A corporation may provide for carrying out a duly authorized reduction of its stock by exchanging for it pro rata stock of another corporation which it owns.⁹⁴

Statutes in some states give corporations the right to retire stock by converting the same into bonds. So the New Jersey statutes permit the redemption and retirement of preferred stock out of bonds or the proceeds of bonds under certain circumstances,⁹⁵ and also per-

into bonds at their option were chargeable with laches in the exercise of the option, and had waived all right to exercise the same.

⁹² *Totten & Co. v. Tison*, 54 Ga. 139.

⁹³ *Franco-Texan Land Co. v. Bousset*, 70 Tex. 422, 7 S. W. 761; *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

⁹⁴ *Wellner v. Gerth* (N. J. L.), 79 Atl. 895.

⁹⁵ P. L. 1902, p. 217; 2 Comp. St. 1910, p. 1616, § 29a. *Allen v. Francisco Sugar Co.*, 193 Fed. 825; *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

This act is not special legislation, but applies alike to all corporations, and is general in its operation, requiring the existence of conditions which all corporations have equal opportunity under the law to conform to, and to which all may attain. *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

It is a restraining and not an enlarging act, and its provisions must be observed to render the retirement of

preferred stock out of bonds or the proceeds of bonds legal. *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14; *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1, rev'g 64 N. J. Eq. 90, 53 Atl. 601; *Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co.*, 197 Fed. 347. See also *Allen v. Francisco Sugar Co.*, 193 Fed. 825.

Prior to the enactment of the statute, a corporation had power under P. L. 1896, p. 285, § 27 (Comp. St. 1910, p. 1612, § 27), authorizing the retirement of stock by purchase of shares, to retire shares of preferred stock purchased with bonds, or with the proceeds of bonds, issued for that purpose. *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1, rev'g 64 N. J. Eq. 90, 53 Atl. 601; *Raymond v. United States Steel Corporation*, 63 N. J. Eq. 830, 53 Atl. 1125; *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14; *C. H. Vanner Co. v. United States*

mit the retirement of common stock by purchasing the same with bonds issued for that purpose.⁹⁶ The statute of that state relating to the redemption of preferred stock expressly requires the consent of two-thirds in interest of each class of stockholders present in person or by proxy at a meeting called for the purpose of considering the question of retirement; ⁹⁷ provides that the stock to be redeemed and retired must entitle the holders to receive dividends at a rate exceeding five per cent per annum and that the company must have continuously declared and paid dividends thereon at the prescribed rate for the period of at least one year next preceding the meeting at which the retirement is authorized; ⁹⁸ requires a certificate to be

Steel Corporation, 116 Fed. 1012. See also *Lazear v. American Steel Foundries*, 86 N. J. Eq. 252, 100 Atl. 1030, 98 Atl. 642; *Allen v. Francisco Sugar Co.*, 193 Fed. 825.

The Act of 1902 changes the mere form of accomplishing that which the Act of 1896 permits to be done, and affects no vested right of a corporation organized under the latter act, in view of the reserved power of the legislature to amend it. *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14. See also *Allen v. Francisco Sugar Co.*, 193 Fed. 825.

Nor, for the same reasons, does it impair the obligations of a preferred stockholder's contract. *C. H. Venner Co. v. United States Steel Corporation*, 116 Fed. 1012.

This statute applies to all conversions of preferred stock into bonds occurring after it took effect. *Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co.*, 197 Fed. 347; *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1, rev'g 64 N. J. Eq. 90, 53 Atl. 601; *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

⁹⁶ Under P. L. 1896, p. 285, § 27 (Comp. St. 1910, p. 1612, § 27), authorizing the retirement of stock by purchase of shares, a corporation had authority to purchase its own stock

either preferred or common, for the purpose of retiring the same, and to pay for the same by exchanging its bonds therefor. *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

The Act of 1902 (P. L. 1902, p. 217) provides an exclusive method for retiring preferred stock by purchasing the same with bonds or the proceeds of bonds. See preceding note.

But it applies exclusively to preferred stock, and does not repeal the provision of the Act of 1896 in so far as the redemption and retirement of common stock are concerned, and such stock may still be converted into bonds under it, the same as before. *Allen v. Francisco Sugar Co.*, 193 Fed. 825.

⁹⁷ *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

Even if this provision is invalid, it does not taint the entire act, but it may be rejected, and the remainder of the act will stand, subject to be availed of when the proposed retirement receives the vote of "two thirds in interest" of each class of stockholders" required by § 27 of the Act of 1896. *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

⁹⁸ P. L. 1902, p. 217; 2 Comp. St. 1910, p. 1616, § 29a. *United States*

filed with the secretary of state,⁹⁹ in which it must be certified that the Steel Corporation v. Hodge, 64 N. J. Eq. 607, 60 L. R. A. 742, 54 Atl. 1, rev'g 64 N. J. Eq. 90, 53 Atl. 601; Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co., 197 Fed. 347.

This provision requires the payment of a dividend at the prescribed rate for the full year next preceding the meeting to retire the preferred stock. If this is done, it is immaterial whether the dividend was paid quarterly, half-yearly or at the end of the year.

The word "continuously" as here used must not be given its strictest meaning, but merely means that dividends at the prescribed rate must be paid for a continuous period of one year. If a dividend at the rate of seven per cent. is paid for the first quarter, and a like dividend for the second, third and fourth quarters of the year next preceding the meeting, this is a compliance with the statute and is sufficient. But where the dividends are payable quarterly, a quarterly dividend cannot be passed without losing the benefit of the act. The failure to pay, under such circumstances would break the continuity and require the company thereafter to make four consecutive quarterly dividends of one and three-quarters per cent. each in the case of seven per cent. stock. United States Steel Corporation v. Hodge, 64 N. J. Eq. 607, 60 L. R. A. 742, 54 Atl. 1, rev'g 64 N. J. Eq. 90, 53 Atl. 601.

In Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co., 197 Fed. 347, it was held that even if it is not enough that dividends at the prescribed rate have been declared and paid unless they were in fact paid out of earnings or out of earnings and surplus, which was not decided, evidence that some of the cash actually paid to the stockholders was borrowed for that purpose was not alone suffi-

cient to justify a finding that such dividends were not earned, since, if a corporation has invested earnings for proper corporate purposes, it may borrow cash for the purpose of paying dividends. See also in this connection, United States Steel Corporation v. Hodge, 64 N. J. Eq. 607, 60 L. R. A. 742, 54 Atl. 1, rev'g 64 N. J. Eq. 90, 53 Atl. 601.

As to the right to borrow money with which to pay dividends, see § 3665, *infra*.

⁹⁹ Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co., 197 Fed. 347; Berger v. United States Steel Corporation, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

The corporation and its stockholders may be estopped to question the validity of bonds issued for stock on the ground that the certificate filed did not certify to all the facts required by the statute, as, for example, that it did not certify that the floating indebtedness of the corporation did not exceed ten per cent. of its capital stock. The exchange, under such circumstances, is not an agreement which is against public policy and good morals, since it is expressly authorized by the statute. Nor, for the same reason, is it an agreement which the corporation has no power to make at all, and even if it were, the courts will ordinarily refuse any relief to either party to such an agreement where it has been fully performed by both. It rather belongs to that class of so-called ultra vires contracts in which the corporation has the power to do what was done, provided it does it in a certain prescribed way. In such cases the corporation will be estopped to deny that it did not do it in the statutory way as against persons who have acted upon the assumption that it had done what the law required it to do. Alabama Consol.

floating or unfunded debt of the corporation at the time of the stockholder's meeting did not exceed ten per cent. of the par amount of the preferred stock then outstanding,¹ and that, in the judgment of the officers making the certificate, its assets at such time, after deducting the amount of its indebtedness, are at least equal to the amount of

Coal & Iron Co. v. Baltimore Trust Co., 197 Fed. 347. In this case the corporation was held to be estopped where it had repeatedly recognized and asserted the validity of the bonds, and their validity had never been questioned for more than seven years after they were issued.

The corporation had pledged a large number of valid third mortgage bonds as security for a loan, and, the loan not having been paid, the pledgee was about to sell them. The corporation sought to enjoin the sale on the ground that the pledgee held a large number of second mortgage bonds which had previously been issued in exchange for preferred stock, and which it claimed were invalid because the required certificate had not been filed, alleging that the pledgee had received interest thereon to which it was not entitled and for which it should account, that it had participated in the invalid conversion and was liable to respond in damages to the company for the injury thereby done it, and that if the pledged bonds were sold while the second bonds were outstanding they would not bring nearly as much as if the sale were postponed until after the second mortgage bonds had been judicially declared to be invalid. The company made no tender into court of the amount of the loan, nor did it offer any security to pay any sum that might be found due the pledgee upon the accounting for which it asked. It was held that since the corporation knew when the loan was made that the pledgee held a large amount of the second mortgage bonds, and had every means of knowing that it had not filed the required certificate, and

since he who seeks equity must do equity, the injunction would be denied.

¹ Berger v. United States Steel Corporation, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co., 197 Fed. 347. In this case the evidence was held to be insufficient to show that the floating indebtedness exceeded the prescribed amount at the time of the meeting. It was also held that the conversion could not be said to have been authorized at meetings held after all the exchanges of stock for bonds which ever took place were made.

In Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co., 197 Fed. 347, it was assumed that the stockholders could not authorize a conversion at a time when the financial condition of the corporation would permit it to be made without having any present intention to make it, but intending merely to secure to themselves the option of making it at some future time when the corporation's financial condition would not authorize it, and thus evade the requirement of the statute, and that if such an intent to evade the statute could be shown everything done in pursuance of such unlawful purpose might be void, and that any stockholder or creditor who thought that the conversion would harm him might prevent it. It was further held that there was no evidence of such an intent, however, and that it would not be presumed from the fact that the floating indebtedness exceeded the limit when the conversion actually took place where the company then had on hand sufficient cash to reduce it below the limit.

preferred stock issued and outstanding;² and also requires the consent of the holder of the stock sought to be redeemed.³

The statute does not require the conversion to take place within any particular time, and the corporation is entitled to a reasonable time after it is authorized in which to effect it.⁴ The fact that after the conversion is authorized the directors vote to postpone indefinitely the carrying out of the plan and return stock deposited under it does not necessarily abrogate it, or prevent its being carried out in the future.⁵ It is not necessary to provide for the conversion of all of the preferred stock, and no one except the corporation and its stockholders is concerned as to whether all of such stock is to be redeemed or only a part of it.⁶ No one but a stockholder who wishes to convert all of his stock into bonds can complain that a plan approved by the stockholders whereby every holder of preferred stock was given the absolute right to exchange all of it for bonds was subsequently changed by the directors so as to permit him to convert but half of his holdings and then only on condition that he purchased additional bonds; and even he may lose his right to do so by acquiescence and delay.⁷

"The manner in which a duly authorized plan" for effecting the conversion, "is to be carried through is part of the business of the corporation, and in the absence of fraud or bad faith, is not the subject of judicial control to any greater extent than other business of the corporation. The court cannot substitute its judgment for that of the directors and majority stockholders and say that a less expensive plan could be successfully adopted."⁸

² *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

This provision "is in the public interest, for the protection of creditors and those who might be induced to purchase the bonds retired to issue the preferred stock. It is obvious that if the assets, after deducting debts, did not equal the preferred shares, immediately upon the conversion the debts of the company would exceed its assets and shareholders would not only be creditors, but would be preferred to the creditors at large." *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g judgment 63 N. J. Eq. 506, 53 Atl. 14.

³ *Berger v. United States Steel Cor-*

poration, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

No stockholder can be compelled to surrender his stock for exchange. *Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co.*, 197 Fed. 347.

⁴ *Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co.*, 197 Fed. 347. In this case it was held that a delay of 18 months was not unreasonably and improperly long under the circumstances.

⁵ *Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co.*, 197 Fed. 347.

⁶ *Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co.*, 197 Fed. 347.

⁷ *Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co.*, 197 Fed. 347.

⁸ *United States Steel Corporation v.*

The mere fact that the conversion will operate to give a particular stockholder control of the corporation and that he proposed the plan in order to accomplish that result, is not ground for enjoining such conversion, where the proceeding is in strict conformity to law and all the steps were taken openly and were publicly proclaimed to all concerned.⁹

The conversion of bonds into stock has been considered in a previous section.¹⁰

XVI. DIVIDENDS

§ 3649. Definition and nature of dividends. The object of modern business corporations is to earn money for their stockholders or members. When such a corporation earns profits over and above the amount of its capital, the stockholders or members have the right, subject to qualifications which will be shown in the following sections, to have such profits set apart from the general mass of the funds of the corporation, and distributed among them in proportion to their shares or interest in the corporation, and the fund set apart for this purpose is called a "dividend."¹¹ The term is also used to designate

Hodge, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1, rev'g 64 N. J. Eq. 90, 53 Atl. 601; *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, rev'g 63 N. J. Eq. 506, 53 Atl. 14.

⁹ *Allen v. Francisco Sugar Co.*, 193 Fed. 825.

¹⁰ See § 1005 et seq., supra.

¹¹ *Morawetz on Corporations*, § 435; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449.

"The term 'dividend' in its technical as well as in its ordinary acceptance means that portion of its profits which the corporation, by its directory, sets apart for ratable division among its shareholders." *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. Ed. 793, quoted with approval in *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N. E. 329.

"A dividend is the appropriation of the earnings of a corporation from whatever source derived among its

share or stockholders." *Van Dyck v. McQuade*, 86 N. Y. 38.

The word "dividend" as used in a stock certificate means "such profits, or such proportion of the profits, as the directors, by proper resolution, have ordered distributed among the stockholders." *Knight v. Alamo Mfg. Co.*, 190 Mich. 223, 157 N. W. 24.

"By a 'dividend' is meant money paid out of its profits by a corporation to its stockholders." *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

A dividend is "a distribution of profits to stockholders, as income from their investment." *Kaufman v. Charlottesville Woolen Mills Co.*, 93 Va. 673, 25 S. E. 1003.

For further definitions see the following decisions:

United States. *In re Haas Co.*, 131 Fed. 232.

Alabama. See *Bigbee & Warrior River Packet Co. v. Moore*, 121 Ala. 379, 25 So. 602.

the shares of the individual stockholders or members in the fund so set apart,¹² and also to designate the assets distributed by a corporation among its stockholders out of capital on reduction of the capital stock or dissolution,¹³ and also in the sense of a payment to be charged upon the profits whenever they may be made.¹⁴

"A division of profits without the formality of declaring a dividend is the equivalent of declaring a dividend."¹⁵

It has been held that where the word dividend is used in a contract or other instrument without qualification, it signifies dividends payable in money.¹⁶ But there is authority to the contrary.¹⁷

To declare a dividend is to announce a readiness to pay a specified dividend.¹⁸

Illinois. *De Koven v. Alsop*, 205 Ill. 309, 63 L. R. A. 587, 68 N. E. 930, aff'g 107 Ill. App. 190.

Missouri. *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819.

New York. *People v. Glynn*, 113 App. Div. 332, 114 N. Y. Supp. 460, aff'd 198 N. Y. 605, 92 N. E. 1097; *Columbus Trust Co. v. Moshier*, 51 Misc. 270, 100 N. Y. Supp. 1066, aff'd 121 App. Div. 906, 106 N. Y. Supp. 1121, 193 N. Y. 660, 87 N. E. 1117.

North Carolina. *Lancaster Trust Co. v. Mason*, 151 N. C. 264, 65 S. E. 1015.

Oregon. *In re Wilson's Estate*, 167 Pac. 580.

Pennsylvania. *Rose v. Barclay*, 191 Pa. St. 594, 45 L. R. A. 392, 43 Atl. 385.

Virginia. *Kain v. Angle*, 111 Va. 415, 69 S. E. 355.

Corporate notes and a mortgage securing them, given for the individual debts of stockholders contracted in the purchase of their stock from others are in no sense a dividend, where they do not pretend to be a division of earnings. *In re Haas Co.*, 131 Fed. 232.

Where money is paid into the treasury of the corporation by its stockholders for the purpose of adding to its surplus, and for which no

stock is issued to them, a part of it which is subsequently returned to the contributors is not a dividend, since it is not paid from surplus profits. *People v. Knight*, 96 N. Y. App. Div. 120, 89 N. Y. Supp. 72.

¹² *Allegheny v. Pittsburgh, A. & M. Passenger R. Co.*, 179 Pa. St. 414, 36 Atl. 161.

¹³ *Larwill v. Burke*, 19 Ohio Cir. Ct. 513.

¹⁴ *Gardner Sav. Bank v. Taber-Prang Art Co.*, 189 Mass. 363, 75 N. E. 705.

¹⁵ See § 3673, *infra*.

¹⁶ *Spooner v. Phillips*, 62 Conn. 62, 16 L. R. A. 461, 24 Atl. 524; *Smith v. Hooper*, 95 Md. 16, 54 Atl. 95, 51 Atl. 844; *Lancaster Trust Co. v. Mason*, 152 N. C. 660, 136 Am. St. Rep. 851, 68 S. E. 235, modifying 151 N. C. 264, 65 S. E. 1015.

¹⁷ In *Rose v. Barclay*, 191 Pa. St. 594, 45 L. R. A. 392, 43 Atl. 385, a sale of stock "including all dividends due or to become due" was held to entitle the vendee to a stock dividend previously declared.

¹⁸ As to the meaning of the words "dividends declared" in a statute relative to the taxation of such dividends, see *Allegheny v. Pittsburgh, A. & M. Passenger R. Co.*, 179 Pa. St. 414, 36 Atl. 161.

To make a dividend is to actually set apart a sum to be divided as explained above.¹⁹

To pass a dividend is to omit to make a regular or expected dividend.²⁰

A stock dividend is a division of profits, actual or anticipated, payable in reserved or additional stock, instead of cash.²¹

"A preferred dividend is that which is paid to one class of shareholders in priority to that to be paid to another class."²²

A cumulative dividend is a dividend with regard to which it is agreed that, if at any time it is not paid in full, the difference shall be added to the payment following. Thus, if a cumulative dividend is six per cent. on the capital stock, and only five per cent. is paid, the amount due at the next payment will be seven per cent.²³

The expressions "dividend on" and "dividend off" are stock-exchange phrases, meaning that, on the day of closing the transfer books of any stock for a dividend, the transactions in such stock for cash include, or do not include, the dividend up to the time officially designated for closing the books.

§ 3650. Dividends distinguished from profits. The terms "profits" and "dividends" are not synonymous.²⁵ "Dividends are declared rightly only from profits after they are earned."²⁶ And the profits of a corporation in its hands do not become a "dividend" until they have been set apart, or at least declared, as a dividend.²⁷ Therefore a reservation of "all dividends" by a stockholder on selling his stock

¹⁹ See also § 3673, *infra*.

²⁰ 2 Clark & Marshall on Corporations 1578.

²¹ See § 3681 et seq., *infra*.

²² Coggeshall v. Georgia Land & Investment Co., 14 Ga. App. 637, 82 S. E. 156; Taft v. Hartford, P. & F. R. Co., 8 R. I. 310, 333, 5 Am. Rep. 575; Kain v. Angle, 111 Va. 415, 69 S. E. 355.

See § 3751 et seq., *infra*.

²³ See § 3754, *infra*.

²⁵ Indiana Veneer & Lumber Co. v. Hageman, 57 Ind. App. 668, 105 N. E. 253; Boothe v. Summit Coal Min. Co., 55 Wash. 167, 19 Ann. Cas. 1255, 104 Pac. 207.

²⁶ Indiana Veneer & Lumber Co. v. Hageman, 57 Ind. App. 668, 105 N. E. 253.

²⁷ Hyatt v. Allen, 56 N. Y. 553, 15 Am. Rep. 449.

The word "dividend" in a stock certificate "does not mean simply profits, but it does mean such profits, or such portion of the profits, as the directors, by proper resolution, have ordered distributed among the stockholders." Knight v. Alamo Mfg. Co., 190 Mich. 223, 157 N. W. 24.

A dividend "differs from profits in being taken by competent authority out of the joint property of the partnership or corporation and transferred to the separate property of the individual partners or stockholders." Allegheny v. Pittsburgh, A. & M. Passenger R. Co., 179 Pa. St. 414, 36 Atl. 161, quoted with approval in Knight

does not include profits which have been made by the corporation, where no dividend has been declared.²⁸

§ 3651. Power to declare dividends. Every business or trading corporation, whether it has a capital stock or not, has the inherent power to declare dividends when it has undivided profits.²⁹ Mutual insurance companies, for example, although they have no capital stock, have the right to declare dividends when they have accumulated a surplus.³⁰

Statutes in some states specifically prohibit the payment of dividends before the capital stock is fully paid in.³¹

The power to declare dividends is vested, in the absence of express provision to the contrary, not in the stockholders, but in the board of directors.³²

§ 3652. Stockholders' right to share in profits—Rights before dividend is declared. As was shown in a previous chapter, the property of a corporation belongs in law to the corporation, and not to the stockholders.³³ This is just as true of the profits earned by a corporation as it is of its other assets. The stockholders of a corporation may have the equitable right to insist that the profits from the corporate business shall be divided among them,³⁴ but they have no legal right to any share therein, nor is there any indebtedness to them on the part of the corporation, so as to entitle them to maintain an action against it, until a dividend has been made or declared; and it can make no difference that the amount of the profits and the condition of the corporation are such that the directors might or should declare a dividend, and would be compelled by equity to declare one.³⁵

v. Alamo Mfg. Co., 190 Mich. 223, 157 N. W. 24.

²⁸ Hyatt v. Allen, 56 N. Y. 553, 15 Am. Rep. 449.

²⁹ McKean v. Biddle, 181 Pa. St. 361, 37 Atl. 528.

"The shareholders may * * *, out of the assets of the corporation, declare and pay dividends." In re Haas Co., 131 Fed. 232.

The surplus of the gains or profits beyond what may be necessary to keep good the liability to capital stock which has been issued may, in the discretion of the directors, be distributed as dividends. Equitable Life Assur.

Society v. Union Pac. R. Co., 212 N. Y. 360, L. R. A. 1915 D 1052, 106 N. E. 92, aff'g 162 N. Y. App. Div. 81, 147 N. Y. Supp. 382.

³⁰ McKean v. Biddle, 181 Pa. St. 361, 37 Atl. 528.

³¹ Williams v. Brewster, 117 Wis. 370, 93 N. W. 479.

³² See § 3672, *infra*.

³³ See § 25, *supra*.

³⁴ See § 3656, *infra*.

³⁵ United States. Gibbons v. Mahon, 136 U. S. 549, 34 L. Ed. 525, aff'g 4 Mackey (D. C.) 130, 54 Am. Rep. 262; Southern Pac. Co. v. Lowe, 238 Fed. 847; American Steel Foundries

It is the declaration of the dividend which creates both the dividend

v. Lazear, 204 Fed. 204; Knapp v. S. Jarvis Adams Co., 135 Fed. 1008; Wheeler v. Northwestern Sleigh Co., 39 Fed. 347.

Alabama. Curry v. Woodward, 44 Ala. 305.

Connecticut. Spooner v. Phillips, 62 Conn. 62, 16 L. R. A. 461, 26 Atl. 396; Phelps v. Farmers' & Mechanics' Bank, 26 Conn. 269.

Georgia. Central of Georgia R. Co. v. Central Trust Co. of New York, 135 Ga. 472, 69 S. E. 708; Mann v. Anderson, 106 Ga. 818, 32 S. E. 870.

Illinois. Hamblock v. Clipper Lawn Mower Co., 148 Ill. App. 618; Robertson v. H. E. Bucklen & Co., 107 Ill. App. 369; Alsop v. De Koven, 107 Ill. App. 190, aff'd 205 Ill. 309, 63 L. R. A. 587, 68 N. E. 930; Waterman v. Alden, 42 Ill. App. 294, rev'd on other grounds 144 Ill. 90, 30 N. E. 972.

Indiana. Fricke v. Angemeier, 53 Ind. App. 140, 101 N. E. 329.

Iowa. Lauman v. Foster, 157 Iowa 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14.

Kentucky. Westerfield-Bonte Co. v. Burnett, 176 Ky. 188, 195 S. W. 477; Guthrie's Trustee v. Akers, 157 Ky. 649, 163 S. W. 1117; Bowman v. Breyfogle, 145 Ky. 443, Ann. Cas. 1914 B 938, 140 S. W. 694; American Wire Nail Co. v. Gedge, 96 Ky. 513, 29 S. W. 353.

Maine. Goodwin v. Hardy, 57 Me. 143, 99 Am. Dec. 758.

Maryland. State v. Baltimore & O. R. Co., 6 Gill 363.

Massachusetts. Trefry v. Putnam, 116 N. E. 904; Lee v. Fisk, 222 Mass. 418, 109 N. E. 833; Boston Safe Deposit & Trust Co. v. Adams, 219 Mass. 175, 106 N. E. 590; Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Williston v. Michigan Southern & N. I. R. Co., 13 Allen 400.

Michigan. Knight v. Alamo Mfg. Co., 190 Mich. 223, 157 N. W. 24;

Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156.

Missouri. Hill v. Atoka Coal & Milling Co., 21 S. W. 508; Kidd v. Puritana Cereal Food Co., 145 Mo. App. 502, 122 S. W. 784.

New Jersey. Jackson's Adm'r v. Newark Plankroad Co., 31 N. J. L. 277; Stevens v. United States Steel Corporation, 68 N. J. Eq. 373, 59 Atl. 905.

New York. Godley v. Crandall & Godley, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818, modifying on other grounds 153 App. Div. 697, 139 N. Y. Supp. 236; Robertson v. De Brulatour, 188 N. Y. 301, 80 N. E. 938, aff'g 111 App. Div. 882, 98 N. Y. Supp. 15; Lowry v. Farmers' Loan & Trust Co., 172 N. Y. 137, 64 N. E. 796, aff'g 56 App. Div. 408, 67 N. Y. Supp. 759; Beveridge v. New York El. R. Co., 112 N. Y. 1, 2 L. R. A. 648, 19 N. E. 489; Jermain v. Lake Shore & M. S. Ry. Co., 91 N. Y. 483; Boardman v. Lake Shore & M. S. Ry. Co., 84 N. Y. 157; Hyatt v. Allen, 56 N. Y. 553, 15 Am. Rep. 449; Knickerbocker v. Conger, 110 App. Div. 125, 97 N. Y. Supp. 127; Scott v. Eagle Fire Co., 7 Paige 198.

North Carolina. Burroughs v. North Carolina R. Co., 67 N. C. 376, 12 Am. Rep. 611.

Pennsylvania. In re Goetz's Estate, 236 Pa. 630, 85 Atl. 65; Corgan v. George F. Lee Coal Co., 218 Pa. 386, 120 Am. St. Rep. 891, 11 Ann. Cas. 838, 67 Atl. 655.

Tennessee. Tubb v. Fowler, 118 Tenn. 325, 99 S. W. 988.

Texas. Bryan v. Sturgis Nat. Bank, 40 Tex. Civ. App. 307, 90 S. W. 704.

Virginia. Gordon's Ex'rs v. Richmond, F. & P. R. Co., 78 Va. 501.

"A dividend is usually considered a parcel of the mass of corporate property until declared." In re Wilson's Estate, — Ore. —, 167 Pac. 580.

itself and the right of the stockholder to demand and receive it.³⁶

Prior to the declaration of a dividend the right of the stockholder to a share of the earnings is not property, and hence will not pass to his trustee in bankruptcy,³⁷ and cannot be attached.³⁸ But it has been held that his right to compel the declaration of a dividend may be enforced by his trustee in bankruptcy.³⁹

"Until a dividend is declared the entire assets of the corporation, including surplus or accumulated profits in whatever form they exist, belong to the corporation, and the corporation owes no debt in respect thereto to the stockholders as individuals." *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905.

"A right to a dividend from the profits of a corporation is no debt until the dividend is declared. Until that time the dividend is only something that may possibly come into existence, but the obligation on the part of the company to declare it cannot be treated as the dividend itself." *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156.

"To let a jury determine whether there are or are not profits, and, if there are any, to let it determine whether those profits may properly be distributed among the stockholders, would be equivalent to letting a jury declare the dividend. This, of course, is not the law; and if each stockholder might call in a jury at his pleasure to determine whether a dividend should be declared, corporations would be short lived affairs and of very little value." *Knight v. Alamo Mfg. Co.*, 190 Mich. 223, 157 N. W. 24.

"A sole stockholder is not entitled to demand the profits of the corporation until they have been set aside and ordered by the directors to be paid." *Central of Georgia R. Co. v. Central Trust Co. of New York*, 135 Ga. 472, 69 S. E. 708.

Where, by agreement, a party is to receive all dividends on stock so long as he remains in a certain employment, and he quits before any dividend is declared, he is not entitled to any dividends thereafter declared. *Clapp v. Astor*, 2 Edw. Ch. (N. Y.) 379.

Where the dividends on stock held for an employee are to be credited on the purchase price thereof under a contract which further provides that if he leaves the company to go into a competing business he is to receive only what has been so credited to him on such stock, and he does so leave, he is not entitled to be credited with any part of the undivided profits where no dividend has been declared. *Knapp v. S. Jarvis Adams Co.*, 135 Fed. 1008.

³⁶ *Boston Safe Deposit & Trust Co. v. Adams*, 219 Mass. 175, 106 N. E. 590.

³⁷ *Bryan v. Sturgis Nat. Bank*, 40 Tex. Civ. App. 307, 90 S. W. 704.

Though dividends on stock which is the separate property of a married woman are community property, and hence will pass to the husband's trustee where he is adjudicated a bankrupt after they are declared, dividends declared after the adjudication will not so pass. *Bryan v. Sturgis Nat. Bank*, 40 Tex. Civ. App. 307, 90 S. W. 704.

³⁸ *Bowman v. Breyfogle*, 145 Ky. 443, Ann. Cas. 1914 B 938, 140 S. W. 694.

³⁹ See § 3657, *infra*.

The rule that stockholders cannot sue for a dividend until it has been declared by the directors may be changed by express provision in the charter of the corporation.⁴⁰ But it cannot be changed by mere agreement between the stockholders.⁴¹

§ 3653. — Rights after a dividend is declared. After a dividend has been set apart or declared, the rule is different. As soon as a dividend is lawfully and fully declared out of surplus profits, the corporation becomes indebted from that moment to each stockholder for the amount of his share, and he may recover the same in an action against the corporation,⁴² and the corporation then acquires in re-

⁴⁰ In *State v. Louisiana Bank*, 5 Mart. N. S. (La.) 327, it was held that, where the charter of a corporation entitles the stockholders to a semiannual dividend as a matter of right, they may sue the corporation therefor at the end of each semiannual dividend period.

⁴¹ An action for a dividend cannot be maintained where no dividend has been declared, although the stockholders may have agreed that one should be declared. *American Wire Nail Co. v. Gedge*, 96 Ky. 513, 29 S. W. 353.

⁴² *United States. Staats v. Biograph Co.*, 236 Fed. 454, L. R. A. 1917 B 728; *Wheeler v. Northwestern Sleigh Co.*, 39 Fed. 347.

Alabama. *Gulf Coal & Coke Co. v. Musgrove*, 195 Ala. 219, 79 So. 179.

California. *Cates v. Consolidated Realty Co.*, 25 Cal. App. 531, 144 Pac. 301.

Connecticut. *Bishop v. Bishop*, 81 Conn. 509, 71 Atl. 583; *Cogswell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059, aff'd 204 U. S. 1, 51 L. Ed. 343; *Terry v. Eagle Lock Co.*, 47 Conn. 141; *Beers v. Bridgeport Spring Co.*, 42 Conn. 17.

Georgia. *Albany Fertilizer & Farm Improvement Co. v. Arnold*, 103 Ga. 145, 29 S. E. 695. See also *Mann v. Anderson*, 106 Ga. 818, 32 S. E. 870.

Illinois. *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707,

rev'g 120 Ill. App. 596; *Pease v. Chicago Crayon Co.*, 170 Ill. App. 234.

Iowa. *Redhead v. Iowa Nat. Bank*, 127 Iowa 572, 103 N. W. 796.

Maryland. *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032.

Massachusetts. *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833; *Ford v. Easthampton Rubber Thread Co.*, 158 Mass. 84, 20 L. R. A. 65, 35 Am. St. Rep. 462, 32 N. E. 1036.

Minnesota. *Northwestern Marble & Tile Co. v. Carlson*, 116 Minn. 438, 133 N. W. 1014.

Missouri. *Ball v. Peper Cotton Press Co.*, 141 Mo. App. 26, 121 S. W. 798; *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819.

New Hampshire. *Hunt v. O'Shea*, 69 N. H. 600, 45 Atl. 480.

New Jersey. *Jackson's Adm'r v. Newark Plankroad Co.*, 31 N. J. L. 277; *King v. Paterson & H. River R. Co.*, 29 N. J. L. 504, aff'g 29 N. J. L. 82; *Raynolds v. Diamond Mills Paper Co.*, 69 N. J. Eq. 299, 60 Atl. 941; *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905.

New York. *Searles v. Gebbie*, 115 App. Div. 778, 101 N. Y. Supp. 199, aff'd 190 N. Y. 533, 83 N. E. 1131; *Billingham v. E. P. Gleason Mfg. Co.*, 101 App. Div. 476, 91 N. Y. Supp. 1046, aff'd 185 N. Y. 571, 78 N. E. 1099;

spect to it a right of set-off for any debts due by the stockholder to the company.⁴³ "A dividend divides the property which belongs to the corporation into that which the corporation retains and that which the corporation agrees to pay to the stockholders, and which it is thereby bound to pay."⁴⁴ "The declaration of the dividend has the effect to segregate the earnings, to the amount of the dividend, from the corporation's assets, or general mass of property, which is represented by the capital stock, and to appropriate the same to the then stockholders. The corporation thereafter holds the dividend for the stockholders, who become entitled to recover the same of the corporation, as debtor, when the time for payment, fixed by the resolution of declaration or by the law, is reached."⁴⁵ "The doctrine is that by the mere declaration, the dividend becomes immediately

In re Le Blanc, 14 Hun 8, 75 N. Y. 598; Le Roy v. Globe Ins. Co., 2 Edw. Ch. 657.

North Carolina. University v. North Carolina R. Co., 76 N. C. 103, 22 Am. Rep. 671.

Oregon. Steel v. Island Milling Co., 47 Ore. 293, 83 Pac. 783.

Pennsylvania. West Chester & P. R. Co. v. Jackson, 77 Pa. St. 321.

Tennessee. Wallin v. Johnson City Lumber & Manufacturing Co., 136 Tenn. 124, L. R. A. 1917 B 323, 188 S. W. 577.

Texas. Yeaman v. Galveston City Co., 106 Tex. 389, 167 S. W. 710.

Virginia. Gordon's Ex'rs v. Richmond, F. & P. R. Co., 78 Va. 501.

Wisconsin. See Zinn v. German-town Farmers' Mut. Ins. Co., 132 Wis. 86, 111 N. W. 1107.

"The declaration of the dividend sets apart from the profits of the corporation a sum which is to be paid to the stockholders in proportion to their shares, and * * * creates a debt due from the corporation to each shareholder, resulting in the relation of debtor and creditor." Staats v. Biograph Co., 236 Fed. 454, L. R. A. 1917 B 728.

"The law at that time implies a promise on the part of the corporation to pay to the then stockholders their

proportionate amounts as dividends." Wallin v. Johnson City Lumber & Mfg. Co., 136 Tenn. 124, L. R. A. 1917 B 323, 188 S. W. 577.

This is true whether the dividend is declared voluntarily or by order of a court of equity. Raynolds v. Diamond Mills Paper Co., 69 N. J. Eq. 299, 60 Atl. 941.

A by-law declaring a certain per cent. dividend on preferred stock from net earnings at an annual date, the remaining net profits, if any, to be devoted to a dividend on common stock, is in effect an appropriation of the net earnings to dividends, and has the force and effect of a contract. Seattle Trust Co. v. Pitner, 18 Wash. 401, 51 Pac. 1048.

After a dividend has been declared out of the surplus, the fund is no longer taxable as the property of the corporation. Pollard v. First Nat. Bank, 47 Kan. 406, 28 Pac. 202.

As to the remedies of stockholders to recover declared dividends, see § 3687 et seq., infra.

⁴³ See § 3697 et seq., infra.

⁴⁴ Staats v. Biograph Co., 236 Fed. 454, L. R. A. 1917 B 728.

⁴⁵ Wallin v. Johnson City Lumber & Manufacturing Co., 136 Tenn. 124, L. R. A. 1917 B 323, 188 S. W. 577.

thereby separated and segregated from the stock and exists independently of it; that the right thereto becomes at once immediately fixed and absolute in the stockholder and from thenceforth the right of each individual stockholder is changed by the act of declaration from that of partner and part owner of the corporate property to a status absolutely adverse to every other stockholder and to the corporation itself, in so far as his pro rata proportion of the dividend is concerned."⁴⁶ "The setting aside or segregation may precede the time of payment, postponed for the convenience of the company, or the order for actual payment."⁴⁷

When the directors of a corporation have merely declared a dividend, the corporation becomes a mere debtor to each stockholder for the amount due him, and the stockholders are in the same position as other creditors. There is no trust relation, but simply the relation of debtor and creditor.⁴⁸ And this is true, notwithstanding the corporation may have an account with each stockholder on its books, and may credit him with the amount of the dividend due him.⁴⁹ But

⁴⁶ *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819.

⁴⁷ *Wallin v. Johnson City Lumber & Manufacturing Co.*, 136 Tenn. 124, L. R. A. 1917 B 323, 188 S. W. 577.

Though payable at a future date, the declaration severs the fund from the assets of the corporation. *Cogswell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059, aff'd 204 U. S. 1, 51 L. Ed. 343.

Where the board of directors adopted a resolution "that a dividend of 6 per cent. be declared on the common stock, payable * * * at such time as the finances of the firm will in the judgment of the board of directors warrant," and the stockholders were notified at their annual meeting that such a dividend had been declared, and the company had on hand sufficient undivided profits to pay such dividend, it was held that this amounted to the declaration of a dividend, and that no further action by the directors was necessary in order to segregate the share of each stockholder. *Northwestern Marble & Tile Co. v. Carlson*, 116 Minn. 438, 133 N. W. 1014.

⁴⁸ *Hunt v. O'Shea*, 69 N. H. 600, 45 Atl. 480; *In re Severn & W. & S. Bridge Ry. Co.*, 74 L. T. (N. S.) 219.

"Upon the principle that the declaration of the dividend operates as a severance thereof from the stock in the general mass of the corporate property, and raises from such declaration an implied promise on the part of the corporation to pay the stockholder the amount of the dividend, it has been adjudicated that when moneys for the payment of such dividend are not set apart for the payment thereof, but are permitted to remain still in the corpus of such corporate estate after the declaration, the stockholder stands as a general creditor of the concern in bankruptcy who can come in only ratably with such creditors, looking to the general estate for liquidation of his divided debt." *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819. See also *Lowne v. American Fire Ins. Co.*, 6 Paige (N. Y.) 482.

⁴⁹ *In re Severn & W. & S. Bridge Ry. Co.*, 74 L. T. (N. S.) 219.

when the directors have not only declared a dividend, but have set apart and appropriated a fund for the payment thereof, the fund so set apart and appropriated is thereby separated from the other assets of the corporation, and becomes a trust fund in the hands of the corporation, and the stockholders have a right to insist that it shall be applied in payment of the dividend, to the exclusion of any other claim against the corporation.⁵⁰

If the amount of a declared dividend is retained by the corporation, with the consent of the stockholder, to indemnify it against possible loss on the stockholder's warranty of title, the arrangement is in the nature of a pledge and creates a trust, and upon a breach of that trust by a conversion of the fund or by the trustee's unauthorized use of it, the corporation, as trustee, becomes liable in assumpsit to the stockholder, the measure of such damages being the amount of the money so used or converted with interest.⁵¹

A stockholder's right to dividends cannot be affected by a change in the by-laws made after he became a stockholder and after the dividends in question accrued, and this is true though the change is made for the ostensible purpose of correcting a mistake in the by-laws.⁵²

A stockholder cannot compel the payment of a declared dividend, where it would necessarily have to be paid out of capital and not out of surplus.⁵³ Nor will a court of equity order the merchantable manufactured product of a corporation on hand to be sold and the proceeds applied to the payment of dividends declared and unpaid, since to

⁵⁰ *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819; *In re Le Blanc*, 14 Hun (N. Y.) 8, aff'd 75 N. Y. 598; *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 657. See also *Staats v. Biograph Co.*, 236 Fed. 454, L. R. A. 1917 B 728; *Ford v. Easthampton Rubber Thread Co.*, 158 Mass. 84, 20 L. R. A. 65, 35 Am. St. Rep. 462, 32 N. E. 1036; *Hunt v. O'Shea*, 69 N. H. 600, 45 Atl. 480; *Van Dyck v. McQuade*, 86 N. Y. 38; *Peckham v. Van Wagenen*, 83 N. Y. 40, 38 Am. Rep. 392; *Lowne v. American Fire Ins. Co.*, 6 Paige (N. Y.) 482; *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656.

Under such circumstances the dec-

laration of the dividend cannot be recalled though the company becomes insolvent before it is paid. *Albany Fertilizer & Farm Improvement Co. v. Arnold*, 103 Ga. 145, 29 S. E. 695.

⁵¹ *Gulf Coal & Coke Co. v. Musgrove*, 195 Ala. 219, 70 So. 179.

⁵² *Gellermann v. Atlas Foundry & Machine Co.*, 45 Wash. 114, 87 Pac. 1059.

⁵³ *Lapsley v. Merchants' Bank of Jefferson City*, 105 Mo. App. 98, 78 S. W. 1095; *Berryman v. Bankers' Life Ins. Co.*, 117 N. Y. App. Div. 730, 102 N. Y. Supp. 695.

That dividends are payable out of profits only, see § 3658, *infra*.

do so would be an unnecessary invasion of the legitimate functions of the board of directors.⁵⁴

§ 3654. Revocation of declaration of dividend. Since the right of the stockholders of a corporation to a dividend becomes vested as soon as the dividend has been fully declared by the directors, and the corporation becomes their debtor for their respective shares, it necessarily follows that neither the same board of directors nor their successors can afterwards reconsider their action and revoke the declaration of a legally declared dividend without the stockholders' consent.⁵⁵ This is especially true where a fund has been set apart or deposited by the corporation out of which the dividend is to be paid.⁵⁶ And it has been held to be true even though no such fund has been set aside or deposited,⁵⁷ although there is a dictum to the effect that where there has been no such appropriation the declaration may be rescinded in a proper case and for cause.⁵⁸

⁵⁴ *Carson v. Allegany Window Glass Co.*, 189 Fed. 791.

⁵⁵ *United States. Staats v. Biograph Co.*, 236 Fed. 454, L. R. A. 1917 B 728.

Connecticut. See *Terry v. Eagle Lock Co.*, 47 Conn. 141.

Georgia. *Albany Fertilizer & Farm Improvement Co. v. Arnold*, 103 Ga. 145, 29 S. E. 695.

Missouri. *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819.

New Jersey. *King v. Paterson & H. River R. Co.*, 29 N. J. L. 82, aff'd 29 N. J. L. 504.

Pennsylvania. *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656.

"Such a dividend cannot be rescinded because a debtor does not have it within his power to 'rescind' his debt." *Staats v. Biograph Co.*, 236 Fed. 454, L. R. A. 1917 B 728.

Where declared dividends have been credited to the individual stockholders on the books of the company, the directors cannot, without their consent, direct that such dividends be taken from the accounts of the indi-

vidual stockholders and carried to a surplus fund account. *Beers v. Bridgeport Spring Co.*, 42 Conn. 17.

⁵⁶ *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656.

If the corporation has become a trustee by depositing a fund out of which the dividends are to be paid, the trust relation so established cannot be terminated at the pleasure of the board of directors by a vote rescinding its former action. *Staats v. Biograph Co.*, 236 Fed. 454, L. R. A. 1917 B 728.

⁵⁷ *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819.

Even under such circumstances it cannot be rescinded unless it is shown that the distribution would be injurious to the business of the company. *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656.

⁵⁸ *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656. In this case it is suggested, by way of example, that if the plant of the corporation should be destroyed by fire immediately after the passage of the resolution, and in the honest judgment of the directors the earnings intended

It has been held that a mere vote of the directors to pay a dividend may be revoked, either by them or by their successors, if it has not been made public or communicated to the stockholders and no fund has been set apart or appropriated for payment of the dividend, since, until there has been at least a communication of the vote, the action of the directors is not final.⁵⁹

There is authority to the effect that the rule precluding rescission does not apply to stock dividends, and that the declaration of such a dividend may be rescinded at any time before the actual issuance of the stock.⁶⁰ And this has been held to be true of a dividend payable in scrip redeemable in cash, stock or evidences of indebtedness at the option of the directors.⁶¹ On the other hand it has been held that the rule precluding rescission applies where the dividend is payable in shares of its own stock which the company has purchased out of its earnings, and it is not shown that its distribution would be injurious to the business of the company.⁶² The reason for the exception in the case of stock dividends is found in the difference in the nature of cash and stock dividends.⁶³ In the case of a cash dividend the amount to be distributed is severed from the general fund and becomes the property of the stockholders pro rata as soon as the dividend is voted,⁶⁴ while in the case of a stock dividend all the formalities necessary to a valid increase of the stock must be complied with before the stockholders are entitled to anything, and the mere declaration of the dividend does not, therefore, give them a vested right.⁶⁵ It is also probable that the declaration of an illegal

for distribution should be recalled and used for the restoration of the destroyed property, they would have a right to rescind it. See also *Ford v. Easthampton Rubber Thread Co.*, 158 Mass. 84, 20 L. R. A. 65, 35 Am. St. Rep. 462, 32 N. E. 1036.

⁵⁹*Ford v. Easthampton Rubber Thread Co.*, 158 Mass. 84, 20 L. R. A. 65, 35 Am. St. Rep. 462, 32 N. E. 1036. See criticism of this case in *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819. See also dictum in *Staats v. Biograph Co.*, 236 Fed. 454, L. R. A. 1917 B 728.

⁶⁰*Staats v. Biograph Co.*, 236 Fed. 454, L. R. A. 1917 B 728; *Terry v. Eagle Lock Co.*, 47 Conn. 141; *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656. See also *Mc-*

Laran v. Crescent Planing Mill Co., 117 Mo. App. 40, 93 S. W. 819, where this rule is referred to but the question is not decided.

And see discussion of this subject in, 15 Mich. L. Rev. 432.

⁶¹*Staats v. Biograph Co.*, 236 Fed. 454, L. R. A. 1917 B 728.

⁶²*Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656.

⁶³*Staats v. Biograph Co.*, 236 Fed. 454, L. R. A. 1917 B 728; *Terry v. Eagle Lock Co.*, 47 Conn. 141; *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656.

⁶⁴See § 3677, *infra*.

⁶⁵See § 3682, *infra*.

As to increases of stock generally, see § 3457 et seq.

dividend may be revoked, as in the case of a dividend declared when the corporation has no profits with which to pay it.⁶⁶ And a stockholder may be estopped to claim a dividend revoked for this alleged reason by accepting payment of one subsequently declared which is expressly stated in the resolution to be in lieu of the former one.⁶⁷

The right to object to a rescission may be waived,⁶⁸ and may be lost in equity by acquiescence and long delay in asserting it.⁶⁹

§ 3655. Effect of insolvency. Since the stockholders of a corporation have no legal right to share in its profits until a dividend has been declared, the right of creditors of an insolvent corporation to have its assets applied to the satisfaction of their claims, before any distribution among the stockholders, attaches, not only to the capital of the corporation, but also to undivided profits out of which a dividend might have been declared if the corporation had not become insolvent.⁷⁰ But when a dividend has been fully and lawfully declared, the stockholders are in precisely the same position as other creditors. If the corporation becomes insolvent before the dividend is paid or set apart, they are entitled to share pro rata with other creditors.⁷¹

When dividends have not only been declared out of surplus profits,

⁶⁶ *Albany Fertilizer & Farm Improvement Co. v. Arnold*, 103 Ga. 145, 29 S. E. 695. See dictum to this effect in *Staats v. Biograph Co.*, 236 Fed. 454, L. R. A. 1917 B 728.

⁶⁷ Where the board of directors revoked the declaration of a dividend on the ground that the corporation had no funds with which to pay it, and thereafter declared another dividend for exactly the same amount, reciting the illegality of the former one, and expressly making the payment and acceptance of the latter one to be in lieu of the former one, it was held that a shareholder who accepted payment of the latter dividend did so in accordance with the terms of the resolution declaring it, and was estopped from claiming payment of the first, even if it was valid. *Albany Fertilizer & Farm Improvement Co. v. Arnold*, 103 Ga. 145, 29 S. E. 695.

⁶⁸ *Terry v. Eagle Lock Co.*, 47 Conn. 141.

⁶⁹ In *Terry v. Eagle Lock Co.*, 47 Conn. 141, it was held that a suit by a stockholder to recover a stock dividend, brought a year after a vote rescinding the declaration of the dividend, was barred by the plaintiff's laches, where important transactions had intervened and stock had changed hands on the basis of the unincreased capital. See also *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656.

⁷⁰ *Scott v. Eagle Fire Co.*, 7 Paige (N. Y.) 198.

⁷¹ *Hunt v. O'Shea*, 69 N. H. 600, 45 Atl. 480. See also *Ball v. Peper Cotton Press Co.*, 141 Mo. App. 26, 121 S. W. 798; *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819. And see *Allen-West Commission Co. v. Gwaltney*, 90 Ark. 608, 119 S. W. 292, where a claim for the

but the fund for their payment has been set apart, and distinguished from the general mass of the company's funds, the fund so set apart becomes a trust fund for the payment of the dividends, and the right of the stockholders to receive the same as against creditors of the corporation is not affected by the subsequent insolvency of the corporation.⁷² This principle does not apply where the funds are not set apart and appropriated to the payment of a dividend which has been declared, but under such circumstances the stockholders are not entitled to any preference over the general creditors.⁷³ And it has been held that merely crediting each stockholder with the amount due him on the books of the corporation is not such a setting apart of the fund as to make the corporation a trustee instead of a mere debtor to the stockholders.⁷⁴

§ 3656. Compelling declaration and payment of dividends—In general. If the directors of a corporation abuse their discretion, and fraudulently or arbitrarily refuse to pay a dividend, when the condition of the corporation makes it their duty to do so, a court of equity

amount of a dividend, filed in insolvency proceedings, was disallowed on the ground that the preponderance of the evidence showed that no such dividend had been declared.

⁷² *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819; *In re Le Blanc*, 14 Hun (N. Y.) 8, aff'd 75 N. Y. 598; *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 657. See also *Ford v. Easthampton Rubber Thread Co.*, 158 Mass. 84, 20 L. R. A. 65, 35 Am. St. Rep. 462, 32 N. E. 1036; *Hunt v. O'Shea*, 69 N. H. 600, 45 Atl. 480; *Van Dyck v. McQuade*, 86 N. Y. 38; *Peckham v. Van Wageningen*, 83 N. Y. 40, 38 Am. Rep. 392; *Lowne v. American Fire Ins. Co.*, 6 Paige (N. Y.) 482.

In *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 657, the board of directors of an insurance company declared a dividend at a time when there were surplus profits out of which it was proper to pay a dividend, fixed the day for its payment, published the fact in the newspapers, carried the

amount on its books to the debit of profit and loss, and apportioned the same among the stockholders by filling up and signing checks upon the bank in which the funds were deposited for the purpose of delivery to each stockholder when called for. Afterwards there was a disastrous fire, and the company became insolvent and went into the hands of a receiver. It was held that the fund was so set apart by the company, and distinguished from the general mass of its funds, that it became a trust fund for the payment of the dividends, and that the stockholders were entitled thereto.

⁷³ *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819; *Hunt v. O'Shea*, 69 N. H. 600, 45 Atl. 480; *Lowne v. American Fire Ins. Co.*, 6 Paige (N. Y.) 482; *In re Severn & W. & S. Bridge Ry. Co.*, 74 L. T. (N. S.) 219.

⁷⁴ *In re Severn & W. & S. Bridge Ry. Co.*, 74 L. T. (N. S.) 219.

will compel them to do so at the suit of a stockholder.⁷⁵ And the same is true where the statute expressly requires the payment of dividends at certain fixed times provided there are surplus profits which may

⁷⁵ **United States.** In re Brantman, 244 Fed. 101; Knapp v. S. Jarvis Adams Co., 135 Fed. 1008; Storror v. Texas Consol. Compress & Manufacturing Ass'n, 92 Fed. 5, 87 Fed. 612.

Colorado. See Rollins v. Denver Club, 43 Colo. 345, 18 L. R. A. (N. S.) 733, 96 Pac. 188.

Connecticut. Beers v. Bridgeport Spring Co., 42 Conn. 17; Pratt v. Pratt, Read & Co., 33 Conn. 446.

Kentucky. See Westerfield-Bonte Co. v. Burnett, 176 Ky. 188, 195 S. W. 477.

Louisiana. Crichton v. Webb Press Co., 113 La. 167, 67 L. R. A. 76, 104 Am. St. Rep. 500, 36 So. 926.

Maine. Spear v. Rockland-Rockport Lime Co., 113 Me. 285, 93 Atl. 754; Hazeltine v. Belfast & M. L. R. Co., 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328; Belfast & M. L. R. Co. v. Belfast, 77 Me. 445, 1 Atl. 362.

Massachusetts. Lee v. Fisk, 222 Mass. 418, 109 N. E. 833. See also Barnard v. Vermont & M. R. Co., 7 Allen 512.

Michigan. Knight v. Alamo Mfg. Co., 190 Mich. 223, 157 N. W. 24.

Minnesota. Anderson v. W. J. Dyer & Bro., 94 Minn. 30, 101 N. W. 1061.

Missouri. Kidd v. Puritana Cereal Food Co., 145 Mo. App. 502, 122 S. W. 784.

New Jersey. Blanchard v. Prudential Ins. Co., 78 N. J. Eq. 471, 79 Atl. 533; Stevens v. United States Steel Corporation, 68 N. J. Eq. 373, 59 Atl. 905; Laurel Springs Land Co. v. Fongeray, 50 N. J. Eq. 756, 26 Atl. 886, rev'g 50 N. J. Eq. 185, 24 Atl. 499; Lawton v. Bedell (N. J. Ch.), 71 Atl. 490.

New York. In re Rogers, 161 N.

Y. 108, 55 N. E. 393, aff'g 22 App. Div. 428, 48 N. Y. Supp. 175; Kassel v. Empire Tinware Co., — App. Div. —, 164 N. Y. Supp. 1033; Hiscock v. Lacy, 9 Misc. 578, 30 N. Y. Supp. 860; Scott v. Eagle Fire Co., 7 Paige 198.

Oregon. Baillie v. Columbia Gold Min. Co., 166 Pac. 965.

South Dakota. Ritchie v. People's Tel. Co., 22 S. D. 598, 119 N. W. 990.

Wisconsin. Morey v. Fish Bros. Wagon Co., 108 Wis. 520, 84 N. W. 862.

England. Rex v. Bank of England, 2 B. & Ald. 620.

Canada. See Earle v. Burland, 27 Ont. App. 540.

"If directors wrongfully refuse to declare a dividend when one ought to be declared, the stockholder may have his remedy in equity." Knight v. Alamo Mfg. Co., 190 Mich. 223, 157 N. W. 24.

"The directors must act honestly and with discretion in the performance of their duties, and this principle applies to their action in the matter of dividends. In a clear case equity will sometimes compel a corporation to declare a dividend." Baillie v. Columbia Gold Min. Co., — Ore. —, 166 Pac. 965.

"When the right to a dividend is clear, and there are funds from which it can properly be made, a court of equity will interfere to compel the corporation to declare it. Directors are not allowed to use their powers illegally, wantonly, or oppressively." Spear v. Rockland-Rockport Lime Co., 113 Me. 285, 93 Atl. 754.

"Where dividends are withheld for an unlawful purpose—to deprive a particular stockholder of his rights—he may have the aid of equity for adequate protection." Anderson v. W.

lawfully be so applied.⁷⁶ But it is a well-settled principle that whether or not dividends shall be paid, and the amount of the dividend at any time, is primarily to be determined by the directors,

J. Dyer & Bro., 94 Minn. 30, 101 N. W. 1061.

"On complaint of the minority stockholders, and on proper showing, the court will order the board of directors of a corporation to declare a dividend." *Crichton v. Webb Press Co.*, 113 La. 167, 67 L. R. A. 76, 104 Am. St. Rep. 500, 36 So. 926.

The court will order the declaration of a dividend at the instance of the trustee in bankruptcy of a stockholder, where there are surplus profits out of which it may be declared, and the directors are acting in collusion with the bankrupt in withholding it so as to prevent his creditors from obtaining the money. In *re Brantman*, 244 Fed. 101.

⁷⁶ In New Jersey, a statute expressly makes it the duty of the directors of a corporation to declare regular dividends of its accumulated profits, if any exist after reserving, over and above its capital, such sum as working capital as may be fixed by the stockholders. And a stockholder may enforce this duty by a suit in equity. *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905; *Trimble v. American Sugar-Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912; *Griffing v. A. A. Griffing Iron Co.*, 61 N. J. Eq. 269, 48 Atl. 910; *Wilson v. American Ice Co.*, 206 Fed. 736.

"While the directors are vested with a discretionary power with regard to the time and manner of making distribution of these profits, they may not improperly withhold them." *Tooker v. National Sugar Refining Co. of New Jersey*, 80 N. J. Eq. 305, 84 Atl. 10.

The statutory rule as to the time, manner and extent of distribution ap-

plies except in so far as the same may be displaced by a rule laid down in the certificate of incorporation or in a by-law adopted by a majority of the stockholders. If it is so displaced, then the provisions of the certificate or the by-law will control. *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905; *Wilson v. American Ice Co.*, 206 Fed. 736.

Under the statute the majority of the stockholders, acting in good faith, may control the business of declaring dividends, and can limit the power of a single stockholder to sue for the annual distribution of accumulated profits to cases of bad faith or gross abuse of discretion. *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905.

A bill filed by a stockholder under this statute to compel declaration of a dividend is not demurrable, where it alleges that there are accumulated profits not reserved for working capital under the statute. *Griffing v. A. A. Griffing Iron Co.*, 61 N. J. Eq. 269, 48 Atl. 910.

In the case last cited the court said: "The argument in support of the claim that the bill is lacking in equity is that, if the duty devolved by that statute upon directors in the respect in question is merely permissive, the purpose of the relief is a decree to control discretionary action, but, if the duty is mandatory, complete relief would be afforded by mandamus out of a court of law. It is obvious that mandamus would not furnish complete relief, unless, perhaps, in cases where accumulated profits in excess of reserved working capital have been so ascertained and determined as to fix the amount applicable to dividends. In other cases, such as that in hand,

and there must be bad faith or a clear abuse of discretion on their part to justify a court of equity in interfering.⁷⁷

a discovery and accounting is necessary to complete relief. But, in any view of the statutory provisions in question, the right to relief in equity by compelling a division of profits among stockholders is, I think, perfectly settled." But it will be presumed that accumulated profits reserved by the directors are such as have been directed to be reserved as working capital by the stockholders, where nothing to the contrary appears, and hence a stockholder's bill which attempts to have the directors required to distribute certain accumulated profits should allege such profits are in excess of the amount reserved as working capital by direction of the stockholders. *Trimble v. American Sugar-Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912; *Wilson v. American Ice Co.*, 206 Fed. 736.

Where the stockholders unaniously adopted a by-law placing the power to declare or withhold dividends in the board of directors, and, pursuant thereto, the board, through a series of years, used the profits in expanding the business without paying dividends, it was held that there was a waiver by the stockholders of the right to invoke the aid of equity to compel the declaration of a dividend, in the absence of a showing that the policy so adopted by the board had become unreasonable. *Raynolds v. Diamond Mills Paper Co.*, 69 N. J. Eq. 299, 60 Atl. 941.

This provision does not apply to life insurance companies. *Blanchard v. Prudential Ins. Co.*, 78 N. J. Eq. 471, 79 Atl. 533.

⁷⁷**United States.** *Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525, aff'g 4 Mackey (D. C.) 130, 54 Am. Rep. 262; *New York, L. E. & W. R. Co. v. Nickals*, 119 U. S. 296, 30 L. Ed. 363;

In re Brantman, 244 Fed. 101; *Southern Pac. Co. v. Lowe*, 238 Fed. 847; *Staats v. Biograph Co.*, 236 Fed. 454, L. R. A. 1917 B 728; *Wilson v. American Ice Co.*, 206 Fed. 736; *Bernier v. Griseom-Spencer Co.*, 161 Fed. 438; *Schell v. Alston Mfg. Co.*, 149 Fed. 439; *Knapp v. S. Jarvis Adams Co.*, 135 Fed. 1008; *Storrow v. Texas Consol. Compress & Manufacturing Ass'n*, 92 Fed. 5, 87 Fed. 612.

Alabama. *Wolfe v. Underwood*, 96 Ala. 329, 11 So. 344; *Smith v. Prattville Mfg. Co.*, 29 Ala. 503.

California. *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786.

Colorado. *Rollins v. Denver Club*, 43 Colo. 345, 18 L. R. A. (N. S.) 733, 96 Pac. 188.

Connecticut. *Pratt v. Pratt, Read & Co.*, 33 Conn. 446; *Phelps v. Farmers' & Mechanics' Bank*, 26 Conn. 269.

Illinois. *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g 120 Ill. App. 596; *Gehrt v. Collins Plow Co.*, 156 Ill. App. 98.

Kentucky. *Smith v. Southern Foundry Co.*, 166 Ky. 208, 179 S. W. 205; *Guthrie's Trustee v. Akers*, 157 Ky. 649, 163 S. W. 1117.

Louisiana. *Marks v. American Brewing Co.*, 126 La. 666, 52 So. 983; *State v. Bank of Louisiana*, 6 La. 745.

Maine. *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754; *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362.

Maryland. *State v. Baltimore & O. R. Co.*, 6 Gill 363.

Massachusetts. *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833; *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126.

Michigan. *Hunter v. Roberts, Throp & Co.*, 83 Mich. 63, 47 N. W. 131.

The mere fact that a corporation has surplus profits out of which a dividend might lawfully be declared is not of itself sufficient ground for a court of equity to compel the directors to make a dividend, for

Minnesota. *Anderson v. W. J. Dyer & Bro.*, 94 Minn. 30, 101 N. W. 1061.

New Jersey. *Jackson's Adm'rs v. Newark Plank Road Co.*, 31 N. J. L. 277; *Blanchard v. Prudential Ins. Co.*, 80 N. J. Eq. 209, 33 Atl. 220, rev'g 78 N. J. Eq. 471, 79 Atl. 533; *Murray v. Beattie Mfg. Co.*, 79 N. J. Eq. 604, 82 Atl. 1038, rev'g 79 N. J. Eq. 322, 82 Atl. 1038; *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905; *Fougeray v. Cord*, 50 N. J. Eq. 185, 24 Atl. 499, rev'd in *Laurel Springs Land Co. v. Fougeray*, 50 N. J. Eq. 756, 26 Atl. 886.

New York. *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17, aff'g 8 App. Div. 160, 40 N. Y. Supp. 499; *Beveridge v. New York El. R. Co.*, 112 N. Y. 1, 2 L. R. A. 648, 19 N. E. 489; *Williams v. Western U. Tel. Co.*, 93 N. Y. 162; *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun 18, 16 N. Y. Supp. 448, aff'd 133 N. Y. 687, 31 N. E. 627; *Karnes v. Rochester & G. Val. R. Co.*, 4 Abb. Pr. (N. S.) 107; *Ely v. Sprague*, *Clarke* Ch. 351.

Oregon. *Baillie v. Columbia Gold Min. Co.*, 166 Pac. 965.

Pennsylvania. *In re Goetz's Estate*, 236 Pa. 630, 85 Atl. 65; *Corgan v. George F. Lee Coal Co.*, 218 Pa. 386, 120 Am. St. Rep. 891, 11 Ann. Cas. 838, 67 Atl. 655; *McLean v. Pittsburgh Plate Glass Co.*, 159 Pa. St. 112, 28 Atl. 211.

Texas. *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115; *Bryan v. Sturgis Nat. Bank*, — Tex. Civ. App. —, 90 S. W. 704.

Virginia. *Kaufman v. Charlottesville Woolen Mills Co.*, 93 Va. 673, 25 S. E. 1003.

Wisconsin. *Estate of Wells*, 156

Wis. 294, 144 N. W. 174; *Morey v. Fish Bros. Wagon Co.*, 108 Wis. 520, 84 N. W. 862.

"The question of whether dividends shall be declared is ordinarily one of internal management with which the courts will not interfere." *Baillie v. Columbia Gold Min. Co.*, — Ore. —, 166 Pac. 965.

"Subject, of course, to provisions in the charter, and also to the by-laws of the company, it is for the directors to say whether profits shall be distributed to the stockholders or retained for the purpose of the corporate business." *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905, quoted with approval in *Wilson v. American Ice Co.*, 206 Fed. 736.

Courts of equity are loath to interfere with the discretion of the directors and a strong case must be made for its interposition. *Rollins v. Denver Club*, 43 Colo. 345, 18 L. R. A. (N. S.) 733, 96 Pac. 188.

"It takes a very strong case to induce a court to order directors to declare a dividend." *Staats v. Biograph Co.*, 236 Fed. 454, L. R. A. 1917 B. 728.

The court will in effect declare a dividend, in a suit by minority stockholders, by requiring the unfaithful majority to pay to the minority its aliquot share of moneys improperly taken from the corporate treasury only where it can say that the powers of the directors will otherwise be abused to the injury of the complaining stockholders, and that the circumstances clearly call for the declaration of a dividend. *Baillie v. Columbia Gold Min. Co.*, — Ore. —, 166 Pac. 965.

they have a right to use surplus profits to extend the business of the corporation, or to make improvements, and even to provide a surplus fund, if it is to the interests of the corporation to do so, and a court of equity will not interfere with or control their discretion in determining what the interests of the corporation require in this respect, unless there is a clear abuse of discretion.⁷⁸ This is ordinarily true

78 United States. *Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525, aff'g 4 Mackey (D. C.) 130, 54 Am. Rep. 262; *New York, L. E. & W. R. R. v. Nickals*, 119 U. S. 296, 30 L. Ed. 363; *Southern Pac. Co. v. Lowe*, 238 Fed. 847; *Union Pac. R. Co. v. Frank*, 226 Fed. 906, 921; *Wilson v. American Ice Co.*, 206 Fed. 736; *Knapp v. S. Jarvis Adams Co.*, 135 Fed. 1008.

Illinois. *Gehrt v. Collins Plow Co.*, 156 Ill. App. 98; *Robertson v. H. E. Bucklen & Co.*, 107 Ill. App. 369.

Louisiana. *Marks v. American Brewing Co.*, 126 La. 666, 52 So. 983.

Maine. *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

Massachusetts. *Trefry v. Putnam*, 116 N. E. 904.

Michigan. *Hunter v. Roberts, Throp & Co.*, 83 Mich. 63, 47 N. W. 131.

New Jersey. *Blanchard v. Prudential Ins. Co.*, 80 N. J. Eq. 209, 83 Atl. 220, rev'g 78 N. J. Eq. 471, 79 Atl. 533.

New York. *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17, aff'g 8 App. Div. 160, 40 N. Y. Supp. 499; *Reynolds v. Bank of Mt. Vernon*, 6 App. Div. 62, 39 N. Y. Supp. 623, aff'd 158 N. Y. 740, 53 N. E. 1131; *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun 18, 16 N. Y. Supp. 448, aff'd 133 N. Y. 687, 31 N. E. 627.

Texas. *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

Virginia. *Kaufman v. Charlottesville Woolen Mills Co.*, 93 Va. 673, 25 S. E. 1003.

Wisconsin. *Morey v. Fish Bros.*

Wagon Co., 108 Wis. 520, 84 N. W. 862.

Canada. *Earle v. Burland*, 27 Ont. App. 540.

"Dividends do not necessarily follow net earnings." *Bernier v. Griscom-Spencer Co.*, 161 Fed. 438.

"The directors of such corporations, having opportunities not ordinarily possessed by others of knowing the resources and condition of the property under their control, are in a better position than stockholders to determine whether, in view of the duties which the corporation owes to the public, and of all its liabilities, it will be prudent, in any particular year, to declare a dividend upon stock. While their authority in respect of these matters may, of course, be controlled or modified by the company's charter, and while the power of the courts may be invoked for the protection of stockholders against bad faith upon the part of the directors, we should hesitate to assume that either the legislature or the parties intended to deprive the corporation, by its managers, of the power to protect the interests of all, including the public, by using earnings when necessary, or when, in good faith, believed to be necessary, for the preservation or improvement of the property intrusted to its control." *New York, L. E. & W. R. Co. v. Nickals*, 119 U. S. 296, 30 L. Ed. 363.

The corporate officers may use the profits for the development of the business so long as they do not abuse their discretionary power, or violate the charter, or the contracts made as to profits with particular classes of

even in the case of preferred stock on which a dividend is required to be paid each year out of the net profits of the company,⁷⁹ or where the statute requires the annual distribution by the corporation of the whole of its accumulated profits after setting off an amount required to be fixed by the stockholders as working capital.⁸⁰ And of course, under such a statute it is proper to reserve the amount so set off.⁸¹

stockholders. *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

It was said in a New Jersey case: "In cases where the power of the directors of a corporation are without limitation, and free from restraint, they are at liberty to exercise a very liberal discretion as to what disposition shall be made of the gains of the business of the corporation. Their power over them is absolute so long as they act in the exercise of an honest judgment. They may reserve of them whatever their judgment approves as necessary or judicious for repairs and improvements, and to meet contingencies, both present and prospective." *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114, 3 Atl. 162.

But they cannot act unreasonably and oppressively. Where an ordinary trading company sets apart from profits a reserve fund far exceeding the amount necessary for that purpose, and particularly when it has invested the same in unauthorized and hazardous investments, a court of equity, at the instance of minority stockholders, will order a distribution among stockholders of all except a reasonable reserve fund. *Earle v. Burland*, 27 Ont. App. 540.

A stockholder who participates without objection in dividends due to the retention of a large surplus by the corporation cannot thereafter complain of such retention or compel the distribution of such surplus. *Marks v. American Brewing Co.*, 126 La. 666, 52 So. 983.

⁷⁹ See § 3757, *infra*.

⁸⁰ Such a statute requires only that "such part of its accumulated surplus shall be so distributed as the directors in good faith, exercising a sound discretion, adjudge capable of being surrendered by the corporation to the stockholders without injury to its business." *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905.

⁸¹ In New Jersey, a statute expressly allows corporations to reserve, over and above their capital, such sum as a working capital as may be fixed by the stockholders. *Raynolds v. Diamond Mills Paper Co.*, 69 N. J. Eq. 299, 60 Atl. 941; *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905; *Trimble v. American Sugar-Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912; *Griffing v. A. A. Griffing Iron Co.*, 61 N. J. Eq. 269, 48 Atl. 910; *Wilson v. American Ice Co.*, 206 Fed. 736.

Primarily it is a function of the stockholders to fix the amount to be reserved, but they may confer this power upon the directors by a provision in the certificate of incorporation or the by-laws. *Bassett v. United States Cast Iron Pipe & Foundry Co.*, 74 N. J. Eq. 668, 70 Atl. 929, *aff'd* 75 N. J. Eq. 539, 73 Atl. 514.

The power given to the stockholders by the statute to fix the amount reserved is absolute, and it is discretionary, and so long as the capital reserved is retained for the benefit of the whole company, a court of equity will not interfere with their action.

It has been held that a contract or statute which requires the distribution of net profits or accumulated profits as dividends should be construed to include only net gains which have been actually realized, or which can be quickly realized without loss by a sale of the assets representing the profits, or, in other words, should include only profits which exist practically in cash, that is, in the form in which they must be paid out; and that securities taken by the corporation in the ordinary course of business are not to be considered where they are not yet due and could not be converted into cash except at a price much less than that which the corporation gave for them.⁸²

Even if the existence of preferred cumulative stock imposes upon the directors a duty in respect to the declaration of dividends on common stock which would not otherwise exist, their duty to care for the interests of the corporation is the paramount one, and they are not bound at all times or at stated times to pay out all profits which may be capable of application to dividends on the common stock, in payment of such dividends, in order to prevent the possibility of such profits being absorbed in the future by the preferred stockholders.⁸³

"It is the duty of the directors, in determining the amount of net earnings available for the payment of dividends, to take into account the needs of the company in its business and sums necessary in the operation of its business until the income from further operations is available, the amount of its debts, the necessity or advisability of paying its debts, or at least reducing them within the limits of the company's credit, the preservation of its capital stock as repre-

Lillard v. Oil, Paint & Drug Co., 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254.

When the by-laws authorize the directors to determine the amount to be reserved, their power to determine the amount of dividends is absolute so long as they act in the exercise of an honest judgment. Murray v. Beattie Mfg. Co., 79 N. J. Eq. 604, 82 Atl. 1038, rev'g 79 N. J. Eq. 322, 82 Atl. 1038; Wilson v. American Ice Co., 206 Fed. 736.

And under this statute the mere fact that a corporation has a large surplus is not sufficient, of itself, to give a single stockholder a right to come into court and compel a dividend of that surplus. Trimble v. American Sugar-

Refining Co., 61 N. J. Eq. 340, 48 Atl. 912.

It is not illegal for the directors to pursue a policy to secure stability in the dividend rate by making the earnings of prosperous years help out the deficiencies of other years. Murray v. Beattie Mfg. Co., 79 N. J. Eq. 604, 82 Atl. 1038, rev'g 79 N. J. Eq. 322, 82 Atl. 1038.

⁸² Park v. Grant Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 162, approved, in Stevens v. United States Steel Corporation, 68 N. J. Eq. 373, 59 Atl. 905.

⁸³ Stevens v. United States Steel Corporation, 68 N. J. Eq. 373, 59 Atl. 905.

sented in the assets of the company as a fund for the protection of its creditors, and the character of its surplus assets, whether cash, credits or merchandise.”⁸⁴ It has been said that whether money on hand is to be regarded as net earnings out of which dividends should be paid “depends usually on several considerations—is a relative question—not always susceptible of clear demonstration—and is a matter to a considerable extent of good judgment in conducting the company’s business and of good faith in upholding its contracts on the part of directors.”⁸⁵ And that “the apportionment of net earnings to the payment of cash dividends, stock dividends, increase of capital, reserve or contingent fund, or to provide for future obligations, is largely one of policy, intrusted to the discretion of the directors, which, when honestly and intelligently exercised, will not be lightly overruled.”⁸⁶ “When a corporation has a surplus,” it was said in a New York case, “whether a dividend shall be made, and if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors uncontrollable by the courts.”⁸⁷ “The principle to be applied is that which shall secure the observance of good faith on the part of the directors.”⁸⁸ “The trustees are chosen by the shareholders, to exercise their best judgment, depending upon their knowledge of the affairs and condition of the company, and when that has been done, the courts do not undertake to control their action, although they might differ in their views of the proper management to be adopted and followed.”⁸⁹

§ 3657. — Jurisdiction and procedure. “A proceeding to compel directors to declare and pay a dividend is of an equitable nature, and

⁸⁴ *Thomas v. Matthews*, 94 Ohio St. 32, L. R. A. 1917 A 1068, 113 N. E. 669.

⁸⁵ *Hazeltine v. Belfast & M. R. Co.*, 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328, quoted with approval in *Inscho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

⁸⁶ *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44, quoted with approval in *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786.

⁸⁷ *Williams v. Western U. Tel. Co.*, 93 N. Y. 162, quoted with approval in *Equitable Life Assur. Society v. Union Pac. R. Co.*, 212 N. Y. 360, L. R. A. 1915 D 1052, 106 N. E. 92, aff’g 162

N. Y. App. Div. 81, 147 N. Y. Supp. 382; *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun (N. Y.) 18, 16 N. Y. Supp. 448, aff’d 133 N. Y. 687, 31 N. E. 627.

“The officers of a corporation are invested with a discretionary power as to the time and manner of distributing its profits.” *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

⁸⁸ *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun (N. Y.) 18, 16 N. Y. Supp. 448, aff’d 133 N. Y. 687, 31 N. E. 627.

⁸⁹ *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun (N. Y.) 18, 16 N. Y. Supp. 448, aff’d 133 N. Y. 687, 31 N. E. 627.

a court of equity is the proper tribunal in which to institute the action." ⁹⁰ Mandamus will not lie for that purpose. ⁹¹ The corporation is a proper party to such a suit. ⁹²

If the suit is brought by a single stockholder for the benefit of himself and all other stockholders in his class, he must allege either that an application has been made to the directors to declare the dividend sought for, or some reason why such an application would be ineffectual if there were any funds to divide. ⁹³ A mere allegation that he has demanded payment of the amount claimed to be due him individually under his own contract is insufficient. ⁹⁴ But no demand

⁹⁰ *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g 120 Ill. App. 596. See also *In re Goetz's Estate*, 236 Pa. 630, 85 Atl. 65, 236 Pa. 638, 85 Atl. 67.

"For neglect or refusal by the officers of the corporation to perform a corporate function, as to the declaration of the dividend, or as to the distribution of funds asserted to be legally or equitably applicable to dividends, relief must be sought by an appropriate suit in equity, in which the chancellor may, while avoiding interference with the exercise of a due discretion by corporate officers, yet enforce the performance of a legal corporate duty." *American Steel Foundries v. Lazear*, 204 Fed. 204.

"The right of preferred and common stockholders to a declaration of dividend is one of purely equitable cognizance." *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833.

An agreement to declare and pay dividends monthly can only be enforced in a court of equity. *Corgan v. George F. Lee Coal Co.*, 218 Pa. 386, 120 Am. St. Rep. 891, 11 Ann. Cas. 838, 67 Atl. 655.

⁹¹ *Rex v. Bank of England*, 2 B. & Ald. 620.

⁹² The corporation is a proper party to such a suit, and should be made a defendant rather than a plaintiff. *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905. In this case the necessity for

joining directors was not determined on demurrer because their nonjoinder was not assigned as cause of demurrer.

In *Laurel Springs Land Co. v. Fougeray*, 50 N. J. Eq. 756, 26 Atl. 886, which was a suit by a stockholder, it is said: "Generally suits to compel the declaration of dividends must be in the name of the corporation, but where the corporation is a defendant and the majority of directors are parties charged with fraud in this very respect, the suit will proceed to a decree upon the complainant's rights." This statement was quoted with approval in *Lawton v. Bedell* (N. J. Ch.), 71 Atl. 490, and in *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. 280, which were also suits by stockholders.

⁹³ *Wilson v. American Ice Co.*, 206 Fed. 736; *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. 280; *Winstead v. Hearne Bros. & Co.*, — N. C. —, 92 S. E. 613; *Baillie v. Columbia Gold Min. Co.*, — Ore. —, 166 Pac. 965.

One or the other allegation is essential. *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

⁹⁴ *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

A mere allegation that the complainant has frequently demanded of the directors that such dividends be declared and that such demands have been refused, though meetings of

is necessary where it appears that it would not have been granted had it been made.⁹⁵

Since the trustee in bankruptcy of a stockholder succeeds to the latter's title to the stock, he may maintain a proceeding to compel the declaration of a dividend where the stockholder could have done so. The bankrupt cannot object to the matter being determined summarily in the bankruptcy court, and the corporation waives any objection to that mode of procedure by failing to raise it in the trial court.⁹⁶

It is sometimes provided by statute that the holders of a certain percentage of the stock of a corporation which has not paid any dividends for a specified number of years may apply for the dissolution of the corporation and the appointment of a receiver on that ground.⁹⁷ It has been held that the purpose of such a provision is to prevent the freezing out of minority stockholders by the suspension of dividends, and that it does not operate to take away from the stockholders the right, by unanimous consent, to manage the business in any legitimate manner most conducive to its consent; and that a stockholder who has never demanded that a dividend be declared or endeavored to have one declared, but who, on the contrary, in his capacity as a director, has consented to the use of the surplus earnings in the enlargement of the business, cannot take advantage of the act.⁹⁸

§ 3658. Dividends payable out of profits only—General rule. It is a well-settled principle that, as between the stockholders of a corporation and its creditors, the assets of the corporation are, in a sense, a trust fund for the payment of its debts, and they cannot lawfully be distributed among the stockholders, even in part, to the prejudice of creditors. Furthermore, the amount of the capital stock of corporations is very generally fixed by their charters or by a general law, and both the state and each stockholder of the corporation, as well as its creditors, have the right to insist that it shall not be reduced or

stockholders and directors have been held since such demands, is not sufficiently specific. *Wilson v. American Ice Co.*, 206 Fed. 736.

⁹⁵ As where a majority of the directors are witnesses at the trial and testify that they would not have declared a dividend if a request had been made. *Hunter v. Roberts, Throp*

& Co., 83 Mich. 63, 47 N. W. 131.

⁹⁶ *In re Brantman*, 244 Fed. 101.

⁹⁷ Pub. Laws 1913, c. 147, as amended by Pub. Laws 1915, c. 137. *Winstead v. Hearne Bros. & Co.*, — N. C. —, 92 S. E. 613.

⁹⁸ *Winstead v. Hearne Bros. & Co.*, — N. C. —, 92 S. E. 613.

impaired by any distribution among the stockholders. It is a settled rule, therefore, even in the absence of any statutory provision, that a corporation cannot lawfully declare dividends out of its capital stock, and thereby reduce the same, or out of assets which are needed to pay the corporate debts. They can be declared only out of surplus profits.⁹⁹ And this is equally true of dividends on ordinary preferred

99 United States. *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 496, 38 L. Ed. 793, 797; *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769; *In re Brantman*, 244 Fed. 101; *Spencer v. Lowe*, 198 Fed. 961; *In re Haas Co.*, 131 Fed. 232; *Leary v. Columbia River & P. S. Nav. Co.*, 82 Fed. 775; *Main v. Mills*, 6 Biss. 98, Fed. Cas. No. 8,974; *Wood v. Dummer*, 3 Mason 308, Fed. Cas. No. 17,944.

Arkansas. *Corn v. Skillern*, 75 Ark. 148, 87 S. W. 142.

California. *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365.

Connecticut. *Union & N. H. Trust Co. v. Taintor*, 85 Conn. 452, 83 Atl. 697; *Bishop v. Bishop*, 81 Conn. 509, 71 Atl. 583; *Smith v. Dana*, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51, 60 Atl. 117.

Delaware. *Kingston v. Home Life Ins. Co.*, — Del. Ch. —, 101 Atl. 898; *Bryan v. Aiken*, — Del. Ch. —, 82 Atl. 817.

Georgia. *Crawford v. Roney*, 130 Ga. 515, 61 S. E. 117; *Reid v. Eaton-ton Mfg. Co.*, 40 Ga. 98, 2 Am. Rep. 563.

Illinois. *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g on other grounds 120 Ill. App. 596; *Pease v. Chicago Crayon Co.*, 170 Ill. App. 234; *Hamblock v. Clipper Lawn Mower Co.*, 148 Ill. App. 618.

Indiana. *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N. E. 329; *Bingham v. Marion Trust Co.*, 27 Ind. App. 247, 61 N. E. 29.

Iowa. *Hubbard v. Weare*, 79 Iowa 678, 44 N. W. 915.

Kansas. *Inscho v. Mid-Continent*

Development Co., 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014; *Salina Mercantile Co. v. Stiefel*, 82 Kan. 7, 107 Pac. 774; *Hogsett v. Aetna Building & Loan Ass'n*, 78 Kan. 71, 96 Pac. 52.

Kentucky. *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477; *Smith v. Southern Foundry Co.*, 166 Ky. 208, 179 S. W. 205; *Franklin v. Caldwell*, 123 Ky. 528, 29 Ky. L. Rep. 935, 96 S. W. 605; *Taylor v. Com.*, 119 Ky. 731, 75 S. W. 244; *Sumrall v. Commercial Bldg. Trust's Assignee*, 106 Ky. 260, 44 L. R. A. 659, 90 Am. St. Rep. 223, 50 S. W. 69; *Grant v. Southern Contract Co.*, 104 Ky. 781, 47 S. W. 1091; *American Wire Nail Co. v. Gedge*, 96 Ky. 513, 29 S. W. 353; *Citizens' Nat. Bank v. Dronillard*, 6 Ky. L. Rep. 588 (abstract).

Louisiana. *Van Vleet v. Evangeline Oil Co.*, 129 La. 406, 56 So. 343.

Massachusetts. *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126.

Michigan. *Knight v. Alamo Mfg. Co.*, 190 Mich. 223, 157 N. W. 24; *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882; *American Steel & Wire Co. v. Eddy*, 130 Mich. 266, 89 N. W. 952; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156.

Minnesota. *Booth v. Union Fibre Co.*, 162 N. W. 677.

Mississippi. *Adams v. Delta & Pine Land Co.*, 89 Miss. 817, 42 So. 170.

Missouri. *Coleman v. Booth*, 268 Mo. 64, 186 S. W. 1021; *Shields v. Hobart*, 172 Mo. 491, 95 Am. St. Rep.

stock.¹ In many jurisdictions this rule has, in somewhat varying language, been expressly declared by statute.²

529, 72 S. W. 669; *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784; *Lapsley v. Merchants' Bank of Jefferson City*, 105 Mo. App. 98, 78 S. W. 1095; *Slayden v. H. J. Seip Coal Co.*, 25 Mo. App. 439.

New Hampshire. *Walker v. Walker*, 68 N. H. 407, 39 Atl. 432.

New Jersey. *Williams v. Boice*, 38 N. J. Eq. 364.

New York. *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13, rev'g 102 App. Div. 118, 92 N. Y. Supp. 387; *Hughes v. Vermont Copper Min. Co.*, 72 N. Y. 207; *Cottrell v. Albany Card & Paper Mfg. Co.*, 142 App. Div. 148, 126 N. Y. Supp. 1070; *Berryman v. Bankers' Life Ins. Co.*, 117 App. Div. 730, 102 N. Y. Supp. 695; *People v. Knight*, 96 App. Div. 120, 89 N. Y. Supp. 72; *Columbus Trust Co. v. Moshier*, 51 Misc. 270, 100 N. Y. Supp. 1066, aff'd 121 App. Div. 906, 106 N. Y. Supp. 1121, aff'd 193 N. Y. 660, 87 N. E. 1117.

Ohio. *Thomas v. Matthews*, 94 Ohio St. 32, L. R. A. 1917 A 1068, 113 N. E. 669; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

Pennsylvania. *Loan Society of Philadelphia v. Eavenson*, 248 Pa. 407, 94 Atl. 121; *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595; *Cornell v. Seddinger*, 237 Pa. 389, 85 Atl. 446.

Rhode Island. *Taft v. Hartford, P. & F. R. Co.*, 8 R. I. 310, 5 Am. Rep. 575.

South Carolina. See *O'Shields v. Union Iron Foundry*, 93 S. C. 393, 76 S. E. 1098.

Vermont. *Chaffee v. Rutland R. Co.*, 55 Vt. 110.

Virginia. *Drewry, Hughes Co. v. Throckmorton*, 92 S. E. 818.

England. *Birch v. Cropper*, 14 App.

Cas. 525; *In re National Funds Assur. Co.*, 10 Ch. Div. 118.

"Under the name of dividends there can be no lawful division of assets and capital that would impair the rights of creditors." *In re Haas Co.*, 131 Fed. 232.

The mere fact that the assets still remain equal to the liabilities will not justify a dividend paid out of capital. *Cottrell v. Albany Card & Paper Mfg. Co.*, 142 N. Y. App. Div. 148, 126 N. Y. Supp. 1070.

In an action to recover dividends, the resolutions directing the payment of the dividends out of profits with proof that such dividends were paid to all the other stockholders, makes a prima facie case for plaintiff that there were profits out of which such dividends could be paid. *Pease v. Chicago Crayon Co.*, 170 Ill. App. 234.

Judgment had been rendered that dividends had been regularly declared by a corporation. For such dividend the corporation had given a note, and upon suit on such note the corporation entered the defense that the dividends had not been earned in fact, but through fictitious inventories the appearance of such earnings had been accomplished. The court held, however, that the corporation could not be permitted to maintain such defense until the judgment referred to had been either modified or reversed. *Camden Nat. Bank v. Fries-Breslin Co.*, 214 Pa. 395, 63 Atl. 1022.

¹ See § 3752, *infra*.

² **California.** *Tapscott v. Mexican Colorado River Land Co.*, 153 Cal. 664, 96 Pac. 271; *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030; *Schaake v. Eagle Automatic Can Co.*, 135 Cal. 472, 67 Pac. 759, 63 Pac. 1025; *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44;

While it is a function of the board of directors to determine whether net earnings or surplus exist applicable to the payment of dividends,³ they cannot by an erroneous determination of this point confer either upon themselves or upon the corporation the power to make dividends out of capital where the statute expressly prohibits the corporation from so making them.⁴ Nor, under such circumstances, will the approval of a majority of the stockholders validate the declaration of dividends out of capital.⁵ But a stockholder may

People v. San Francisco Sav. Union, 72 Cal. 199, 13 Pac. 498.

Delaware. *Butler v. New Keystone Copper Co.*, — Del. Ch. —, 93 Atl. 380.

Georgia. *Crawford v. Roney*, 130 Ga. 515, 61 S. E. 117; *Albany Fertilizer & Farm Improvement Co. v. Arnold*, 103 Ga. 145, 29 S. E. 695; *Mangham v. State*, 11 Ga. App. 440, 75 S. E. 508; *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849.

Idaho. *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340.

Kentucky. *Cox v. Gaulbert's Trustee*, 148 Ky. 407, 147 S. W. 25.

Louisiana. *Van Vleet v. Evangeline Oil Co.*, 129 La. 406, 56 So. 343.

New Jersey. *Hyams v. Old Dominion Copper Mining & Smelting Co.*, 82 N. J. Eq. 507, 89 Atl. 37, aff'd 83 N. J. Eq. 705, 92 Atl. 588; *Strickland v. National Salt Co.*, 79 N. J. Eq. 182, 81 Atl. 828, aff'g 77 N. J. Eq. 328, 76 Atl. 1048; *Goodnow v. American Writing Paper Co.*, 73 N. J. Eq. 692, 69 Atl. 1014, aff'g 72 N. J. Eq. 645, 66 Atl. 607; *Siegman v. Electric Vehicle Co.*, 72 N. J. Eq. 403, 65 Atl. 910, aff'g 71 N. J. Eq. 123, 62 Atl. 941; *Schoenfeld v. American Can Co.* (N. J. Eq.), 55 Atl. 1044; *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 54 Atl. 454, rev'g 63 N. J. Eq. 422, 51 Atl. 1003; *Siegman v. Electric Vehicle Co.*, 140 Fed. 117, construing the New Jersey statute; *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424, 83 N. Y. Supp. 509; *Hutchinson v. Curtiss*, 45 N. Y. Misc. 484, 92 N. Y. Supp. 70, construing the New Jersey statute.

New York. *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422; *Borke v. Thomas*, 56 N. Y. 559; *Cottrell v. Albany Card & Paper Mfg. Co.*, 142 App. Div. 148, 126 N. Y. Supp. 1070; *Wesp v. Muckle*, 136 App. Div. 241, 120 N. Y. Supp. 976, aff'd 201 N. Y. 527, 94 N. E. 1100 (mem. dec.); *Berryman v. Bankers' Life Ins. Co.*, 117 App. Div. 730, 102 N. Y. Supp. 695; *People v. Knight*, 96 App. Div. 120, 89 N. Y. Supp. 72; *Hutchinson v. Stadler*, 85 App. Div. 424, 83 N. Y. Supp. 509; *Hutchinson v. Curtiss*, 45 Misc. 484, 92 N. Y. Supp. 70.

Washington. *Brenaman v. Whitehouse*, 85 Wash. 355, 148 Pac. 24; *Northern Bank & Trust Co. v. Day*, 83 Wash. 296, 145 Pac. 182; *Jorguson v. Apex Gold Mines Co.*, 74 Wash. 243, 46 L. R. A. (N. S.) 637, 133 Pac. 465.

There is such a statute in Ohio. *McVity v. E. D. Albro Co.*, 90 N. Y. App. Div. 109, 86 N. Y. Supp. 144, aff'd 180 N. Y. 554, 73 N. E. 1126.

The National Banking Act forbids the withdrawal of capital in the form of dividends or the declaration of dividends where there are no net profits with which to pay them. *United States v. Britton*, 108 U. S. 199, 27 L. Ed. 698; *Witters v. Sowles*, 31 Fed. 1; *Cogswell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059, aff'd 204 U. S. 1, 51 L. Ed. 343.

³ See § 3656, *supra*, § 3660, *infra*.

⁴ *Siegman v. Electric Vehicle Co.*, 72 N. J. Eq. 403, 65 Atl. 910, aff'g 71 N. J. Eq. 123, 62 Atl. 941.

⁵ *Siegman v. Electric Vehicle Co.*,

by his conduct, estop himself from objecting that a dividend was so made.⁶

Some statutes by their terms merely prohibit directors from making dividends except from surplus profits, and do not make their acts in so doing void, nor prohibit the corporation from paying dividends out of capital.⁷ And it has been held that, where the statute does not in terms prohibit the declaration of dividends out of capital, but merely makes the directors liable for the corporate debts if they are so paid, they have the power, if they choose to bear that responsibility, to declare and pay dividends although no surplus exists beyond the capital, at least until some judicial restraint interferes to prevent.⁸

A dividend paid when the corporation is insolvent is necessarily paid out of its capital stock, and to the injury of its existing and subsequent creditors.⁹

Profits which have been made and allowed to accumulate may be paid out as dividends in subsequent years in which no profits are made.¹⁰

As a rule it will be presumed that dividends paid out of surplus by a solvent, going concern were paid out of profits.¹¹ But where the

72 N. J. Eq. 403, 65 Atl. 910, aff'g 71 N. J. Eq. 123, 62 Atl. 941.

⁶ In *Hyams v. Old Dominion Copper Mining & Smelting Co.*, 82 N. J. Eq. 507, 89 Atl. 37, aff'd 83 N. J. Eq. 705, 92 Atl. 588, a stockholder was held not to be estopped to object to the declaration of a dividend as being declared out of capital.

⁷ In *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030, this is said to be true of the California statute.

⁸ *People v. Barker*, 141 N. Y. 251, 36 N. E. 196. See also *Collins v. Penn-Wyoming Copper Co.*, 203 Fed. 726.

⁹ *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N. E. 329.

¹⁰ *Beers v. Bridgeport Spring Co.*, 42 Conn. 17; *Williams v. Western U. Tel. Co.*, 93 N. Y. 162; *Mills v. Northern Ry. of Buenos Ayres Co.*, 5 Ch. App. 621; *Hoole v. Great Western Ry. Co.*, 3 Ch. App. 262.

¹¹ *Connecticut. Boardman v. Boardman*, 78 Conn. 451, 12 L. R. A. (N. S.) 779, 62 Atl. 339; *Smith v. Dana*, 77

Conn. 543, 555, 69 L. R. A. 76, 107 Am. St. Rep. 51, 60 Atl. 117.

Delaware. *Bryan v. Aiken*, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

Iowa. *Lauman v. Foster*, 157 Iowa 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14; *Kalbach v. Clark*, 133 Iowa 215, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647, 110 N. W. 599; *Redhead v. Iowa Nat. Bank*, 127 Iowa 572, 103 N. W. 796.

Kentucky. *Cox v. Gaulbert's Trustee*, 148 Ky. 407, 147 S. W. 25.

New Hampshire. *Walker v. Walker*, 68 N. H. 407, 39 Atl. 432.

New Jersey. *Lang v. Lang's Ex'r*, 57 N. J. Eq. 325, 41 Atl. 705, modifying 56 N. J. Eq. 603, 40 Atl. 278.

New York. In re *Leask*, 159 App. Div. 102, 143 N. Y. Supp. 865, modifying 142 N. Y. Supp. 462.

Pennsylvania. In re *Robinson's Trust*, 218 Pa. 481, 67 Atl. 775.

Rhode Island. *Newport Trust Co. v. Van Rennselaer*, 32 R. I. 231, 35 L. R. A. (N. S.) 930, 78 Atl. 342.

Vermont. In re *Heaton's Estate*,

statute does not in terms prohibit the payment of dividends out of capital, but merely imposes a penalty on the directors for doing so, this presumption, if it exists at all, is extremely slender and weak.¹²

§ 3659. — Unconditional agreement to pay dividends. From the rule that dividends can only be paid out of surplus profits, it follows that a corporation has no power to enter into an unconditional agreement to pay dividends to shareholders, without regard to the condition of the corporation at the time of payment. Such an agreement is ultra vires and void.¹³ And the same is true of an agreement

89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21.

Wisconsin. *Miller v. Payne*, 150 Wis. 354, 136 N. W. 811; *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

In the absence of any showing to the contrary the corporate officers are presumed to have obeyed the law, and therefore not to have declared a dividend which impaired in any way the capital of the corporation. *Redhead v. Iowa Nat. Bank*, 127 Iowa 572, 103 N. W. 796.

"It is not to be presumed that the board of directors would have declared a dividend without having on hand earnings out of which to pay it," in view of the statute forbidding the payment of dividends except out of earnings. *Cox v. Gaulbert's Trustee*, 148 Ky. 407, 147 S. W. 25.

¹² *People v. Barker*, 141 N. Y. 251, 36 N. E. 196.

¹³ **Indiana.** *Bingham v. Marion Trust Co.*, 27 Ind. App. 247, 61 N. E. 29.

Kansas. *Burk v. Ottawa Gas & Electric Co.*, 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857; *Hogsett v. Aetna Building & Loan Ass'n*, 78 Kan. 71, 96 Pac. 52.

Kentucky. *Sumrall v. Commercial Bldg. Trust's Assignee*, 136 Ky. 260, 44 L. R. A. 659, 90 Am. St. Rep. 223, 50 S. W. 69.

Michigan. *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156.

New Jersey. *Strickland v. National*

Salt Co., 79 N. J. Eq. 182, 81 Atl. 823, aff'g 77 N. J. Eq. 328, 96 Atl. 1048.

Ohio. *McVity v. E. D. Albro Co.*, 90 N. Y. App. Div. 109, 86 N. Y. Supp. 144, aff'd 180 N. Y. 554, 73 N. E. 1126, holding that this is true under the laws of Ohio. See also *Thomas v. Matthews*, 94 Ohio St. 32, L. R. A. 1917 A 1068, 113 N. E. 669.

Pennsylvania. *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595; *Fidelity Trust Co. v. Lehigh Valley R. Co.*, 215 Pa. 610, 7 Ann. Cas. 613, 64 Atl. 829; *Pittsburgh & C. R. Co. v. Allegheny County*, 63 Pa. St. 126.

Tennessee. *Elevator Co. v. Memphis & C. R. Co.*, 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. 52.

Texas. *Reagan Bale Co. v. Heuermann*, — Tex. Civ. App. —, 149 S. W. 228.

Virginia. *Drewry, Hughes Co. v. Throckmorton*, 92 S. E. 818.

Washington. *Jorguson v. Apex Gold Mines Co.*, 74 Wash. 243, 46 L. R. A. (N. S.) 637, 133 Pac. 465.

England. *Guinness v. Land Corporation of Ireland*, 22 Ch. Div. 349.

"Without authority from the legislature, an incorporated company cannot confer on holders of preferred shares a right to be paid dividends, if the capital of the company will thereby be impaired or the demands of its creditors postponed." *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

"It is against public policy to con-

to pay dividends out of the capital stock, or before the payment of expenses which must be paid in order to keep the capital intact.¹⁴

strue the terms upon which stock is issued so as to require dividends to be paid to preferred creditors out of the invested capital, as that might result in the destruction of the capital." *Burk v. Ottawa Gas & Electric Co.*, 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857.

A contract by which a corporation agrees to repay a purchaser of stock in dividends an amount equal to the amount paid therefor is void under a constitutional provision that no corporation shall issue stock except for money, labor done, or money or property actually received, and all fictitious issues of stock shall be void. *Smith v. Alabama Fruit Growing & Winery Ass'n*, 123 Ala. 538, 26 So. 232.

Where a corporation issued certificates of indebtedness equal in amount to expected dividends on its stock for the time the certificates had to run, and pledged as collateral stock of another company acquired from the stockholders of the latter company to whom the certificates of indebtedness were issued, and those stockholders at the same time pledged stock of the first corporation issued to them in exchange, it being agreed that the dividends received on the latter stock should be applied to the payment of the certificates, it was held that this was an attempt to secure the payment of dividends, whether earned or not, and was an illegal transaction. *Strickland v. National Salt Co.*, 79 N. J. Eq. 182, 81 Atl. 828, aff'g 77 N. J. Eq. 328, 76 Atl. 1048. In this case it was further held that since the arrangement violated the express provisions of the statute, the receivers of the corporation could avail themselves of the illegality although the corporation had received a benefit therefrom.

In *Ingraham v. National Salt Co.*, 130

Fed. 676, the Federal Circuit Court of Appeals, overruling its decision to the contrary on a former appeal in the same case (122 Fed. 40), held that the same arrangement and certificates involved in the *Strickland* case, supra, were not a guaranty of dividends, whether earned or not, and were valid. This holding proceeds on the theory that while both the vendors and the corporation doubtless expected that the dividends on the stock would meet the payments on the certificates of indebtedness, there was no agreement to that effect. In this connection the court says, "The promise contained in the certificates may have been regarded by both as substantially equivalent to such an agreement, but assuming this to be so, so long as it was not the agreement, and could not be enforced, it is quite immaterial what were the expectations which prompted it." A petition for a writ of certiorari to review this decision was denied by the Supreme Court (201 U. S. 644, 50 L. Ed. 902 [mem. dec.]); and it was followed by the Court of Appeals on a third appeal in the same case, *National Salt Co. v. Ingraham*, 143 Fed. 805.

In *Wisconsin Lumber Co. v. Greene & W. Tel. Co.*, 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742, the court said: "A corporation may guaranty dividends upon its stock if it is so minded. To hold otherwise would be to set aside many contracts of the kind, which no one heretofore has thought of questioning."

¹⁴ *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g on other grounds 120 Ill. App. 596.

This is true of an agreement by a law library association to pay dividends before the payment of such

The law of the state under which a corporation is created determines its right to issue stock with a guaranty of dividends, and hence a purchaser of stock in a foreign corporation cannot be charged with constructive knowledge as to the right of such corporation to make such guaranty.¹⁵

The effect of a guaranty of dividends on preferred stock will be considered in a subsequent section.¹⁶

§ 3660. Determination of profits—In general. It is clear that there cannot be surplus or net profits for the purpose of declaring a dividend, unless the total value of the assets of the corporation at the time it is proposed to declare the dividend exceeds the amount of its capital stock, after deducting all expenses which have been incurred, and all losses which have been sustained. It may be laid down as a general proposition, therefore, subject to the qualifications shown in the following sections, that the surplus or net profits of a corporation are the difference between the total present value of its assets, after deducting losses and liabilities, and the amount of its capital stock.¹⁷ "The assets, resources and funds of the corporation must consist of cash on hand and other property, and, if such

expenses, which would include the expense of necessary rebinding of books, and otherwise keeping the library up to the point where the capital will not be impaired. *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g on other grounds 120 Ill. App. 596.

¹⁵ *McVity v. E. D. Albro Co.*, 90 N. Y. App. Div. 109, 86 N. Y. Supp. 144, aff'd 180 N. Y. 554, 73 N. E. 1126.

¹⁶ See § 3751 et seq., *infra*.

¹⁷ *United States. Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. Ed. 793; *Main v. Mills*, 6 Biss. 98, Fed. Cas. No. 8,974; *St. John v. Erie Ry. Co.*, 10 Blatchf. 271, Fed. Cas. No. 12,226, aff'd 22 Wall. 136, 22 L. Ed. 743.

Connecticut. Russell v. Bristol, 49 Conn. 251.

Iowa. Miller v. Bradish, 69 Iowa 278.

Kansas. Ryan v. Leavenworth, A. & N. W. Ry. Co., 21 Kan. 365.

Maine. Belfast & M. L. R. Co. v.

Belfast, 77 Me. 445, 1 Atl. 362.

Massachusetts. Phillips v. Eastern R. Co., 138 Mass. 122.

New Jersey. Park v. Grant Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 162.

New York. Williams v. Western U. Tel. Co., 93 N. Y. 162; *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. 280.

England. In re London & General Bank, 72 L. T. (N. S.) 227.

In determining the ability of the corporation to pay dividends the court must ascertain "whether, after payment and satisfaction of all liabilities, taking into account the ability to redeem the capital stock at par, there still remains a fund out of which the proposed dividend can be paid without impairment of the capital, or whether there are net profits arising from the business which can be used for that purpose." *Hyams v. Old Dominion Copper Mining & Smelting Co.*, 82 N. J. Eq. 507, 89 Atl. 37, aff'd 83 N. J. Eq. 705, 92 Atl. 588.

assets exceed the liabilities, a dividend can be lawfully declared; in other words, a profit exists.”¹⁸ In a New York case it was said: “The capital stock of a corporation, is, like that of a co-partnership or joint stock company, the amount which the partners or associates put in as their stake in the concern. To this they add upon the credit of the company, from the means and resources of others, to such extent as their own prudence or the confidence of such other persons will permit. Such additions create a debt; they do not form capital. And if successful in their career, the surplus over and above their capital and debts becomes profits, and is either divided among the partners and associates, or used still further to extend their operations.”¹⁹

Net profits have been defined to be “what shall remain, as the clear gains of any business venture, after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses sustained in its prosecution.”²⁰ It has also been said that “the surplus over and above the capital and debts constitutes profits”;²¹ and that the term profits “imports an excess of receipts over expenditures.”²²

Net earnings have been defined to be what remains of gross receipts after deducting the expenses of producing them.²³

The terms “profits” and “income” are sometimes used synonymously; “but, strictly speaking, income means that which comes in or is received from any business or investment of capital, without reference to the outgoing expenditures; while profits generally mean the gain which is made upon any business or investment, when both receipts and payments are taken into account. Income when applied to the affairs of individuals, expresses the same idea that revenue

¹⁸ Hubbard v. Weare, 79 Iowa 678, 44 N. W. 915; Miller v. Bradish, 69 Iowa 278, 28 N. W. 594.

It is not necessary that its cash on hand should alone be sufficient to pay all its liabilities. Miller v. Bradish, 69 Iowa 278, 28 N. W. 594.

¹⁹ Per Sanford, Vice Chancellor, in Barry v. Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280, 307.

²⁰ Park v. Grant Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 162, quoted with approval in Mangham v. State, 11 Ga. App. 440, 75 S. E. 508; Hunter v. Roberts, Throp & Co., 83 Mich. 63, 47 N. W. 131.

“Net profits are defined in the Century Dictionary ‘as what remains as the clear gain of any business after deducting the capital invested in the business, the expenses incurred in its management, and the losses sustained by its operation.’” Hutchinson v. Curtiss, 45 N. Y. Misc. 484, 92 N. Y. Supp. 70.

²¹ Barry v. Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280, 307, quoted with approval in Mangham v. State, 11 Ga. App. 440, 75 S. E. 508.

²² People v. San Francisco Sav. Union, 72 Cal. 199, 13 Pac. 498.

²³ See § 3662, *infra*.

does when applied to the affairs of a state or nation.”²⁴ “Accumulated surplus” and “accumulated profits” have also been held not to mean the same thing.²⁵ “The surplus is that which remains after expenses and dividends.”²⁶ “Accumulated surplus” means the fund which the corporation has in excess of its capital and liabilities.²⁷

In determining whether there are net profits from which dividends must be declared the capital must be regarded as a liability.²⁸ But it has been held that profits are to be ascertained with reference to the capital stock paid in rather than with reference to the nominal share capital.²⁹

All losses,³⁰ and the expenses of conducting the corporate business,³¹ must of course be deducted from the gross earnings, and the indebtedness of the corporation must also be taken into account, although, as we shall see, it is not always necessary that all of its debts be paid before a dividend is declared.³²

It is a function of the board of directors of a corporation to determine whether net earnings or a surplus exist applicable to the payment of dividends.³³ And their discretion in declaring and paying

²⁴ Quoted in *People v. San Francisco Sav. Union*, 72 Cal. 199, 13 Pac. 498, from *People v. Board Sup'rs Niagara Co.*, 4 Hill (N. Y.) 20, which was a case involving taxation.

²⁵ *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905.

²⁶ *Marks v. American Brewing Co.*, 126 La. 666, 52 So. 983.

²⁷ *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905. See also *State v. Utter*, 34 N. J. L. 489.

²⁸ *Cornell v. Seddinger*, 237 Pa. 389, 85 Atl. 446. See also cases cited in the preceding notes.

²⁹ *Goodnow v. American Writing Paper Co.*, 73 N. J. Eq. 692, 69 Atl. 1014, aff'g 72 N. J. Eq. 645, 66 Atl. 607. In this case it was held that a dividend may be declared where there is an excess of gross earnings over the operating expenses of the current year, and the value of the present assets exceeds the value of the actual assets with which the company began business. Under such circumstances

it is not necessary that the difference between the actual value of property taken at an overvaluation for stock and the value at which it was taken be made up before a dividend is declared.

³⁰ National banks are required by the statute to deduct all losses in determining whether there are net profits applicable to the payment of dividends. Rev. St. § 5204. *United States v. Britton*, 108 U. S. 199, 27 L. Ed. 698. See also cases cited in the preceding notes.

³¹ See § 3662, *infra*.

³² See § 3663, *infra*.

³³ *Siegman v. Electric Vehicle Co.*, 72 N. J. Eq. 403, 65 Atl. 910, aff'g 71 N. J. Eq. 123, 62 Atl. 941.

The directors, in the first instance, are to determine whether profits have been earned, and whether, in their discretion, they ought to be divided among the shareholders. In *re Goetz's Estate*, 236 Pa. 630, 85 Atl. 65.

The orphans' court has no jurisdiction to ascertain and distribute the profits of a corporation formed to car-

dividends will not be questioned if the corporation is solvent, and such payment does not impair its capital.³⁴ But they cannot, by an erroneous determination of this point, confer either upon themselves or upon the corporation powers that by the corporation act are withheld, nor make lawful that which the act has prohibited. "If this were permissible, then by the same logic a court that is called upon to pass on the question of its jurisdiction over a given subject matter might, by an erroneous determination, enlarge its jurisdiction."³⁵ So they cannot by such an erroneous determination confer either upon themselves or upon the corporation the power to make dividends out of capital, where the statute expressly prohibits the corporation from so making them.³⁶

§ 3661. — Time of determining profits. Whether or not there were surplus profits, so as to render it lawful to declare a dividend, is to be determined as of the time when the dividend was made.³⁷ If the condition of the company at that time was apparently such as to show surplus profits out of which a dividend could lawfully be paid, the payment of the dividend is not rendered wrongful by the fact that debtors of the company who were then considered solvent afterwards became insolvent, and the company sustained losses,³⁸ or because, for any other reason, the conditions existing at the time the dividend was paid were such, unknown to the directors, that losses were sure to be sustained,³⁹ or because the company subsequently

ry on the business of a decedent. In re Goetz's Estate, 236 Pa. 638, 85 Atl. 67, 236 Pa. 630, 85 Atl. 65.

³⁴ Taylor v. Com., 119 Ky. 731, 75 S. W. 244; Hyams v. Old Dominion Copper Mining & Smelting Co., 82 N. J. Eq. 507, 89 Atl. 37, aff'd 83 N. J. Eq. 705, 92 Atl. 588.

The action of the directors, taken in good faith, in paying out as a dividend stock of another corporation in which its surplus earnings have been invested will not be reviewed by the courts. Gray v. Hemenway, 212 Mass. 239, 98 N. E. 789.

³⁵ Siegman v. Electric Vehicle Co., 72 N. J. Eq. 403, 65 Atl. 910, aff'g 71 N. J. Eq. 123, 62 Atl. 941.

³⁶ See § 3658, supra.

³⁷ United States. Main v. Mills,

6 Biss. 98, Fed. Cas. No. 8,974.

Georgia. Reid v. Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563.

Iowa. Hubbard v. Weare, 79 Iowa 678, 44 N. W. 916; Miller v. Bradish, 69 Iowa 278, 28 N. W. 594.

New Jersey. Whittaker v. Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203.

New York. Le Roy v. Globe Ins. Co., 2 Edw. Ch. 657.

Tennessee. Tradesman Pub. Co. v. Knoxville Car Wheel Co., 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

³⁸ Main v. Mills, 6 Biss. 98, Fed. Cas. No. 8,974.

³⁹ Stringer's Case (In re Mercantile Trading Co.), 4 Ch. App. 475.

becomes insolvent by reason of a business depression,⁴⁰ or a diminution or decline in the value of its assets,⁴¹ or the destruction of its property,⁴² or otherwise.⁴³ Nor is it material that but for the payment of the dividend insolvency would not have occurred if the company had sufficient assets to pay all its debts at the time when the dividend in question was paid.⁴⁴

§ 3662. — Deduction of expenses. In addition to deducting the amount of the capital stock from the value of the assets of the corporation, deduction must also, as a rule, be made for all expenses incurred in the conduct of the business of the company.⁴⁵ Generally speaking, net earnings are what remains of gross receipts after deducting the expenses of producing them.⁴⁶ The Supreme Court of the

⁴⁰ Because it becomes insolvent by reason of a subsequent business depression. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

⁴¹ The payment of a dividend is not rendered unlawful because of a subsequent diminution in or decline in the value of its assets, even below the point of solvency. See *Siegman v. Electric Vehicle Co.*, 140 Fed. 117.

⁴² Creditors cannot recover from stockholders dividends declared while the company was solvent although it afterwards became insolvent by reason of the destruction of its property by General Sherman's army during the Civil War. *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98, 2 Am. Rep. 563.

⁴³ *Miller v. Bradish*, 69 Iowa 278, 28 N. W. 594.

⁴⁴ *Miller v. Bradish*, 69 Iowa 278, 28 N. W. 594.

⁴⁵ *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114, 3 Atl. 162; *Loan Soc. of Philadelphia v. Eavenson*, 248 Pa. 407, 94 Atl. 121.

Net income is what remains after deducting all legitimate charges. *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g on other grounds 120 Ill. App. 596.

In the case of a library association the expense of conducting the library

should be deducted from the gross income. *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g on other grounds 120 Ill. App. 596.

⁴⁶ *United States v. Union Pac. R. Co. v. United States*, 99 U. S. 402, 420, 25 L. Ed. 274, followed in *United States v. Kansas Pac. Ry. Co.*, 99 U. S. 455, 25 L. Ed. 289; *United States v. Central Pac. R. Co.*, 99 U. S. 449, 25 L. Ed. 287.

Kansas. *Incho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014; *Erie v. Erie Gas & Mineral Co.*, 78 Kan. 348, 97 Pac. 468.

Maine. *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362.

New York. *New York v. Manhattan R. Co.*, 192 N. Y. 90, 84 N. E. 745, aff'g 119 App. Div. 240, 104 N. Y. Supp. 609.

Speaking of a railroad company, it was said by Judge Blatchford: "Net earnings are, properly, the gross receipts, less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains, that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of

United States has said: "The term 'profits,' out of which dividends alone can properly be declared, denotes what remains after defraying every expense, including loans falling due, as well as the interest on such loans."⁴⁷

Depreciation in the value of the corporation's plant is a proper expense charge⁴⁸ and the same is true of expenditures for maintenance and upkeep.⁴⁹ And a reserve fund may be accumulated for the purpose of making repairs and renewals.⁵⁰

Taxes are properly treated as a part of the company's operating expenses, to be paid out of the earnings, and this is true even though

the shareholders, to go towards dividends, which, in that way, are paid out of the net earnings." *St. John v. Erie Ry. Co.*, 10 Blatchf. 271, Fed. Cas. No. 12,226, aff'd 22 Wall. (U. S.) 136, 22 L. Ed. 743, quoted with approval in *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. Ed. 793; *People v. San Francisco Sav. Union*, 72 Cal. 199, 13 Pac. 498; *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N. E. 329.

As to the deduction of debts and interest, see § 3663, *infra*.

⁴⁷ *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. Ed. 793, quoted with approval in *Mangham v. State*, 11 Ga. App. 440, 75 S. E. 508; *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N. E. 329; *Van Vleet v. Evangeline Oil Co.*, 129 La. 406, 56 So. 343; *Thomas v. Matthews*, 94 Ohio St. 32, L. R. A. 1917 A 1068, 113 N. E. 669.

"Net earnings are what is left after paying current expenses and interest on debt and everything else which the stockholders, preferred and common, as a body corporate, are liable to pay." *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769, quoted with approval in *Insko v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

As to the deduction of debts and interest, see § 3663, *infra*.

⁴⁸ *Indiana Veneer & Lumber Co. v. Hageman*, 57 Ind. App. 668, 105 N. E.

253; *People v. State Board of Tax Com'rs*, 128 N. Y. App. Div. 13, 112 N. Y. Supp. 392, modified on other grounds 196 N. Y. 39, 89 N. E. 581.

⁴⁹ *People v. State Board of Tax Com'rs*, 128 N. Y. App. Div. 13, 112 N. Y. Supp. 392, modified on other grounds 196 N. Y. 39, 89 N. E. 581.

In the case of a library association the net income is to be ascertained by deducting from the gross income the expenses of conducting the library and for losses and deterioration of books, and the rebinding of books, so as to keep the capital unimpaired. *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g on other grounds 120 Ill. App. 596.

The cost of replacing and rebuilding the rolling stock, machinery, etc., of a railroad company is properly chargeable to earnings if actually paid out of them and not raised by the issue of bonds or stock. *United States v. Kansas Pac. Ry. Co.*, 99 U. S. 455, 25 L. Ed. 289.

Only expenditures actually made for this purpose can be considered, however. So the amount necessary to put the road of a railroad company in proper repair cannot be deducted where it has not been expended for that purpose. *United States v. Kansas Pac. Ry. Co.*, 99 U. S. 455, 25 L. Ed. 289.

⁵⁰ See § 3666, *infra*.

they are founded upon an erroneous valuation of the property upon which they are assessed.⁵¹

Expenditures in the original construction and equipment of the company's works are properly charged to capital, and not to earnings.⁵² "Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof."⁵³ But it may often be difficult to draw a precise line between the two classes of expenditures, and different practices have been followed in regard to the matter.⁵⁴ "Some charge to construction account every item of expense, and every part and portion of every item, which goes to make the road, or any of its appurtenances or equipments better than they were before; whilst others charge to ordinary expense account, and against earnings, whatever is taken for these purposes from the earnings and is not raised upon bonds or issues of stock.⁵⁵ The latter method is deemed the most conserva-

⁵¹ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 51, 53 L. Ed. 382, 399, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; *People v. State Board of Tax Com'rs*, 196 N. Y. 39, 57, 89 N. E. 581, modifying on other grounds 128 N. Y. App. Div. 13, 112 N. Y. Supp. 392. See also *People v. Stevens*, 203 N. Y. 7, 23, 96 N. E. 114, rev'g 143 N. Y. App. Div. 789, 128 N. Y. Supp. 440; *People v. State Board of Tax Com'rs*, 196 N. Y. 39, 89 N. E. 581, modifying 128 N. Y. App. Div. 13, 112 N. Y. Supp. 392; *New York v. Manhattan, R. Co.*, 192 N. Y. 90, 84 N. E. 745, aff'g 119 N. Y. App. Div. 240, 104 N. Y. Supp. 609.

⁵² *Union Pac. R. Co. v. United States*, 99 U. S. 402, 25 L. Ed. 274, followed in *United States v. Central Pac. R. Co.*, 99 U. S. 499, 25 L. Ed. 287; *United States v. Kansas Pac. Ry. Co.*, 99 U. S. 455, 25 L. Ed. 289; *Erie v. Erie Gas & Mineral Co.*, 78 Kan. 348, 97 Pac. 468.

Expenses incurred by railroad companies in the original construction of

their roads may be charged to capital where this can be safely done considering the interests of creditors and all persons concerned. *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362.

⁵³ *Union Pac. R. Co. v. United States*, 99 U. S. 402, 25 L. Ed. 274, quoted with approval in *Erie v. Erie Gas & Mineral Co.*, 78 Kan. 348, 97 Pac. 468.

⁵⁴ *Union Pac. R. Co. v. United States*, 99 U. S. 402, 25 L. Ed. 274.

⁵⁵ *Union Pac. R. Co. v. United States*, 99 U. S. 402, 25 L. Ed. 274.

Expenditures for station buildings, shops and the like may properly be charged against earnings, when they have actually been paid from earnings and have not been carried to capital account. *Union Pac. R. Co. v. United States*, 99 U. S. 402, 422, 25 L. Ed. 274, followed in *United States v. Kansas Pac. Ry. Co.*, 99 U. S. 455, 25 L. Ed. 289.

In *Inscho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1914

tive and beneficial for the company, and operates as a restraint upon injudicious dividends, and the accumulation of a heavy indebtedness." But "the question is one of policy, which is usually left to the discretion of the directors."⁵⁶

Only such expenditures as have actually been made can properly be claimed as a deduction from earnings.⁵⁷

§ 3663. — Debts and interest. The duty to pay the debts of the company is superior to the duty to pay dividends,⁵⁸ and it has often been said that the indebtedness of the corporation must be deducted from its gross earnings in order to ascertain the amount applicable to the payment of dividends.⁵⁹ A dividend may be declared if the assets of the corporation exceed its liabilities.⁶⁰ But "there can be no actual, legitimate net earnings as long as the outstanding indebtedness of the company is greater than its income."⁶¹ Nor can an insolvent corporation lawfully declare and distribute a dividend since it cannot have any surplus or net earnings as long as it is unable to pay its debts.⁶² And it has been held that a floating indebtedness which it is not wise or prudent to place in the form of a funded debt, or to postpone for later payment, should be paid.⁶³ But a cor-

1917 B 546, 146 Pac. 1014, it was held that the board of directors of an oil and gas company did not disregard the rights of the preferred stockholders in paying off a debt incurred in constructing a pipe line and drilling new wells and connecting them with such pipe line, but that such debt was justly entitled to absorb earnings before dividends were paid and that money used in paying it was not net earnings.

⁵⁶ *Union Pac. R. Co. v. United States*, 99 U. S. 402, 25 L. Ed. 274.

⁵⁷ *United States v. Kansas Pac. Ry. Co.*, 99 U. S. 455, 25 L. Ed. 289.

⁵⁸ *Ryan v. Leavenworth, A. & N. W. Ry. Co.*, 21 Kan. 365.

"The creditor comes in for consideration before the stockholder." *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362, quoted with approval in *Inscho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

⁵⁹ "Comprehensively speaking, the

net earnings are the amount of earnings left after deducting the indebtedness of the company from its gross earnings." *Mangham v. State*, 11 Ga. App. 440, 75 S. E. 508.

There must be deducted from the actual profits debts and interest paid or due thereon. *Van Dyck v. McQuade*, 86 N. Y. 38.

The stockholders are not entitled to a division of the profits until all the debts have been paid. *Inscho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014; *Ryan v. Leavenworth, A. & N. W. Ry. Co.*, 21 Kan. 365.

⁶⁰ *Hubbard v. Weare*, 79 Iowa 678, 44 N. W. 915.

⁶¹ *Mangham v. State*, 11 Ga. App. 440, 75 S. E. 508.

⁶² *Mangham v. State*, 11 Ga. App. 440, 75 S. E. 508; *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N. E. 329.

⁶³ *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362, quoted in *Inscho v. Mid-Continent Development*

poration is not necessarily required to be entirely out of debt before declaring and paying a dividend.⁶⁴ "Debts often represent investments in machinery or other property, and their existence is not proof that the corporation made no net profit."⁶⁵ "If the assets are reasonably worth, or are honestly believed to be worth, largely more than the company's indebtedness, and upon this basis profits are estimated, the company is not insolvent, although its indebtedness may exceed its capital stock paid in."⁶⁶

Bonded indebtedness need not be paid before the payment of dividends,⁶⁷ nor, as a rule, can net earnings be withheld to liquidate funded debts,⁶⁸ or other indebtedness of a permanent nature,⁶⁹ nor to liquidate floating indebtedness properly convertible into bonded or funded indebtedness.⁷⁰ A sinking fund, however, should be provided for the payment of the bonded or permanent indebtedness as it falls due.⁷¹

Future contingent claims against the corporation must be reduced to their present value.⁷²

Co., 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

⁶⁴ *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362; *O'Shields v. Union Iron Foundry*, 93 S. C. 393, 76 S. E. 1098; *Mills v. Northern Ry. of Buenos Ayres Co.*, 5 Ch. App. 621.

A solvent corporation may distribute its earnings among its stockholders by way of dividends without first paying its general creditors. *Great Western Min. & Mfg. Co. v. Harris*, 128 Fed. 321, rev'g 111 Fed. 38. Judgment aff'd on other grounds 198 U. S. 561, 49 L. Ed. 1163; *New Hampshire Sav. Bank v. Richey*, 121 Fed. 956.

⁶⁵ *O'Shields v. Union Iron Foundry*, 93 S. C. 393, 76 S. E. 1098.

⁶⁶ *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

⁶⁷ Such indebtedness is represented by the corporate assets. *Mills v. Northern Ry. of Buenos Ayres Co.*, 5 Ch. App. 621.

"Speaking generally, net earnings cannot be withheld to liquidate bonded indebtedness maturing in the fu-

ture." *Inscho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

⁶⁸ In *Corry v. Londonderry & E. Ry. Co.*, 29 Beav. 263, it was held that the funded indebtedness of a railroad company, such as a debt for money raised by mortgage for the purpose of completing its line, could not properly be deducted. See also *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362.

⁶⁹ *Inscho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

⁷⁰ *Inscho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014; *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362.

⁷¹ *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44; *Gratz v. Redd*, 4 B. Mon. (Ky.) 178, 188; *Hazeltine v. Belfast & M. L. R. Co.*, 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 528.

⁷² *Crawford v. Roney*, 130 Ga. 515, 61 S. E. 117.

Discount⁷³ and interest⁷⁴ on borrowed money, including interest on bonded, funded or permanent indebtedness,⁷⁵ and accrued interest on bills payable,⁷⁶ should be paid out of earnings before paying dividends.

§ 3664. — Money due but not received. It has been held that the profits of a corporation, out of which dividends may be paid, do not include earnings which have not yet been received by the corporation, even though they may consist in money which is due, and which is well secured or certain to be eventually paid.⁷⁷ So it has been held that interest which has matured upon loans made by the corporation, but which has not been received, cannot be considered, though it is secured by the mortgages securing the principal of the loans, and though such security is ample;⁷⁸ and that accrued interest

⁷³ *Indiana Veneer & Lumber Co. v. Hageman*, 57 Ind. App. 668, 105 N. E. 253.

⁷⁴ *United States. Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. Ed. 793; *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769; *St. John v. Erie Ry. Co.*, 10 Blatchf. 271, Fed. Cas. No. 12,226, aff'd 22 Wall. 136, 22 L. Ed. 743.

Georgia. *Mangham v. State*, 11 Ga. App. 440, 75 S. E. 508.

Indiana. *Indiana Veneer & Lumber Co. v. Hageman*, 57 Ind. App. 668, 105 N. E. 253; *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N. E. 329.

Kentucky. *Gratz v. Redd*, 4 B. Mon. 178, 188.

Louisiana. *Van Vleet v. Evangeline Oil Co.*, 129 La. 406, 56 So. 343.

New York. *Van Dyck v. McQuade*, 86 N. Y. 38. See also *New York v. Manhattan R. Co.*, 192 N. Y. 90, 84 N. E. 745, aff'g 119 App. Div. 240, 104 N. Y. Supp. 609.

Ohio. *Thomas v. Matthews*, 94 Ohio St. 32, L. R. A. 1917 A 1068, 113 N. E. 669.

⁷⁵ *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. Ed. 793; *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44; *Inscho v.*

Mid-Continent Development Co., 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014; *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362. See also *Union Pac. R. Co. v. United States*, 99 U. S. 402, 422, 25 L. Ed. 274.

⁷⁶ If not capable of exact ascertainment, the amount should be approximated. *Hubbard v. Weare*, 79 Iowa 678, 44 N. W. 915.

⁷⁷ *People v. San Francisco Sav. Union*, 72 Cal. 199, 13 Pac. 498.

Earned profits may be a very different thing, for the purpose of distribution, from accumulated profits, since earnings may be made without ever having been received. *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905.

And see *Allen-West Commission Co. v. Gwaltney*, 90 Ark. 608, 119 S. W. 292, holding that where the amount of a corporation's merchandise accounts exceeded the excess of its liabilities over its assets, it was in no condition to declare a dividend.

⁷⁸ *People v. San Francisco Sav. Union*, 72 Cal. 199, 13 Pac. 498. "Money earned as interest," said the court in this case, "however well secured, or certain to be eventually paid

on government bonds held by the corporation cannot be considered where it is not yet payable.⁷⁹ On the other hand it has been held that bills and accounts receivable may be considered,⁸⁰ provided a deduction is made for shrinkage or loss in collections.⁸¹ So it has been held that the book accounts of a corporation created for the purpose of merchandising against parties to whom merchandise has been sold in the ordinary course of business, and concerning which there is no question, may be included in its assets in determining whether there has been a net profit.⁸² And it has at least been intimated that accrued interest on bills receivable may be taken into account.⁸³ Of course worthless bills receivable and accounts,⁸⁴ or worthless loans,⁸⁵ cannot properly be considered as assets in any case.

A guaranty that assets purchased by the company will net it a certain sum at a date subsequent to the payment of the dividend will not justify the assumption that the original assets are good until that time comes, or warrant the declaration of a dividend on that basis, but the guaranty merely furnishes an additional asset to be considered, and may be good or worthless, depending upon the responsibility and solvency of the guarantors.⁸⁶

The National Banking Act requires the deduction of bad debts in determining whether there are net profits applicable to the payment of dividends, and provides that all debts due the bank on which interest is past due and unpaid for a period of six months, unless the same are well secured and in process of collection, shall be considered bad debts.⁸⁷

Estimated profits expected on existing contracts for delivery of

cannot in fact be distributed as dividends to stockholders, and does not constitute surplus profits."

⁷⁹ *People v. San Francisco Sav. Union*, 72 Cal. 199, 13 Pac. 498.

⁸⁰ *Hubbard v. Weare*, 79 Iowa 678, 44 N. W. 915.

⁸¹ It is inevitable that some such loss will occur, and though its amount cannot be determined exactly, it should be approximated. *Hubbard v. Weare*, 79 Iowa 678, 44 N. W. 915.

⁸² *Spencer v. Lowe*, 198 Fed. 961.

⁸³ In *Hubbard v. Weare*, 79 Iowa 678, 44 N. W. 915, it was held that, where the statement of profits for the purpose of declaring dividends in-

cludes as an asset "accrued interest on bills receivable," an approximation should be made of the accrued interest on bills payable, for which the company would be liable. The court did not say that the interest on bills receivable was a proper item, but apparently considered it.

⁸⁴ *American Steel & Wire Co. v. Eddy*, 138 Mich. 403, 101 N. W. 578.

⁸⁵ *Loan Soc. of Philadelphia v. Eavenson*, 248 Pa. 407, 94 Atl. 121.

⁸⁶ *American Steel & Wire Co. v. Eddy*, 138 Mich. 403, 101 N. W. 578.

⁸⁷ Rev. St. § 5204. *United States v. Britton*, 108 U. S. 199, 27 L. Ed. 698; *Witters v. Sowles*, 31 Fed. 1.

goods in the future to be manufactured from raw material which the company has not yet purchased cannot be taken into account.⁸⁸

§ 3665. — Borrowed money. If a corporation borrows money, the indebtedness therefor offsets the fund borrowed, and as a general rule, therefore, money cannot be borrowed for the purpose of paying dividends.⁸⁹

It has been held, however, that when a corporation has used profits out of which it might have paid a dividend in the improvement of its property, when it might have borrowed the money for such purposes, it may borrow the money to take the place of the profits so used, and use it in paying the dividend, for the dividend in such a case is paid, in effect, out of the profits.⁹⁰ And if surplus profits have in fact been earned, and are invested in property used in the business of the corporation, or other assets not at present available for the purpose of distribution among the stockholders as a dividend, a dividend may properly be paid by borrowing money.⁹¹ "A company," said Judge Kekewich, "is quite as competent to declare dividends out of property which is invested for the time being in buildings, or anything else, as it is out of cash in hand, and it is not necessary that a company, any more than an individual, should have cash at the bank on which it can draw in order to declare divi-

⁸⁸ *Hutchinson v. Curtiss*, 45 N. Y. Misc. 484, 92 N. Y. Supp. 70.

⁸⁹ *Davis v. Flagstaff Silver Min. Co. of Utah*, 2 Utah 74.

⁹⁰ *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44; *Bankers' Trust Co. v. R. E. Dietz Co.*, 157 N. Y. App. Div. 594, 142 N. Y. Supp. 847.

⁹¹ *Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co.*, 197 Fed. 347; *Bankers' Trust Co. v. R. E. Dietz Co.*, 157 N. Y. App. Div. 594, 142 N. Y. Supp. 847; *Thomas v. Matthews*, 94 Ohio St. 32, L. R. A. 1917 A 1068, 113 N. E. 669; *Corry v. Londonderry & E. Ry. Co.*, 29 Beav. 263; *Mills v. Northern Ry. of Buenos Ayres Co.*, 5 Ch. App. 621; *Stringer's Case* (In re *Mercantile Trading Co.*), 4 Ch. App. 475. See also *State v. Baltimore & O. R. Co.*, 6 Gill (Md.) 363; *Williams v. Western U. Tel. Co.*, 93 N. Y. 162;

Wood v. Lary, 47 Hun (N. Y.) 550, appeal dismissed 124 N. Y. 83, 26 N. E. 338; *Holmes v. St. Joseph Lead Co.*, 84 N. Y. Misc. 278, 147 N. Y. Supp. 104, aff'd 163 N. Y. App. Div. 885, 147 N. Y. Supp. 1117.

"The law permits a corporation to borrow money to pay dividends when the earnings are represented in credits or merchandise readily reducible to cash." *Thomas v. Matthews*, 94 Ohio St. 32, L. R. A. 1917 A 1068, 113 N. E. 669.

Where a corporation has invested its earnings for proper corporate purposes it may borrow cash for the purpose of paying dividends, and hence the fact that some of the cash actually paid stockholders was borrowed for the purpose is not proof that the dividend so paid was not earned. *Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co.*, 197 Fed. 347.

dends.”⁹² And it has been said that “a situation might arise in which a corporation ought to borrow money to pay preferred dividends.”⁹³ But, “no court of equity will compel a board of directors, against their judgment and wishes, to borrow money to pay dividends.”⁹⁴

“If the company is * * * so largely indebted that it cannot borrow the money necessary for the payment of dividends upon its own credit, then the net earnings represented in credits and merchandise do not permit the payment of dividends.”⁹⁵

§ 3666. — Creation of reserve fund for repairs, etc. In the case of railroad companies and other corporations whose capital stock is invested in rolling stock, tracks, buildings, machinery, or other property which must become worn and depreciated in value in its use, and which will have to be repaired or renewed from time to time, the wear of the property and necessity for repairs must be taken into consideration in estimating profits for the purpose of declaring dividends, and a sufficient sum must be set aside to create a reserve fund for repairs and renewals.⁹⁶

Statutes sometimes require the creation of a contingent or sinking fund, or the accumulation of a certain amount before a dividend may be declared.⁹⁷ And banks are often required to set apart a certain

⁹² *Municipal Freehold Land Co. v. Pollington*, 63 L. T. (N. S.) 238.

⁹³ *Inscho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

⁹⁴ *Hunter v. Roberts, Throp & Co.*, 83 Mich. 63, 47 N. W. 131.

⁹⁵ *Thomas v. Matthews*, 94 Ohio St. 32, L. R. A. 1917 A 1068, 113 N. E. 669.

⁹⁶ *Davidson v. Gillies*, 16 Ch. Div. 347, note. See also *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400, 29 A.1. 203; *People v. Stevens*, 203 N. Y. 7, 96 N. E. 114, rev'g 143 N. Y. App. Div. 789, 128 N. Y. Supp. 440; *People v. State Board of Tax Com'rs*, 196 N. Y. 39, 89 N. E. 581, modifying 128 N. Y. App. Div. 13, 112 N. Y. Supp. 392; *People v. State Board of Tax Com'rs*, 136 N. Y. App. Div. 155, 120 N. Y. Supp. 528, aff'd 198 N. Y. 608, 92 N. E. 1098.

But where a corporation allows its

property to get out of repair, and pays dividends to ordinary shareholders without setting apart any reserve fund for making necessary repairs and renewals, it cannot, in a subsequent year, set apart such a fund, not only for the current year, but also for preceding years, and thus defeat the payment of a dividend to preferred shareholders, whose right to dividends is dependent upon the profits of the particular year only. See post, § 3751 et seq.

As to the different rule applicable to mining companies, see § 3670, *infra*.

⁹⁷ The Massachusetts statute forbids the distribution of earnings by certain classes of corporations “unless at least ten per cent. of the net profits have been appropriated for a contingent or sinking fund, until an amount has accumulated equal to thirty per cent. of its capital stock.” But violation of this provision does

percentage of their net profits to a surplus fund before declaring a dividend.⁹⁸

§ 3667. — Valuation of property. The property and assets of the company must be taken at their actual fair value.⁹⁹ And if the directors or stockholders act honestly and in good faith in placing a value upon them, no creditor can successfully complain.¹ "The court will look to the bona fides of such a transaction and, if it is clear that it was carried out in good faith in all its particulars, and in the exercise of a judgment fairly and honestly directed, it will be sustained."² Nor is bad faith necessarily shown by the fact that the company subsequently becomes insolvent.³

Property in which the capital of the corporation has been invested may be considered as representing the amount invested, after deducting a fair allowance for depreciation in value by reason of wear and tear and other causes.⁴ But the Supreme Court of the United States has held that the expression "profits of a business" means the receipts, deducting current expenses, and is equivalent to "net receipts"; and that depreciation of buildings in which the business is carried on, although they were erected by expenditure of the capital invested, is not ordinarily or necessarily considered in estimating the profits.⁵

not make the directors personally liable to creditors. *Ellis v. French-Canadian Co-op. Ass'n*, 189 Mass. 566, 76 N. E. 207.

⁹⁸ Such a provision is mandatory. *Lapsley v. Merchants' Bank of Jefferson City*, 105 Mo. App. 98, 78 S. W. 1095.

⁹⁹ *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400, 29 Atl. 203.

In determining whether there has been an impairment of capital by the payment of dividends, assets of the company must be taken at their actual value. *American Steel & Wire Co. v. Eddy*, 138 Mich. 403, 101 N. W. 578.

The directors must value the corporate assets "at no higher figure than reasonably prudent men would do." *Sieglman v. Electric Vehicle Co.*, 140 Fed. 117.

See *Hyams v. Old Dominion Copper Mining & Smelting Co.*, 82 N. J. Eq.

507, 89 Atl. 37, aff'd 83 N. J. Eq. 705, 92 Atl. 588, where the evidence was held to show that the real value of the corporation's mine and mining claims exceeded the sum at which they were carried on its books.

¹ *Northern Bank & Trust Co. v. Day*, 83 Wash. 296, 145 Pac. 182.

² *Northern Bank & Trust Co. v. Day*, 83 Wash. 296, 145 Pac. 182.

³ *Northern Bank & Trust Co. v. Day*, 83 Wash. 296, 145 Pac. 182.

⁴ *Mills v. Northern Ry. of Buenos Ayres Co.*, 5 Ch. App. 621. See also opinion of Judge Crow in *Boothe v. Summit Coal Min. Co.*, 55 Wash. 167, 19 Ann. Cas. 1255, 104 Pac. 207.

An allowance should be made for depreciation in the value of machinery. *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400, 29 Atl. 203.

⁵ *Eyster v. Centennial Board of Finance*, 94 U. S. 500, 24 L. Ed. 188.

"It cannot be said that the operating plant of a mine has little or no value simply because it is used as a factor in the development and working of a wasting property. It, or its equivalent, is necessary to the operation of the mine, and its valuation for that purpose must be left to the honest judgment of the board of directors."⁶

An increase in the bulk of raw material in the process of manufacture may be given the value of the raw material where such is the custom of the trade.⁷

Care must be taken not to include the same item twice, as by including expenses paid and other items as separate assets, when they go to make up the estimated aggregate value of the corporate property. And it is also necessary, in fixing the value of particular assets, to make a proper allowance for probable loss. So it has been held that, in stating the profits of a corporation for the purpose of declaring a dividend, money paid out for moving machinery or materials which went into the buildings of the corporation should be included in the assets, but not as a separate item, where the aggregate value of the buildings is given; that expenses of perfecting a machine should not be included as an asset until it is known that the machine will be successful, where its sole value depends upon that contingency; that money paid out for expenses should not be included as an asset, since, if the value of the corporate property is enhanced thereby, it is included in the statement of the value of the property; that profits of a former season should not be stated as a separate item in the statement of the assets of the corporation for a certain year, where such profits have not been declared or withdrawn from the general assets, as they are a part thereof; that outstanding accounts should not be stated as an asset, without approximating the amount to be deducted for loss; and that expenses for exhibiting a machine should not be included in the assets as a separate item, as they enter into the value of the general assets.⁸

§ 3668. — Property or money representing capital stock. Property or money which represents an investment of the capital stock of a

⁶ Hyams v. Old Dominion Copper Mining & Smelting Co., 82 N. J. Eq. 507, 89 Atl. 37, aff'd 83 N. J. Eq. 705, 92 Atl. 588.

⁷ So where it appeared that in manufacturing barley into malt its bulk increases fifteen per cent., in determining whether the books of a malting concern justified the declaring of

a dividend, the court held that the increase might be set down as having the value of barley, where it appeared that this was in accordance with the custom of the trade. Hutchinson v. Curtiss, 45 N. Y. Misc. 484, 92 N. Y. Supp. 70.

⁸ Hubbard v. Weare, 79 Iowa 678, 44 N. W. 915.

corporation, or of any part thereof, cannot be regarded as surplus profits, and distributed as dividends, irrespective of the financial condition of the corporation. When a person subscribes for or purchases shares of stock in a corporation, and pays a part only of the amount due thereon, and the shares are afterwards forfeited for nonpayment of the balance, the amount paid is not profits, but a part of the capital, and cannot be divided among the stockholders.⁹ And the same is true of the proceeds of the sale by the corporation of shares of its own stock not previously issued,¹⁰ and of money paid into the treasury of the corporation by certain of its stockholders for the purpose of strengthening the company and adding to its working capital, and for which no additional stock is issued.¹¹

An estimated increase in the value of a building owned and occupied by the corporation cannot be deemed a net profit arising from the business, at least until it is realized by a sale,¹² nor can the difference between the price at which a corporate officer is authorized to buy property for the corporation and a less price which he actually pays for it.¹³

The stockholders of a corporation have the right to a division of its capital among them, after payment of its debts, when the corporation has been dissolved.¹⁴ And when the amount of the capital stock of a corporation has been reduced under legislative authority, they are entitled to a distribution of the excess of the actual capital over the amount of the stock as reduced.¹⁵ The fund thus distributed is sometimes called a "dividend," but it is very different from a dividend out of profits.¹⁶

⁹ Gratz v. Redd, 4 B. Mon. (Ky.) 178.

¹⁰ Brenaman v. Whitehouse, 85 Wash. 355, 148 Pac. 24.

¹¹ A return of a part of this amount to those who contributed it was held not to be a dividend within the meaning of a statute making the amount of a tax dependent upon dividends made and declared. *People v. Knight*, 96 N. Y. App. Div. 120, 89 N. Y. Supp. 72.

¹² *Kingston v. Home Life Ins. Co.*, — Del. Ch. —, 101 Atl. 898.

¹³ The assets of the company are not increased thereby. *Kingston v. Home Life Ins. Co.*, — Del. Ch. —, 101 Atl. 898.

¹⁴ See chapter on Forfeiture, Dissolution and Winding Up, *infra*.

¹⁵ See § 3472, *supra*.

¹⁶ The fund resulting from the reduction of the capital stock is not surplus profits, and preferred stockholders who are entitled to cumulative dividends are not entitled to have it applied in payment of arrearages due them. *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13, rev'g 102 N. Y. App. Div. 118, 92 N. Y. Supp. 387. See also *Larwill v. Burk*, 19 Ohio Cir. Ct. 513.

§ 3669. — Insurance companies. In estimating the surplus profits of an insurance company for the purpose of determining the amount which may lawfully be paid in dividends, it is not proper to regard as profits premiums paid, but not yet earned, without taking into consideration probable losses upon existing policies, for the unearned premiums and the interest upon the capital stock, and not the capital stock, is the primary fund out of which losses on existing risks are to be paid. And it has been held that unearned premiums could not be counted at all as surplus profits.¹⁷ The better rule, however, is that unearned premiums may be included in the computation of profits, for the purpose of declaring a dividend, provided a sufficient surplus is retained, over and above the capital stock, to pay all probable losses on existing risks.¹⁸

A guaranty fund in approved notes raised by subscription of the stockholders, under an agreement that it is to be used only for the payment of claims, and after all the assets of the company have been exhausted, and that any portion of it so used shall be refunded with interest out of the first surplus receipts of the company, cannot be reckoned with the company's assets in determining its right to declare a dividend.¹⁹

§ 3670. — Corporations whose property is necessarily consumed in use. When a corporation is created for the purpose of investing its capital in property which will necessarily be consumed or exhausted in the course of its operations, so that the depreciation in the value of the property cannot be repaired, as in the case of a mining company, it is not subject to the same rules as other corporations. A mining company is not formed for the purpose of permanently using the property in which its capital is invested, but for the purpose of investing in property which, in the nature of things, will be gradually consumed in making profits, and, in estimating the profits of such a corporation for the purpose of determining whether it may lawfully declare a dividend, no deduction is to be made for depreciation in the value of its mine by reason of its use and consumption in taking out the ore or other minerals. Dividends may be lawfully declared out of the net proceeds of its operations after deducting expenses and debts and a reasonable fund for contingencies.²⁰ And the same

¹⁷ *Lexington Life, Fire & Marine Ins. Co. v. Page & Richardson*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 135.

See standard works on insurance.

¹⁸ *Crawford v. Roney*, 130 Ga. 515, 61 S. E. 117; *Scott v. Eagle Fire Co.*,

7 Paige (N. Y.) 198; *De Peyster v. American Fire Ins. Co.*, 6 Paige (N. Y.) 486.

¹⁹ *Russell v. Bristol*, 49 Conn. 251.

²⁰ *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44. See

is true of a corporation created for the purpose of utilizing a lease for a term of years,²¹ or a patent.²² Similarly, where a corporation is formed for the purpose of liquidating the business of a partnership, and selling all of its property and dividing the proceeds among its stockholders, such property is, in no proper sense, its capital stock within the meaning of the rule prohibiting a corporation from distributing its capital in the form of dividends, but is rather to be regarded as property held by the corporation in trust for the benefit of its stockholders, and which may be distributed by it to them in the manner prescribed in the articles of incorporation, at least where the rights of creditors are not involved.²³

A mining company, however, cannot lawfully sell its mine, or any part of it, and declare a dividend out of the proceeds.²⁴ Nor can an oil company distribute as dividends the proceeds of the sale of oil placed in tanks before the formation of the company and which is a part of the assets which went to form its capital stock.²⁵

If the mining property has been taken subject to a debt, or it becomes necessary to incur one as a preliminary operation in opening up the property, the whole of such debt need not first be paid before a dividend is declared, but it is necessary to first pay the interest thereon and to provide a sinking fund sufficient to extinguish the principal before the mine is exhausted.²⁶ If there is no such indebtedness the surplus profits may be determined by deducting the gross outlay from the gross receipts, the balance, less a reasonable reserve to meet contingencies, being the legitimate subject of a dividend.²⁷

also *People v. Roberts*, 156 N. Y. 585, 51 N. E. 293, rev'g 25 N. Y. App. Div. 89, 48 N. Y. Supp. 881; *Lee v. Neuchatel Asphalte Co.*, 41 Ch. Div. 1; *Lambert v. Neuchatel Asphalte Co.*, 51 L. J. Ch. 882. See also opinion of Judge Crow in *Boothe v. Summit Coal Min. Co.*, 55 Wash. 167, 19 Ann. Cas. 1255, 104 Pac. 207.

"Where mines, oil wells, quarries, etc., become exhausted by the working of them, and thus cease to be assets of the corporation owning them, it will not be necessary for the board of directors to set aside funds for the purpose of purchasing other mines, wells, quarries, etc." *Van Vleet v. Evangeline Oil Co.*, 129 La. 406, 56 So. 343.

²¹ See the dictum in *Excelsior*

Water & Mining Co. v. Pierce, 90 Cal. 131, 27 Pac. 44.

²² *Mellon v. Mississippi Wire Glass Co.*, 77 N. J. Eq. 498, 78 Atl. 710. See also dictum to this effect in *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44.

²³ *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030.

²⁴ *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44; *Davis v. Flagstaff Silver Min. Co. of Utah*, 2 Utah 74.

²⁵ *Van Vleet v. Evangeline Oil Co.*, 129 La. 406, 56 So. 343.

²⁶ *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44.

²⁷ *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44.

§ 3671. — Further illustrations. A fund which is properly surplus may be distributed as dividends regardless of whether it is carried on the books of the company as surplus or as segregated assets, or in a special fund account, or otherwise.²⁸

“Money paid out is not on hand, and should not be reckoned as assets. If paid for property that is on hand, the property is assets. If expended in a way that has enhanced the value of the general assets, it is included in their valuation. If so expended as to have brought no property, or no enhancement of that on hand, then it is a loss, and should not be counted as assets.”²⁹

A premium received for new stock which is sold by the corporation,³⁰ or which is used by it in retiring convertible bonds,³¹ is not capital, but is profits and distributable as such. And the same is true of profits derived from the sale of stock of other corporations.³²

The proceeds of a decree against a promoter for the recovery of secret profits may be regarded as surplus, where it appears that the company has sufficient assets over all its liabilities, accumulated from its current net profits, to make good its capital, and hence that such fund is not needed to make good any impairment thereof.³³

§ 3672. In whom authority to declare dividends is vested. Ordinarily the right to declare a dividend is vested in the board of directors, and not in the stockholders³⁴ nor in the corporate offi-

²⁸ *Hyams v. Old Dominion Copper Mining & Smelting Co.*, 82 N. J. Eq. 507, 89 Atl. 37, aff'd 83 N. J. Eq. 705, 92 Atl. 588; *Bassett v. United States Cast Iron Pipe & Foundry Co.*, 74 N. J. Eq. 668, 70 Atl. 929, aff'd 75 N. J. Eq. 539, 73 Atl. 514.

²⁹ *Hubbard v. Weare*, 79 Iowa 678, 44 N. W. 915.

³⁰ So much of the premium as is necessary should be applied to make the book value of the new stock equal the book value of the old stock, and the balance remaining represents a net profit to be distributed ratably between old and new stock. *Miller v. Payne*, 150 Wis. 854, 136 N. W. 811.

³¹ Exchanged on the basis of one share of stock at par for \$175 par value of bonds. *Equitable Life Assur.*

Society v. Union Pac. R. Co., 212 N. Y. 360, L. R. A. 1915 D 1052, 106 N. E. 92, aff'g 162 N. Y. App. Div. 81, 147 N. Y. Supp. 382.

³² *Equitable Life Assur. Society v. Union Pac. R. Co.*, 212 N. Y. 360, L. R. A. 1915 D 1052, 106 N. E. 92, aff'g 162 N. Y. App. Div. 81, 147 N. Y. Supp. 382.

³³ *Hyams v. Old Dominion Copper Mining & Smelting Co.*, 82 N. J. Eq. 507, 89 Atl. 37, aff'd 83 N. J. Eq. 705, 92 Atl. 588.

³⁴ *United States. Schell v. Alston Mfg. Co.*, 149 Fed. 439.

Illinois. Hamblock v. Clipper Lawn Mower Co., 148 Ill. App. 618.

Kentucky. Grant v. Ross, 100 Ky. 44, 37 S. W. 263; *American Wire Nail Co. v. Gedge*, 96 Ky. 513, 29 S. W. 353.

cers.³⁵ If the duty is on the board of directors they cannot delegate it, or at least cannot escape liability for the wrongful distribution of the capital of the corporation by so doing.³⁶ And where the power is lodged in the directors alone, a resolution adopted at a meeting of the stockholders authorizing and directing the directors to pay a dividend is of no force or effect.³⁷ But a dividend otherwise unobjectionable is not invalidated because its declaration was brought about by another corporation which owned a majority of its stock.³⁸

The power to declare dividends is sometimes vested in the stockholders, however, especially in the case of stock dividends.³⁹ And there may be a division of profits which will be equivalent to a divi-

Massachusetts. *Pennsylvania Iron Works v. Mackenzie*, 190 Mass. 61, 76 N. E. 228.

Michigan. See *Knight v. Alamo Mfg. Co.*, 190 Mich. 223, 157 N. W. 24; *Hunter v. Roberts, Throp & Co.*, 83 Mich. 63, 47 N. W. 131.

New Jersey. *Breslin v. Fries-Breslin Co.*, 70 N. J. L. 274, 58 Atl. 313; *King v. Peterson & H. River R. Co.*, 29 N. J. L. 82, aff'd on other grounds 29 N. J. L. 504.

New York. *Berryman v. Bankers' Life Ins. Co.*, 117 App. Div. 730, 102 N. Y. Supp. 695.

A cash dividend is ordinarily created by a simple vote of the directors. *Terry v. Eagle Lock Co.*, 47 Conn. 141.

"The distribution among stockholders of the property of the corporation whether made out of profits or supposed profits while the corporation is going on or out of the proceeds of a realization of the property in winding up its concerns, must be made by directors and cannot be made by anyone else." *Pennsylvania Iron Works Co. v. Mackenzie*, 190 Mass. 61, 76 N. E. 228.

That powers vested in the directors by the charter or statute cannot be exercised by the stockholders, see Chap. 41, supra.

³⁵ It cannot be exercised by the president and secretary. *Shelby v.*

New York Steam Co., 121 N. Y. Supp. 619.

³⁶ *Pennsylvania Iron Works Co. v. Mackenzie*, 190 Mass. 61, 76 N. E. 228.

As to the right of directors to delegate their powers generally, see § 1951 et seq., supra.

³⁷ *Grant v. Ross*, 100 Ky. 44, 37 S. W. 263.

³⁸ So a dividend was held not to be invalid because in declaring it the directors acted under compulsion of an agreement made between the corporation's stockholders and the stockholders of another corporation which owned a majority of the first corporation's stock, where neither the first corporation nor its officers or directors were parties to such agreement, though there were three common directors of the two companies. *Hyams v. Old Dominion Copper Mining & Smelting Co.*, 82 N. J. Eq. 507, 89 Atl. 37, aff'd 83 N. J. Eq. 705, 92 Atl. 588.

³⁹ Generally a stock dividend must be authorized by a vote of the stockholders. *Terry v. Eagle Lock Co.*, 47 Conn. 141.

The declaration of a stock dividend is not within the power of the board of directors, but the direct action or subsequent sanction of the stockholders is essential. *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656.

dend, where all the stockholders consent to it, without any formal action on the part of the board of directors.⁴⁰ It has also been held that where a dividend has been paid to a stockholder who has no notice of any infirmity in the manner of its declaration, it cannot be recovered back by the corporation solely because it was not formally declared by the board of directors.⁴¹

§ 3673. Formal requisites of declaration. The usual and proper way to appropriate corporate profits to stockholders is by formally declaring a dividend.⁴² And there is authority to the effect that a dividend can only be declared by formal action of the board of directors, or of the stockholders as a body, as the case may be, and that the vote must appear on the records of the corporation.⁴³ So it has been held that the declaration of a dividend cannot be proved by parol evidence in collateral suits between the corporation and stockholders, but only by the corporate records, and that if a dividend has in fact been declared, but does not appear on the records, the remedy is to correct the records, first in the corporation itself, by calling attention to the omission, or, where this will not avail, by mandamus to the proper officer, or by a suit in equity.⁴⁴

It has been very generally held, however, that there may be a division of profits among stockholders without the formality of declaring a dividend, and that such a division is the equivalent of a dividend.⁴⁵ And it has been held that a division of profits is a dividend

⁴⁰ See § 3673, *infra*.

⁴¹ *Berryman v. Bankers' Life Ins. Co.*, 117 N. Y. App. Div. 730, 102 N. Y. Supp. 695.

⁴² *Central of Georgia R. Co. v. Central Trust Co. of New York*, 135 Ga. 472, 69 S. E. 708.

⁴³ *American Wire Nail Co. v. Gedge*, 96 Ky. 513, 29 S. W. 353; *Dennis v. Joslin Mfg. Co.*, 19 R. I. 666, 61 Am. St. Rep. 805, 36 Atl. 129.

⁴⁴ *Dennis v. Joslin Mfg. Co.*, 19 R. I. 666, 61 Am. St. Rep. 805, 36 Atl. 129.

In this case the court, in the course of its opinion, said: "Where, as in the matter of a dividend, members of a corporation have a common interest and right by virtue of action taken, the record should show what the corporation did, and in case of error the

remedy should be a proceeding to correct the record itself, rather than by parol evidence in collateral suits, which would be liable to different results. It follows that the parol evidence offered in this case to show that a dividend was voted as an offset to advances, is inadmissible."

⁴⁵ *United States*. *Smith v. Moore*, 199 Fed. 689; *Spencer v. Lowe*, 198 Fed. 961.

Georgia. *Central of Georgia R. Co. v. Central Trust Co. of New York*, 135 Ga. 472, 69 S. E. 708.

Michigan. *Knight v. Alamo Mfg. Co.*, 190 Mich. 223, 157 N. W. 24; *Barnes v. Spencer & Barnes Co.*, 162 Mich. 509, 139 Am. St. Rep. 587, 127 N. W. 752.

New York. *Hartley v. Pioneer Iron Works*, 181 N. Y. 73, 73 N. E. 576,

even though it is not called a dividend and is not considered to be such by the directors or stockholders.⁴⁶ So where the governing body of a corporation turns over its profits to its sole stockholder without liability to account, their action is the equivalent of declaring a dividend.⁴⁷ And if the directors ascertain the profits and set apart the portion thereof that is to be divided, a failure to observe the forms prescribed by law as to the time, place and manner of declaring them is immaterial.⁴⁸ And it has been held that a resolution of the directors of a bank "that the bank shall pay the taxes on the bank stock" is equivalent to the declaration of a dividend equal to the taxes which may be levied on each share, where the bank is under no legal obligation to pay such taxes.⁴⁹ And where, upon reduction of the capital of a national bank, the directors, with the approval of the comptroller of the currency, charged off certain bad and doubtful assets, which were set apart as a trust fund for the benefit of the then stockholders, it was held that this was simply a form of declaring a dividend from assets in excess of the capital stock.⁵⁰

The stockholders may also informally agree among themselves to distribute a certain sum as dividends without going through the form of corporate action, and if all consent, their action in so doing will be valid, at least where the rights of creditors are not involved.⁵¹

rev'g 87 N. Y. App. Div. 107, 84 N. Y. Supp. 79; *Shaw v. Ansaldi Co., Inc.*, — App. Div. —, 165 N. Y. Supp. 872; *Berryman v. Bankers' Life Ins. Co.*, 117 App. Div. 730, 102 N. Y. Supp. 695. See also *Rorke v. Thomas*, 56 N. Y. 559.

Oregon. *In re Wilson's Estate*, 167 Pac. 580; *Grants Pass Hardware Co. v. Calvert*, 71 Ore. 103, 142 Pac. 569.

Pennsylvania. *Com. v. Pittsburgh, Ft. W. & C. R. Co.*, 74 Pa. St. 83, 90. See also *Reading Trust Co. v. Reading Iron-Works*, 137 Pa. St. 282, 21 Atl. 169, 170; *Childs v. Adams*, 43 Pa. Super. Ct. 239.

In *Grants Pass Hardware Co. v. Calvert*, 71 Ore. 103, 142 Pac. 569, a transfer of real property to stockholders was held to be, in effect, the payment of a dividend in property in accordance with the previous action and intention of the company, though the proceedings relating thereto, prior to the execution of the

deeds, were not very formal.

⁴⁶ 2 Cook on Corporations, § 534. *Barnes v. Spencer & Barnes Co.*, 162 Mich. 509, 139 Am. St. Rep. 587, 127 N. W. 752; *In re Wilson's Estate*, — Ore. —, 167 Pac. 580. See also *Com. v. Pittsburgh, Ft. W. & C. R. Co.*, 74 Pa. St. 83, 90.

⁴⁷ *Central of Georgia R. Co. v. Central Trust Co. of New York*, 135 Ga. 472, 69 S. E. 708.

⁴⁸ *Breslin v. Fries-Breslin Co.*, 70 N. J. L. 274, 58 Atl. 313.

⁴⁹ The bank, not being liable for the taxes, could not pay the same except from dividends or other property of the stockholders in its possession, and hence, unless a dividend was intended, would act illegally in paying them. *Redhead v. Iowa Nat. Bank*, 127 Iowa 572, 103 N. W. 796.

⁵⁰ *Cogswell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059, aff'd 204 U. S. 1, 51 L. Ed. 343.

⁵¹ *Smith v. Moore*, 199 Fed. 689;

For example, it has been held that "when all the stockholders, including all the directors of a solvent corporation, meet and agree to a division of profits, and they are credited to the several individual stockholders upon the books of the company, and subsequently some of the stockholders withdraw their shares in whole or in part, that is the equivalent of a dividend," and the other stockholders are entitled to the amounts so credited to them.⁵² A distribution of the proceeds of the sale of all ⁵³ or a part of ⁵⁴ the property of the corpora-

Knight v. Alamo Mfg. Co., 190 Mich. 223, 157 N. W. 24; *Barnes v. Spencer & Barnes Co.*, 162 Mich. 509, 139 Am. St. Rep. 587, 127 N. W. 752. See also *New Jersey Car Spring & Rubber Co. v. Fields*, 85 N. J. L. 217, 88 Atl. 1031; *Breslin v. Fries-Breslin Co.*, 70 N. J. L. 274, 58 Atl. 313; *Childs v. Adams*, 43 Pa. Super. Ct. 239; *O'Shields v. Union Iron Foundry*, 93 S. C. 393, 76 S. E. 1098.

Where the profits of a corporation are actually distributed among the stockholders by virtue of an agreement of all the stockholders, such distribution amounts to a mere division of the profits, and, as between them, it is good and may not be attacked if the rights of third persons are not thereby impaired. *Central of Georgia R. Co. v. Central Trust Co. of New York*, 135 Ga. 472, 69 S. E. 708; *M. Groh's Sons v. Groh*, 80 N. Y. App. Div. 85, 91, 80 N. Y. Supp. 438, rev'd on other grounds 177 N. Y. 8, 68 N. E. 992.

Where the stockholders direct that the net profits as shown by the corporate minutes be credited on the books to the stockholders in proportion to the amount of stock owned by them respectively, and each receives his proper part and assents to the distribution so made, this constitutes a valid dividend. *Grants Pass Hardware Co. v. Calvert*, 71 Ore. 103, 142 Pac. 569.

Where two men who owned all of the stock of a corporation, and constituted two out of three of the directors, divided the proceeds of the

sale of corporate property between them, intending thereby to declare a dividend, it was held that this was equivalent to a dividend. *In re Wilson's Estate*, — Ore. —, 167 Pac. 580.

Where the directors are the sole stockholders, their action in voting themselves salaries may amount to the declaration of a dividend. *Shaw v. Ansaldo Co., Inc.*, — N. Y. App. Div. —, 165 N. Y. Supp. 872.

In *Smith v. Moore*, 199 Fed. 689, it was held that where a purchase of stock by the majority stockholder in a corporation was set aside for fraud, he could not escape liability to account for money received by him on a distribution of profits by the corporation after such sale on the ground that there had been no formal declaration of dividends by the directors.

⁵² *Spencer v. Lowe*, 198 Fed. 961.

⁵³ Such a distribution is a dividend within the meaning of a statute imposing personal liability on the president and directors for making or consenting to a dividend which renders the corporation insolvent. *Pennsylvania Ironworks Co. v. Mackenzie*, 190 Mass. 61, 76 N. E. 228.

⁵⁴ *In re Wilson's Estate*, — Ore. —, 167 Pac. 580.

Selling a part of the assets of the corporation and dividing the proceeds among the stockholders is, in substance and effect, the same thing as declaring a dividend. *Rorke v. Thomas*, 56 N. Y. 559.

tion will also be regarded as a dividend. But "an unauthorized payment of dividends to a few preferred stockholders cannot be held equivalent to the declaration of a dividend in favor of all preferred stockholders" so as to entitle the others to recover their proportionate share.⁵⁵

Of course, in declaring dividends, the corporation must comply, both as to mode and time, with any express provisions in the charter or general law.⁵⁶ But it has been held that the purpose of a statute "in prescribing that at a fixed time each year the directors shall make and declare dividends out of the profits, is to safeguard the right of the stockholders to have a just participation in the gains of the company," and that such a statute "does not invalidate dividends declared at other times, provided they be declared out of the actual profits."⁵⁷

Since a stock dividend ordinarily involves an increase in the capital stock,⁵⁸ all the formalities prescribed for effecting such an increase must be complied with.⁵⁹

Stockholders and officers of the corporation may be estopped by their conduct and acquiescence to set up the absence of a formal declaration or resolution of dividends to the prejudice of innocent parties,⁶⁰ or from asserting any claim to recover such dividends

⁵⁵ Knight v. Alamo Mfg. Co., 190 Mich. 223, 157 N. W. 24.

⁵⁶ Under the New Jersey Corporation Act (section 47), which provides for the distribution of all accumulated profits of a corporation, less the amount reserved for working capital, in dividends in January of each year, "unless some specific day or days for that purpose be fixed in its charter or by-laws," a corporation whose charter provides that dividends on its common stock shall be declared after the close of any fiscal year has no power to declare such dividends previous to the close of a fiscal year. Marquand v. Federal Steel Co., 95 Fed. 725.

Such provision applies to dividends on preferred stock, as well as to dividends on common stock. While the statute (Laws 1896, p. 283, § 18) permits the payment of dividends on preferred stock quarterly or semiannually, it does not affect the requirement that

the specific day or days for declaring such dividends must be fixed by the charter or by-laws. If they are not so fixed, the directors have no power to declare dividends on preferred stock on days selected in their discretion; nor can the articles of incorporation give them such discretionary power. Marquand v. Federal Steel Co., 95 Fed. 725.

⁵⁷ Breslin v. Fries-Breslin Co., 70 N. J. L. 274, 58 Atl. 313.

⁵⁸ See § 3681 et seq., *infra*.

⁵⁹ Terry v. Eagle Lock Co., 47 Conn. 141.

As to the mode of increasing the capital stock, see § 3457 et seq., *supra*.

⁶⁰ In Ratcliff v. Clendenin, 232 Fed. 61, which was a suit by the trustee in bankruptcy of a corporation to recover money paid to a stockholder, pursuant to an agreement by the president and general manager of a corporation guaranteeing him interest on his stock

back.⁶¹ The corporation may be estopped by acquiescing in the payment of a dividend to all but one of its stockholders to set up as against him that the resolution declaring such dividend was never formally adopted.⁶² But the fact that in the past dividends on preferred stock have been paid by the secretary of the company without any formal resolution or declaration by the board of directors authorizing him to do so, and that the stockholders have acquiesced in the practice, will not give a preferred stockholder the right to maintain an action at law to recover a subsequent dividend which has never been declared by the board of directors.⁶³

§ 3674. Discrimination between stockholders. Dividends among stockholders of the same class must always be pro rata, equal, and without discrimination or preference.⁶⁴

at ten per cent. per annum, it was held that it was immaterial in so far as the defendant's rights were concerned, that there had been no formal declarations of dividends on his stock, since the officers and stockholders of the corporation by common consent to and acquiescence in the exercise of all the powers and the conduct of all of the business of the corporation by said president and general manager had estopped themselves to deny his authority to make the contract and to pay the money to the stockholder, whether such payment was a payment of interest on his investment or of dividends on his stock.

The corporation ratifies the division of the proceeds of the sale of corporate property without the formal declaration of a dividend by failing to properly disavow it after knowledge. In re Wilson's Estate, — Ore. —, 167 Pac. 580.

⁶¹ Knight v. Alamo Mfg. Co., 190 Mich. 223, 157 N. W. 24.

⁶² So where the minutes of a directors' meeting showed that a resolution declaring a dividend was offered and seconded, but failed to show that it was voted upon or adopted, and there was no direct evidence upon the subject, but it was proved that the

directors and officers had acted upon the assumption that it had been adopted, and that every stockholder except the plaintiff had been permitted to draw his dividend in accordance with its provisions, it was held that in a suit by the plaintiff to recover his share of the dividend the corporation could not be heard to say that the resolution had not been adopted. Southwestern, A. & I. T. Ry. Co. v. Martin, 57 Ark. 355, 21 S. W. 465.

⁶³ Knight v. Alamo Mfg. Co., 190 Mich. 223, 157 N. W. 24.

⁶⁴ **Alabama.** Gulf Coal & Coke Co. v. Musgrove, 195 Ala. 219, 70 So. 179.
Illinois. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707, rev'g 120 Ill. App. 596.

Iowa. Redhead v. Iowa Nat. Bank, 127 Iowa 572, 103 N. W. 796.

Kansas. Hale v. Republican River Bridge Co., 8 Kan. 466.

Maryland. State v. Baltimore & O. R. Co., 6 Gill (Md.) 363.

Missouri. Hill v. Atoka Coal & Mining Co., 21 S. W. 508.

New Jersey. Jackson's Adm'rs v. Newark Plank Road Co., 31 N. J. L. 277; Willcox v. Trenton Potteries Co., 64 N. J. Eq. 173, 53 Atl. 474. See also Edwards v. National Window

“The dividends must be general on all the stock, so that each stockholder will receive his proportionate share. The directors have no authority to declare a dividend on any other principle. They cannot exclude any portion of the stockholders from an equal participation in the profits of the company.”⁶⁵ So the directors cannot discriminate by voting a dividend to certain stockholders only, to the exclusion of others of the same class,⁶⁶ or by giving certain stockholders more than others of the same class,⁶⁷ or by providing for the payment of some of the stockholders in money and others in bonds.⁶⁸ And a corporation declaring a dividend for the purpose of paying taxes on its stock, which it is itself under no obligation to pay, would have no right to refuse to pay their proportionate share in cash to stockholders whose stock was not subject to taxation because its value was offset by debts.⁶⁹ Similarly, where the by-laws provide for the declaration of dividends on paid-up stock and for the application of dividends on stock not paid up to the liquidating of the unpaid balance, when dividends are declared on the paid-up stock, a dividend

Glass Jobbers' Ass'n (N. J. L.), 68 Atl. 800; General Inv. Co. v. Bethlehem Steel Corporation, — N. J. Eq. —, 100 Atl. 347.

New York. Jones v. Terre Haute & R. R. Co., 57 N. Y. 196, aff'g 29 Barb. 353; Luling v. Atlantic Mut. Ins. Co., 45 Barb. 510, 30 How. Pr. 69, rev'd 50 Barb. 520, on the ground, among others, that there was no discrimination.

⁶⁵ Ryder v. Alton & S. R. Co., 13 Ill. 516.

⁶⁶ Southwestern, A. & I. T. Ry. Co. v. Martin, 57 Ark. 355, 21 S. W. 465; Jackson's Adm'rs v. Newark Plank Road Co., 31 N. J. L. 277; Willcox v. Trenton Potteries Co., 64 N. J. Eq. 173, 53 Atl. 474; Pittsburgh & S. R. Co. v. Allegheny, 79 Pa. St. 210. See also Jones v. Terre Haute & R. R. Co., 57 N. Y. 196, aff'g 29 Barb. (N. Y.) 353.

A resolution declaring a dividend which excepts a particular certificate of stock from the benefits of such declaration is void in so far as the exception is concerned. Hill v. Atoka

Coal & Mining Co. (Mo.), 21 S. W. 508.

In Stoddard v. Shetucket Foundry Co., 34 Conn. 542, it was held that where a dividend had been paid to all but one of the stockholders, the company could not set up as against him that the dividend had not been earned.

⁶⁷ Hale v. Republican River Bridge Co., 8 Kan. 466.

⁶⁸ Where the board of directors of a corporation declared a dividend of a certain per cent., and gave to all stockholders holding less than fifty shares a right to a cash payment, but declared that stockholders holding more than fifty shares must accept part cash and part in bonds of the company, it was held that a stockholder of the latter class was not obliged to receive the bonds, but might treat the dividend, so far as the bonds were concerned, as illegal. State v. Baltimore & O. R. Co., 6 Gill (Md.) 363.

⁶⁹ Redhead v. Iowa Nat. Bank, 127 Iowa 572, 103 N. W. 796.

accrues also as a matter of course in favor of the stock not paid up.⁷⁰

The rule against discrimination is equally applicable to stock dividends. Each shareholder is entitled to receive new shares in proportion to the stock held by him, and any discrimination is illegal.⁷¹ But it has been held that a stock dividend is not discriminatory because payable in preferred stock to the holders of preferred stock, and in common stock to the holders of common stock.⁷²

If a scrip dividend is payable at the pleasure of the company, and it pays some of the holders of the certificates representing the dividend, it thereby makes all of the certificates payable, since it has no right of selection as to the payment of individual certificates, and no right to discriminate in the payment of dividends to stockholders.⁷³

"A bill in equity may be maintained by a stockholder to prevent discrimination or unequal or unfair distribution."⁷⁴ And it has been held that where a dividend is declared on all the stock of a corporation except that evidenced by a particular certificate, the owner of such certificate may recover his proportionate share in equity;⁷⁵ and also that he may sue in assumpsit for breach of the corporation's implied promise to distribute dividends ratably on all its capital stock.⁷⁶

While ordinarily dividends must be apportioned among the stockholders pro rata to their several holdings, "it cannot be doubted that the stockholders may, by unanimous consent, adopt and become bound by a different mode of division."⁷⁷ And stockholders who assent to a discriminatory arrangement may thereby be estopped to object.⁷⁸ Provisions in the by-laws for the forfeiture of dividends under certain circumstances may be valid.⁷⁹ And of course the holders of preferred

⁷⁰ *Gellermann v. Atlas Foundry & Machine Co.*, 45 Wash. 114, 87 Pac. 1059.

⁷¹ See *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156; *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; *State v. Smith*, 48 Vt. 289.

⁷² *Howell v. Chicago & N. W. R. Co.*, 51 Barb. (N. Y.) 378.

⁷³ *Billingham v. E. P. Gleason Mfg. Co.*, 101 N. Y. App. Div. 476, 91 N. Y. Supp. 1046, aff'd 185 N. Y. 571, 78 N. E. 1099.

⁷⁴ *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g 120 Ill. App. 596.

⁷⁵ *Hill v. Atoka Coal & Mining Co.* (Mo.), 21 S. W. 508.

⁷⁶ *Jackson's Adm'rs v. Newark Plank Road Co.*, 31 N. J. L. 277. See also *Edwards v. National Window Glass Jobbers' Ass'n* (N. J. L.), 68 Atl. 800.

⁷⁷ *Breslin v. Fries-Breslin Co.*, 70 N. J. L. 274, 58 Atl. 313.

⁷⁸ See *Pittsburgh & S. R. Co. v. Allegheny*, 79 Pa. St. 210.

⁷⁹ Where the by-laws of a steamboat company required each stockholder to put a boat into its service, and provided that, if any boat should become unfit for service, the dividends

or guaranteed stock are entitled to preference over the holders of common stock.⁸⁰

§ 3675. Time of payment. It is within the discretion of the directors to fix the time for payment of a dividend.⁸¹ If no time is fixed by the resolution declaring a dividend, it is payable on demand,⁸² and if the resolution declares that it shall be payable at such time as the board of directors may direct, and the board fixes no time, the law implies that it shall be paid within a reasonable time.⁸³ Similarly, if the resolution makes the dividend payable "at such time as the finances of the corporation will in the judgment of the board warrant," and it appears that the financial condition of the corporation justifies its payment, it is payable within a reasonable time.⁸⁴ And where a certificate representing a scrip dividend provided that such dividend was payable "at the pleasure of the com-

on the owner's stock should cease until it should be repaired, or another should be furnished, but that the proportion of the dividends up to the time of the boat's becoming unfit should be paid to the owner, it was held that a stockholder who failed to repair forfeited only so much of the dividends as were earned during the default, whether they were declared during or after the default. *Bigbee & Warrior River Packet Co. v. Moore*, 121 Ala. 379, 25 So. 602. It was also held in this case that a provision in the by-laws allowing the company, after notice, to repair at the owner's expense, on his failure to repair, and appropriate his share of dividends for such purpose, did not impose on the company a duty to repair, but it could do so or not, at its option.

⁸⁰ See § 3751 et seq., *infra*.

⁸¹ *Kihg v. Paterson & H. River R. Co.*, 29 N. J. L. 82, *aff'd* 29 N. J. L. 504; *Hyams v. Old Dominion Copper Mining & Smelting Co.*, 82 N. J. Eq. 507, 89 Atl. 37, *aff'd* 83 N. J. Eq. 705, 92 Atl. 588; *Equitable Life Assur. Society v. Union Pac. R. Co.*, 212 N. Y. 360, L. R. A. 1915 D 1052, 106 N. E. 92, *aff'g* 162 N. Y. App. Div. 81,

147 N. Y. Supp. 382; *Williams v. Western U. Tel. Co.*, 93 N. Y. 162; *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun (N. Y.) 18, 16 N. Y. Supp. 448, *aff'd* 133 N. Y. 687, 31 N. E. 627.

⁸² *Armant v. New Orleans & C. R. Co.*, 41 La. Ann. 1020, 7 So. 35; *State v. Baltimore & O. R. Co.*, 6 Gill (Md.) 363; *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128.

"The debt which a declared dividend creates on the part of the corporation to the stockholder is one payable only on demand." *Yeaman v. Galveston City Co.*, 106 Tex. 389, 167 S. W. 710.

⁸³ *Beers v. Bridgeport Spring Co.*, 42 Conn. 17.

This is true where the resolution provides that the money is to be held in the treasury and "paid out at a later date on the order of the board of directors." *Wallin v. Johnson City Lumber & Manufacturing Co.*, 136 Tenn. 124, L. R. A. 1917 B 323, 188 S. W. 577.

⁸⁴ *Northwestern Marble & Tile Co. v. Carlson*, 116 Minn. 438, 133 N. W. 1014.

pany," it was held that it was payable within a reasonable time, the obligation to pay being absolute.⁸⁵

If the dividend is made payable only upon condition precedent, the happening of performance of the condition must be shown before it can be recovered.⁸⁶

§ 3676. Place of payment. Generally the place where a dividend is payable rests in the discretion of the directors.⁸⁷ But the debt due from the corporation to the stockholder as a result of the declaration of a dividend "is strictly demandable and to be paid at the office of the corporation." And, "admitting the right of the corporation to make it payable elsewhere, it must be done at the risk of the corporation." The corporation has no right, without the express or implied consent of the stockholder, to intrust a third party with the fund for the purposes of payment, and does so at its own risk. The third party, under such circumstances is the agent of the corporation, not of the stockholders, and if the agent prove faithless or the fund is lost in his hands, the loss must fall upon the corporation, which remains the owner of the fund until payment is made. So, where a dividend is made payable at the office of a trust company, which is appointed registrar of the corporation to transfer stock and pay dividends, and the money to pay the dividend is deposited with it, but the trust company fails before payment is made, and the money is lost, the stockholders may recover the amount of the dividend to which they are respectively entitled from the corporation which declared it.⁸⁸

§ 3677. Cash dividends. "Cash dividends include all distributions of surplus assets, whether in the form of cash or property, taken from the body of the assets to become the property of the shareholders."⁸⁹

⁸⁵ *Billingham v. E. P. Gleason Mfg. Co.*, 101 N. Y. App. Div. 476, 91 N. Y. Supp. 1046, aff'd 185 N. Y. 571, 78 N. E. 1099.

⁸⁶ Where the resolution declaring a dividend provided that it should not be paid until after the accounts of three named creditors had been paid, it was held that a stockholder could not maintain an action to recover such dividend where it was shown that none of such named creditors had been paid when it was begun. *Tepfer v. Rival Gas & Electric Fixture*

Supply Co., 117 N. Y. Supp. 959, aff'd 136 N. Y. App. Div. 942, 121 N. Y. Supp. 1149.

⁸⁷ See *Williams v. Western U. Tel. Co.*, 93 N. Y. 162, 191.

⁸⁸ *King v. Paterson & H. River R. Co.*, 29 N. J. L. 504, aff'g 29 N. J. L. 82.

⁸⁹ *Union & N. H. Trust Co. v. Taintor*, 85 Conn. 452, 83 Atl. 697. To the same effect, see *Bishop v. Bishop*, 81 Conn. 509, 71 Atl. 583.

"The underlying idea of a cash dividend * * * is the distribu-

Such a dividend diminishes the property of the corporation by exactly the amount paid out and correspondingly increases the property of the individual stockholders,⁹⁰ or, in other words, "subtracts so much from the treasury of the corporation and transfers it to the pockets of the stockholders."⁹¹ It leaves the fractional interest in the corporate property represented by each share of stock precisely what it was before,⁹² and does not materially affect the value of the stock.⁹³ In these respects a cash dividend differs from a stock dividend, which, as we shall see, neither decreases the property of the corporation nor increases the interest of the stockholders in the corporate property.⁹⁴

A dividend paid by the distribution of the stock of another company held by the corporation as an asset is a cash dividend.⁹⁵ And

tion to shareholders, as the rewards of the corporate enterprise, of a portion of the profits or surplus assets of the corporation. Usually the assets thus distributed are in the form of cash and the distribution a cash one. This, however, is not necessarily so, and there is no departure in principle or essence if the distributed assets chance to be in some other form of property." *Green v. Bissell*, 79 Conn. 547, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287, 65 Atl. 1056.

"A cash dividend entitles the stockholder to so much money, the ordinary way in which he receives from time to time the fruits of his investment." *Terry v. Eagle Lock Co.*, 47 Conn. 141.

⁹⁰ *Talbot v. Milliken*, 221 Mass. 367, 108 N. E. 1060; *Boston Safe Deposit & Trust Co. v. Adams*, 219 Mass. 175, 106 N. E. 590; *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789; *Leland v. Hayden*, 102 Mass. 542, 551.

"A cash dividend depletes the treasury of the corporation and detracts from its assets." *Lancaster Trust Co. v. Mason*, 152 N. C. 660, 136 Am. St. Rep. 851, 68 S. E. 235, modifying 151 N. C. 264, 65 S. E. 1035.

"Whatever form the distribution takes, the result always is the reduc-

tion of both the corporate assets and surplus by just the amount of the distribution. Something is taken from the corporation and given to the shareholders. That which is distributed becomes released from all corporate control and comes under the dominion of the shareowner." *Green v. Bissell*, 79 Conn. 547, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287, 65 Atl. 1056.

⁹¹ *Humphrey v. Lang*, 169 N. C. 601, L. R. A. 1916B 626, 86 S. E. 526.

⁹² *Talbot v. Milliken*, 221 Mass. 367, 108 N. E. 1060; *Boston Safe Deposit & Trust Co. v. Adams*, 219 Mass. 175, 106 N. E. 590; *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789; *Leland v. Hayden*, 102 Mass. 542, 551.

⁹³ *Terry v. Eagle Lock Co.*, 47 Conn. 141.

⁹⁴ See § 3683, *infra*.

⁹⁵ *Union & N. H. Trust Co. v. Taintor*, 85 Conn. 452, 83 Atl. 697; *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789. See also *Leland v. Hayden*, 102 Mass. 542, 551.

There is no distinction in a legal sense between the distribution of such stock as a dividend and the distribution of its equivalent in money. *Kimball v. Success Min. Co.*, 38 Utah 78, 110 Pac. 872.

the same has been held to be true of a distribution by a corporation of shares of its own stock received by it in payment of a debt,⁹⁶ or in which it has legally invested its accumulated earnings, taking title thereto in the name of a trustee.⁹⁷ On the other hand "a dividend purporting to be made in cash will be regarded as a stock dividend, when it manifestly was intended to be such."⁹⁸ The question whether a particular dividend is a stock or a cash dividend most frequently arises in determining whether it belongs to the life tenant or remainderman under a will or deed of trust giving the income of stock to one person for life with remainder over, and will be further considered in that connection.⁹⁹

It has been held that directors have no authority to declare that a dividend of cash profits shall be paid in depreciated bank notes,¹ and that a dividend out of cash profits payable "in New York State currency" is payable in money, and that the stockholders cannot be required to accept uncurrent depreciated bank bills in satisfaction thereof.² It has also been held that, if a dividend payable out of cash profits is in terms payable in dollars, without any limitation, and without specifying the payment to be in any currency whatever, the corporation cannot show that all its earnings were received in the form of Confederate money, nor can the stockholders be required to accept such money in payment.³

One who receives and accepts the note of the promoter and principal owner of a corporation in payment of a dividend cannot afterwards maintain an action against the corporation for such dividend.⁴

§ 3678. Dividends payable in property. In the absence of a statutory or charter provision to the contrary, dividends may lawfully

⁹⁶ *Green v. Bissell*, 79 Conn. 547, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287, 65 Atl. 1056.

⁹⁷ *Leland v. Hayden*, 102 Mass. 542, 551.

⁹⁸ *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789.

⁹⁹ See § 3711, *infra*.

¹ *Ehle v. Chittenango Bank*, 24 N. Y. 548.

² *Ehle v. Chittenango Bank*, 24 N. Y. 548.

"The term 'New York State currency' must be held to mean what the ordinary signification of those words

imply, unless, by some general known usage, some other technical meaning can be attached to it. The testimony of the cashier [of the bank declaring the dividend] as to what he understood the phrase to mean, did not tend to prove any such known usage; or that the directors, when they used the term in their resolution making the dividend, understood what he did." *Id.*

³ *Scott v. Central Railroad & Banking Co. of Georgia*, 52 Barb. (N. Y.) 45.

⁴ *Whisker v. Vera Cruz Coffee Co.*, 95 Neb. 119, 145 N. W. 254.

be paid in property instead of cash, where the surplus is in that form, and it is practicable to so distribute it among the stockholders.⁵ And statutes sometimes specifically provide for dividends in this form.⁶ "There is no rule of law or reason founded upon public policy which condemns a property dividend. The directors could convert the property into cash before a dividend and divide that. So the stockholders can take the property divided to them and sell it and thus realize the cash. Within the domain of law, it can make no material difference which course is pursued. If, however, a dividend be made payable in cash or payable generally, the corporation becomes a debtor, and must discharge such debt, as it is bound to discharge all its other debts, in lawful currency. It is true that a stockholder cannot be compelled to receive property divided to him. So he cannot be compelled to take a cash dividend. In case of his refusal to take a cash dividend, the corporation may retain it for him until he shall demand it. In case he shall refuse to take a property dividend, the corporation may retain it and hold it in trust for him, or possibly sell it for his benefit." ⁷ A dividend payable in property is a "cash," as distinguished from a "stock," dividend.⁸

Whether a dividend shall be made in cash or property rests in the discretion of the directors.⁹

It has been held that where land is distributed by way of a dividend the corporation is under no obligation to make good the title to the stockholder, and is not liable to him in damages in case

⁵ *Williams v. Western U. Tel. Co.*, 93 N. Y. 162, rev'g 48 N. Y. Super. Ct. 349; *Grants Pass Hardware Co. v. Calvert*, 71 Ore. 103, 142 Pac. 569. See also *Ehle v. Chittenango Bank*, 24 N. Y. 548; *Scott v. Central Railroad & Banking Co. of Georgia*, 52 Barb. (N. Y.) 45; *Olsen v. Homestead Land & Improvement Co.*, 87 Tex. 368, 28 S. W. 944.

⁶ In *Merchant v. Western Land Ass'n*, 56 Minn. 327, 57 N. W. 931, a statute authorizing any stockholder of a particular corporation to require that its real property not necessary for the transaction of its business and the payment of its debts be partitioned, so that those of its stockholders who desired it should have conveyed to them in severalty an

amount of such property which at its appraised value should bear the same proportion to the appraised value of the whole as the stock held by him sustained to the whole stock legally issued, was held to merely authorize stockholders to require a dividend of profits in property instead of money, and to impair no rights of the corporation or of its stockholders or creditors, and to be constitutional.

⁷ *Williams v. Western U. Tel. Co.*, 93 N. Y. 162, 192, rev'g 48 N. Y. Super. Ct. 349.

⁸ See § 3677, *supra*.

⁹ *Williams v. Western U. Tel. Co.*, 93 N. Y. 162, rev'g 48 N. Y. Super. Ct. 349.

the title fails, at least unless it specifically covenants to indemnify him.¹⁰

§ 3679. Bond or scrip dividends. In the absence of statutory provision to the contrary, a corporation may use surplus profits in improvement of its property or in purchasing machinery or other property which it is authorized under its charter to acquire and hold, and issue its bonds in payment of the dividend from such profits.¹¹ Or it may issue a scrip dividend. Scrip is simply a writing or certificate issued to shareholders in lieu of a dividend, entitling them to money, stock, bonds, land, or other benefit at some future time,—“an interim or provisional document or certificate, to be exchanged, when certain payments have been made or conditions complied with, for a more formal certificate, as of shares or bonds, or entitling the holder to the payment of interest, a dividend, or the like.”¹² “A scrip dividend is resorted to where the company has profits not in cash.”¹³

The issuing of a bond or scrip dividend by a corporation to represent an investment of bona fide profits is not prohibited by a statute requiring dividends to be made only from surplus profits of the corporation, and providing that it shall not be lawful for corporations to divide or pay to stockholders any part of the capital, or to reduce the capital stock. Nor is such a dividend contrary to public policy.¹⁴

The rights of the holder of scrip depend upon the terms of his

¹⁰ *Olsen v. Homestead Land & Improvement Co.*, 87 Tex. 368, 28 S. W. 944. In this case it is said that “From the fact that a corporation has determined to release a portion of assets for division among its shareholders, no presumption arises that it intended to make good the title of the property so relinquished.”

¹¹ *State v. Baltimore & O. R. Co.*, 6 Gill (Md.) 363; *Wood v. Lary*, 47 Hun (N. Y.) 550, appeal dismissed 124 N. Y. 83, 26 N. E. 338.

¹² *Century Dict. & Cyc.* “Scrip.” See *State v. Baltimore & O. R. Co.*, 6 Gill (Md.) 363; *Rogers v. New York & T. Land Co.*, 134 N. Y. 197, 32 N. E. 27; *Bankers' Trust Co. v. R. E. Dietz Co.*, 157 N. Y. App. Div. 594, 142 N. Y. Supp. 847; *Williams v. Western U. Tel. Co.*, 9 Abb. N. Cas.

(N. Y.) 437, 61 How. Pr. (N. Y.) 216; *In re Robinson's Trust*, 218 Pa. 481, 67 Atl. 775; *Chaffee v. Rutland R. Co.*, 55 Vt. 110. See also *Billingham v. E. P. Gleason Mfg. Co.*, 101 N. Y. App. Div. 476, 91 N. Y. Supp. 1046, aff'd 185 N. Y. 571, 78 N. E. 1099; *Shelby v. New York Steam Co.*, 121 N. Y. Supp. 619; *Brown v. Lehigh Coal & Navigation Co.*, 49 Pa. St. 270; *Gordon's Ex'rs v. Richmond, F. & P. R. Co.*, 78 Va. 501.

¹³ *Barnes v. Spencer & Barnes Co.*, 162 Mich. 509, 139 Am. St. Rep. 587, 127 N. W. 752. And see to the same effect, *Bankers' Trust Co. v. R. E. Dietz Co.*, 157 N. Y. App. Div. 594, 142 N. Y. Supp. 847.

¹⁴ *Williams v. Western U. Tel. Co.*, 9 Abb. N. Cas. (N. Y.) 437, 61 How. Pr. (N. Y.) 216.

contract as therein expressed.¹⁵ Such a dividend, when the obligation to pay is absolute, is a debt due absolutely to the stockholders, although payment is postponed to a future time.¹⁶

To warrant the recovery of interest therein provided for it must be shown that the dividend was legally declared.¹⁷

§ 3680. Interest and interest dividends. The rule that a corporation cannot reduce its capital stock by distributing any part of the same among its stockholders prevents a corporation from entering into an agreement to pay its stockholders interest upon the amount paid in by them on their shares, if there are no means except the capital stock out of which the interest can be paid, for the effect of such a transaction is to distribute among the stockholders a part of the capital stock.¹⁸

There is nothing, however, to prevent a corporation from agreeing to pay its shareholders interest out of surplus or net profits, out of which it would be lawful for it to pay dividends, for this "is not more withdrawing capital from the corporation than would be the payment of ordinary dividends, to which purpose the fund would otherwise be appropriated."¹⁹ And an agreement by a corporation

¹⁵*Brown v. Lehigh Coal & Navigation Co.*, 49 Pa. St. 270. In this case it was held that under the terms of their contract as found in the scrip the holders thereof were not entitled to any dividends on the scrip or on the stock into which it was subsequently converted except such as were declared after such conversion.

¹⁶*Bankers' Trust Co. v. R. E. Dietz Co.*, 157 N. Y. App. Div. 594, 142 N. Y. Supp. 847; *Billingham v. E. P. Gleason Mfg. Co.*, 101 N. Y. App. Div. 476, 91 N. Y. Supp. 1046, aff'd 185 N. Y. 571, 78 N. E. 1099. In the latter case it was held that a provision in the certificate that the dividend was "payable at the pleasure of the company" referred only to the time of payment, and did not make the obligation to pay any the less absolute.

¹⁷The holder must show that fact in a suit to recover interest, where it appears that the instrument representing the dividend was issued without consideration. *Shelby v. New*

York Steam Co., 121 N. Y. Supp. 619.

¹⁸*Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Troy & B. R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297; *Painesville & H. R. Co. v. King*, 17 Ohio St. 534; *Pittsburgh & S. R. Co. v. Allegheny*, 79 Pa. St. 210; *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. St. 126.

As to the right to interest on dividends after they have been declared, see § 3695, *infra*.

¹⁹*Indiana*. *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 414.

Kentucky. *Louisville & N. R. Co. v. Hart County*, 116 Ky. 186, 25 Ky. L. Rep. 395, 75 S. W. 288; *Hardin County v. Louisville & N. R. Co.*, 92 Ky. 412, 17 S. W. 860.

Massachusetts. *Barnard v. Vermont & M. R. Co.*, 7 Allen 512; *Wright v. Vermont & M. R. Co.*, 12 Cush. 75; *Cunningham v. Vermont & M. R. Co.*, 12 Gray 411; *Waterman v. Troy & G. R. Co.*, 8 Gray 433.

to pay its stockholders interest on the amount paid in on their shares, if it fixes no time for payment, is to be construed as an agreement to pay out of profits when earned.²⁰

It has been held that, where stockholders of a corporation pay in part of their subscription before it is due or calls are made, the corporation may lawfully pay interest thereon, for this is in effect a loan by the stockholders, and not a contribution to the capital stock.²¹

An agreement to pay interest on stock until the happening of a certain event is a contract between the corporation and the individual stockholder, which cannot be altered or modified without his consent. So he cannot be compelled, without his consent, to accept the bonds of the corporation in payment of such interest in lieu of cash.²²

§ 3681. Stock dividends—General principles. A stock dividend is a dividend payable in reserved or additional stock of the corporation, instead of in cash or in property.²³ It has been said that such a dividend is not a dividend, in the ordinary or strict sense of the word.²⁴

“The fact that a dividend may first or last take the shape of cer-

Michigan. *McLaughlin v. Detroit & M. Ry. Co.*, 8 Mich. 100.

Vermont. *Richardson v. Vermont & M. R. Co.*, 44 Vt. 613; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 543.

Where the charter provided for the payment of interest in stock from the time of paying for the stock “up to the time of making the first dividend,” it was held that this meant a cash dividend, and that the running of interest was not stopped by the declaration of a stock dividend of one-quarter of one per cent. *Hardin County v. Louisville & N. R. Co.*, 92 Ky. 412, 17 S. W. 860, followed in *Louisville & N. R. Co. v. Hart County*, 116 Ky. 186, 25 Ky. L. Rep. 395, 75 S. W. 288.

The right to such accrued interest passes to a purchaser of the stock as an incident to it, even though such interest is payable in stock. *Louisville & N. R. Co. v. Hart County*, 116 Ky. 186, 25 Ky. L. Rep. 395, 75 S. W. 288.

²⁰ *Waterman v. Troy & G. R. Co.*,

8 Gray (Mass.) 433; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 543.

²¹ See § 605, *supra*.

²² He is not bound by a resolution of the stockholders directing payment in bonds, to which he does not assent. *McLaughlin v. Detroit & M. R. Co.*, 8 Mich. 100.

²³ It is a dividend payable by the issuing by the corporation of new shares of its own stock to its stockholders. *Union & N. H. Trust Co. v. Taintor*, 85 Conn. 452, 83 Atl. 697; *Green v. Bissell*, 79 Conn. 547, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287, 65 Atl. 1056; *Bryan v. Aiken*, — Del. Ch. —, 82 Atl. 817.

Payment of a stock dividend is made “from an increase of the capital authorized by the legislature or by the charter of the company.” *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656.

²⁴ *Lancaster Trust Co. v. Mason*, 152 N. C. 660, 136 Am. St. Rep. 851, 68 S. E. 235, modifying 151 N. C. 264, 65 S. E. 1015.

tificates of stock does not necessarily make it a stock dividend.”²⁵ “By a stock dividend is generally understood a distribution made by a corporation of shares of its own stock.”²⁶ So a distribution of shares of stock of another corporation in which the company declaring the dividend has invested a part of its surplus earnings is not a stock dividend.²⁷ And the same has been held to be true of the distribution by a corporation of shares of its own stock received by it in payment of a debt, or in which it has legally invested its accumulated earnings.²⁸ On the other hand “a dividend purporting to be made in cash will be regarded as a stock dividend, when it manifestly was intended to be such.”²⁹ The question whether a particular dividend is a stock or cash dividend most frequently arises in determining whether it belongs to the life tenant or remainderman under a will or deed of trust giving the income of stock to one person for life with remainder over, and will be further considered in that connection.³⁰

A stock dividend may be declared in either preferred or common stock where the corporation has authority to issue either.³¹

It has been held that a vote of a corporation declaring a stock dividend does not give a stockholder a vested interest in the stock, as in the case of the declaration of a cash dividend by the directors, so as to prevent a subsequent vote rescinding the declaration.³²

Stock dividends, like cash dividends, belong, in the absence of agreement to the contrary, to the holders of stock at the time the dividend is declared, without regard to the time when the dividend is payable, and without regard to the source from which, or the time during which, the funds so divided among the stockholders were acquired.³³ The right to a stock dividend as between a person entitled to the income only of shares and the remainderman will be considered in a subsequent section.³⁴

§ 3682. — Right to declare stock dividends. If a corporation has issued all the shares of stock which its charter authorizes it to issue,

²⁵ Gray v. Hemenway, 212 Mass. 239, 98 N. E. 789.

²⁶ Gray v. Hemenway, 212 Mass. 239, 98 N. E. 789.

²⁷ See § 3677, supra.

²⁸ See § 3677, supra.

²⁹ Gray v. Hemenway, 212 Mass. 239, 98 N. E. 789.

³⁰ See § 3715, infra.

³¹ Soehnlein v. Soehnlein, 146 Wis.

330, 131 N. W. 739. See also Howell v. Chicago & N. W. R. Co., 51 Barb. (N. Y.) 378, where provision was made for the payment of a dividend on preferred and common stock to each class of stockholders in the same kind of stock as that held by them.

³² See § 3654, supra.

³³ See § 3699, infra.

³⁴ See § 3711 et seq., infra.

and has no authority to increase its capital stock, it is clear that it cannot increase its capital stock by retaining surplus profits in its business, and paying a dividend by issuing additional stock therefor.³⁵ It is otherwise, however, when a corporation has in reserve stock which it can lawfully issue, or when it is authorized to increase its capital stock. In such a case, in the absence of a constitutional or statutory prohibition, if the directors of the corporation, acting in good faith, are of the opinion that it is for the best interests of the corporation and its stockholders to retain profits in the business of the corporation, or as a surplus fund to meet future needs, instead of dividing them among the stockholders as a dividend in cash or property, it is within their discretion to do so, and to pay a dividend by issuing reserved or additional stock.³⁶ And if they act in good faith the transaction may not afterwards as a rule, be successfully questioned, nor assailed by an existing creditor nor by one who has been informed of the circumstances, although it has been held that

³⁵ As to overissues of stock, see § 3467.

³⁶ **United States.** *Schell v. Alston Mfg. Co.*, 149 Fed. 439; *Kenton Furnace, Railroad & Manufacturing Co. v. McAlpin*, 5 Fed. 737. See also *Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525; *Bowers v. Post*, 209 Fed. 660, aff'd 220 Fed. 1006 (mem. dec.).

Connecticut. *Terry v. Eagle Lock Co.*, 47 Conn. 141.

Delaware. *Bryan v. Aiken*, — Del. Ch. —, 82 Atl. 817.

Illinois. *Farwell v. Great Western Tel. Co.*, 161 Ill. 522, 44 N. E. 891, rev'g 47 Ill. App. 579. See *Waterman v. Alden*, 42 Ill. App. 294, rev'd on other grounds 144 Ill. 90, 30 N. E. 972.

New Jersey. *General Inv. Co. v. Bethlehem Steel Corporation*, — N. J. Eq. —, 100 Atl. 347.

New York. *Williams v. Western Tel. Co.*, 93 N. Y. 162; *Howell v. Chicago & N. W. Ry. Co.*, 51 Barb. 378. See *Jones v. Terre Haute & R. R. Co.*, 57 N. Y. 196.

Pennsylvania. *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 31 Atl. 656; *Com. v. Pittsburgh, Ft. W. & C. Ry. Co.*, 74 Pa. St. 83; *Brown v.*

Lehigh Coal & Navigation Co., 49 Pa. St. 270.

Rhode Island. See *Parker v. Mason*, 8 R. I. 427.

Virginia. See *Gordon's Ex'rs v. Richmond, F. & P. R. Co.*, 78 Va. 501.

Washington. *Northern Bank & Trust Co. v. Day*, 83 Wash. 296, 145 Pac. 182; *Lantz v. Moeller*, 76 Wash. 429, 50 L. R. A. (N. S.) 68, 136 Pac. 687.

"In the absence of some statute to the contrary, there is no legal objection to a corporation's declaring a dividend payable in stock out of its net income leaving its ordinary capital unimpaired." In *re Heaton's Estate*, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21; *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

A stock dividend may be declared where the total amount of stock is kept within the charter limits and the profits have been really earned. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538.

A stock dividend is valid where the corporation is authorized to increase its capital stock, and the increase is effected in the manner prescribed.

as to subsequent creditors the holder of such stock may be held accountable.³⁷

Stock dividends are sometimes expressly authorized by statute.³⁸ On the other hand, in some jurisdictions there are constitutional or statutory prohibitions against issuing stock dividends, or limitations upon the power to issue them,³⁹ or imposing a penalty for participation in the declaration of such a dividend.⁴⁰

If the charter of a corporation requires it to pay dividends in cash, it cannot declare a stock dividend and compel its shareholders to accept the new stock instead of cash; and its obligation to pay in cash is not affected by statutory authority to increase its capital stock, or to liquidate its indebtedness by issuing preferred stock.⁴¹

A statutory provision that no corporation shall issue any certificates

Stamford Trust Co. v. Yale & Town Mfg. Co., 83 Conn. 43, 75 Atl. 90.

³⁷ Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538.

"In order to charge a stockholder with further liability, who has received his issue by way of a dividend as paid up stock, actual fraud may be established." The good faith rule does not mean that the matter is referred absolutely to the directorate or other managing agents of the company, but "these officers are supposed and are held to act with good sense and reasonable business prudence." If the directors "have declared a dividend and issued stock for it by an excessive overvaluation of property or by an excessive and entirely unwarranted estimate of the profits or the unearned increment, this would be evidence from which fraud could be inferred, and, in extreme cases, it might * * * be regarded as conclusive." Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538.

³⁸ Soehnlein v. Soehnlein, 146 Wis. 330, 131 N. W. 739.

³⁹ Distribution by a corporation, under statutory authority, of shares of stock purchased by it from the state, is not a violation of a statute forbidding declaration of a stock dividend without authority from a court.

Com. v. Boston & A. R. R., 142 Mass. 146, 7 N. E. 716.

Nor is the issuance of additional stock for its fair market value in cash to secure funds to pay for additions to plant, which might have been paid for by earnings, which earnings were used in part for extra dividends to stockholders. Fall River Gas Works Co. v. Board of Gas & Electric Light Com'rs, 214 Mass. 529, 102 N. E. 475.

⁴⁰ The New Hampshire statute imposing such a penalty does not prohibit the capitalization of a surplus by means other than a stock dividend. Grafton County Elec. Light & Power Co. v. State, 77 N. H. 539, 94 Atl. 193.

⁴¹ Hardin County v. Louisville & N. R. Co., 92 Ky. 412, 17 S. W. 860. In this case it was held that a statute amending the charter of a railroad company, and providing that it should allow all stockholders interest on their stock from the time of paying for the same to the time of making the first dividend, made it obligatory upon the company to pay such dividend in cash, and that this obligation was not affected by a statute authorizing it to increase its capital stock to an amount sufficient to represent the full cost of its road, and to liquidate its indebtedness by issuing preferred stock.

for stock until the stock has been subscribed and paid for in full, does not preclude the declaration of a stock dividend.⁴² Nor does a statute prohibiting the making of dividends except from surplus profits, or the division, withdrawal or payment to the stockholders of any part of the capital stock, or the reduction of the capital stock, without the consent of the legislature.⁴³

A corporation has no right to keep its earnings and make a stock dividend in lieu of distributing them in cash where the inevitable effect would be to deprive the holders of guaranteed stock of their clearly defined rights.⁴⁴

Where the right to make a stock dividend exists, whether or not a dividend shall be declared in this form rests in the fair and honest discretion of the directors, and their decision will not be interfered with so long as they act in good faith and reasonably.⁴⁵

§ 3683. — Necessity for surplus profits. As in the case of a cash or property dividend, a stock dividend can only be issued to represent surplus profits. The assets of the corporation, over and above its debts, etc., must be equal to the amount of the new stock added to the amount of the original capital stock.⁴⁶

Under a constitutional or statutory provision that no corporation shall issue stock except for money, labor done or money or property actually received, and all fictitious increase of stock shall be void, it was held that a corporation with a capital stock of \$10,000 had no authority to double its capital stock, and distribute the new stock among its stockholders as a stock dividend, on the mere statement that its capital stock "has been invested in property which has more than

A corporation cannot pay a dividend in stock instead of cash, against the dissent of a stockholder, where such a mode of payment is contrary to the provisions of its charter, or of a statute, or where the stockholders are entitled to cash dividends, and the shares which it is proposed to issue are of less value than the amount to which they are entitled. *Hoole v. Great Western Ry. Co.*, 3 Ch. App. 262.

⁴² *Stamford Trust Co. v. Yale & Town Mfg. Co.*, 83 Conn. 43, 75 Atl. 90.

⁴³ *Williams v. Western U. Tel. Co.*,

93 N. Y. 162, rev'g 48 N. Y. Super. Ct. 349.

⁴⁴ *Gordon's Ex'rs v. Richmond, F. & P. R. Co.*, 78 Va. 501.

⁴⁵ *Schell v. Alston Mfg. Co.*, 149 Fed. 439; *Williams v. Western U. Tel. Co.*, 93 N. Y. 162; *Howell v. Chicago & N. W. R. Co.*, 51 Barb. (N. Y.) 378.

⁴⁶ *Williams v. Western U. Tel. Co.*, 93 N. Y. 162. And see *Howell v. Chicago & N. W. R. Co.*, 51 Barb. (N. Y.) 378; *Northern Bank & Trust Co. v. Day*, 83 Wash. 296, 145 Pac. 182; *Lantz v. Moeller*, 76 Wash. 429, 50 L. R. A. (N. S.) 68, 136 Pac. 687.

See generally § 3658 et seq., supra.

doubled in value, and is now worth \$20,000 over and above all liabilities." ⁴⁷

"Whether a distribution of stock pro rata among the stockholders of a corporation is a dividend representing profits, or an adjustment of capital account, depends upon the circumstances of each case. If such distribution represents surplus earnings, it may fairly be treated as a dividend, and as the income from the original stock." ⁴⁸

§ 3684. — Effect of stock dividends. A stock dividend converts surplus assets into capital. ⁴⁹

Such a dividend takes nothing from the property of the corporation, and in no way depletes its assets. ⁵⁰ The corporation still has

⁴⁷ *Fitzpatrick v. Dispatch Pub. Co.*, 83 Ala. 604, 2 So. 727. And see *Parsons v. Joseph*, 92 Ala. 403, 8 So. 788.

⁴⁸ *People v. Glynn*, 130 N. Y. App. Div. 332, 114 N. Y. Supp. 460, aff'd 198 N. Y. 605, 92 N. E. 1097.

⁴⁹ "Usually the payment of a stock dividend is made by the transfer of surplus assets to capital." *Union & N. H. Trust Co. v. Taintor*, 85 Conn. 452, 83 Atl. 697.

The profits represented by the dividend are permanently capitalized. *Bryan v. Aiken*, — Del. Ch. —, 82 Atl. 817.

"Such a dividend operates to transfer distributable assets to the individual ownership of the stockholders, thus changing accumulated surplus into permanent capital, and thereby creating an additional liability of the corporation." *In re Heaton's Estate*, 89 Vt 550, L. R. A. 1916 D 201, 96 Atl. 21.

"The declaration of a stock dividend involves the creation and issue of new shares of stock. The basis of the issue, in so far as payment into the corporation is not required of the recipient, is surplus assets which thus become converted into strict capital with all which that implies. From the process there results an increase of both the number of outstanding shares and the amount of the corpo-

rate assets which have had that peculiar dedication to the corporate uses which entitles them to the name of capital, strictly speaking." *Green v. Bissell*, 79 Conn. 547, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287, 65 Atl. 1056.

⁵⁰ *Humphrey v. Lang*, 169 N. C. 601, L. R. A. 1916 B 626, 86 S. E. 526; *Kaufman v. Charlottesville Woolen Mills Co.*, 93 Va. 673, 25 S. E. 1003.

The property of the corporation remains unchanged. *Boston Safe Deposit & Trust Co. v. Adams*, 219 Mass. 175, 106 N. E. 590; *Gardiner v. Gardiner*, 212 Mass. 508, 90 N. E. 171; *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789; *Leland v. Hayden*, 102 Mass. 542, 551.

"A stock dividend neither takes from nor adds to the corporate wealth." *Lancaster Trust Co. v. Mason*, 152 N. C. 660, 136 Am. St. Rep. 851, 68 S. E. 235, modifying 151 N. C. 264, 65 S. E. 1015.

Such a dividend does not distribute property and "nothing passes out of the dominion of the company to the stockholder." *Bryan v. Aiken*, — Del. Ch. —, 82 Atl. 817.

The holder of such stock has withdrawn nothing from the corporation nor in any way depleted its assets. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538.

just as much property as it had before and is just as solvent and just as capable of meeting all demands upon it.⁵¹ Nor does such a dividend add anything to the capital of the shareholder.⁵² "It changes the form of his investment by increasing his number of shares, thereby diminishing the value of each share, leaving the aggregate value of all his stock substantially the same."⁵³ While he acquires the ownership of more shares, each represents a smaller fractional interest than before in the total amount of the corporate property, and his proportionate interest and ownership in the assets of the corporation remain precisely the same.⁵⁴ As has been said by the Supreme Court of the United States: "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares; and the proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones."⁵⁵

⁵¹ *Williams v. Western U. Tel. Co.*, 93 N. Y. 162, rev'g 48 N. Y. Super. Ct. 349.

⁵² "Stock dividends add nothing to the capital of the corporation nor to the capital of the shareholder." *De Koven v. Alsop*, 205 Ill. 309, 63 L. R. A. 587, 68 N. E. 930, aff'g 107 Ill. App. 190.

⁵³ *Terry v. Eagle Lock Co.*, 47 Conn. 141.

⁵⁴ *United States. Staats v. Biograph Co.*, 236 Fed. 454, L. R. A. 1917 B 728.

Connecticut. *Green v. Bissell*, 79 Conn. 547, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287, 65 Atl. 1056.

Delaware. *Bryan v. Aiken*, — Del. Ch. —, 82 Atl. 817.

Massachusetts. *Boston Safe Deposit & Trust Co. v. Adams*, 219 Mass. 175, 106 N. E. 590; *Gardiner v. Gardiner*, 212 Mass. 508, 99 N. E. 171; *Gray v. Hemenway*, 212 Mass. 239, 98

N. E. 789; *Leland v. Hayden*, 102 Mass. 542, 551.

North Carolina. *Humphrey v. Lang*, 169 N. C. 601, L. R. A. 1916 B 626, 86 S. E. 526; *Lancaster Trust Co. v. Mason*, 152 N. C. 660, 133 Am. St. Rep. 851, 68 S. E. 235, modifying 151 N. C. 264, 65 S. E. 1015.

Virginia. *Kaufman v. Charlottesville Woolen Mills Co.*, 93 Va. 673, 25 S. E. 1003.

"After such a dividend the aggregate of the stockholders own no more interest in the corporation than before. The whole number of shares before the stock dividend represented the whole property, and after the dividend they represent that and no more. A stock dividend does not distribute property, but simply dilutes the shares as they existed before." *Williams v. Western U. Tel. Co.*, 93 N. Y. 162, rev'g 48 N. Y. Super. Ct. 349.

⁵⁵ *Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525, aff'g 4 Mackey (D. C.)

§ 3685. — Recovery of dividend in money. If a corporation has declared a stock dividend, a stockholder cannot make it the basis of an action against the corporation to recover his dividend in money, for in bringing the action he ratifies the dividend, and can only recover it as declared.⁵⁶ To permit him to recover in money under such circumstances would be, in effect, making the dividend a cash dividend, which the company never intended. "It would withdraw from the working funds of the company that amount, which would not have been the result had the stock dividend been carried into effect." And it would result in the court making a dividend instead of enforcing the one made by the corporation.⁵⁷

§ 3686. Dividends for particular purposes. It has been held that a resolution of the board of directors of a bank "that the bank shall pay the taxes on the bank stock," shows an intention to declare a dividend equal to the taxes which may be levied on each share; and that, where it does not specify to whom payment shall be made, it may be construed as creating a fund to the credit of each stockholder out of which the taxes which might be levied on his shares could be paid to himself or to the treasurer, and as being equivalent to a cash dividend which may be used by the stockholder in payment of taxes or for any other purpose as he may choose; and hence that stockholders who make a sufficient showing of indebtedness to offset the value of their stock so that the same is not subject to the levy may recover in cash an amount equal to what they would otherwise have been required to pay.⁵⁸

§ 3687. Remedies of stockholders to recover dividends—Action at law against corporation. When the directors of a corporation lawfully declare a dividend, the effect, as we have seen, is to create the relation of debtor and creditor between the corporation and each stockholder for his proportion of the dividend,⁵⁹ and if the corporation refuses to pay any stockholder his share, and the dividend is

130, 54 Am. Rep. 262, quoted with approval in *Bryan v. Aiken*, — Del. Ch. —, 82 Atl. 817; *De Koven v. Alsop*, 205 Ill. 309, 63 L. R. A. 587, 68 N. E. 930, aff'g 107 Ill. App. 190.

⁵⁶ *Terry v. Eagle Lock Co.*, 47 Conn. 141; *State v. Baltimore & O. R. Co.*, 6 Gill (Md.) 363. And see *Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 393. Especially is this true where

the stockholder has also ratified the dividend by recovering his share of the new stock. *Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 393.

⁵⁷ *Terry v. Eagle Lock Co.*, 47 Conn. 141.

⁵⁸ *Redhead v. Iowa Nat. Bank*, 127 Iowa 572, 103 N. W. 796.

⁵⁹ See § 3653, *supra*.

payable in cash, he may recover the same in an action at law,⁶⁰ as, for example, in an action of assumpsit on the common count for money had and received, or in an action of special assumpsit,⁶¹ or an action of debt.⁶² "After a dividend is declared, all community of interest in relation to such dividend, as between the stockholders themselves and between the stockholders and the corporation, is at an end. The right of a party to whom the dividend is payable is recognized as a separate and independent right, which may be enforced as against the corporation. * * * The dividend, from the time that it is declared, becomes a debt due from the corporation to the individual

60 California. *Cates v. Consolidated Realty Co.*, 25 Cal. App. 531, 144 Pac. 301.

Illinois. *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g on other grounds 120 Ill. App. 596.

Iowa. *Redhead v. Iowa Nat. Bank*, 127 Iowa 572, 103 N. W. 796.

Massachusetts. *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833.

New Jersey. *King v. Paterson & H. River R. Co.*, 29 N. J. L. 504, aff'g 29 N. J. L. 82; *Raynolds v. Diamond Mills Paper Co.*, 69 N. J. Eq. 299, 60 Atl. 941; *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373, 59 Atl. 905.

New York. *Searles v. Gebbie*, 115 App. Div. 778, 101 N. Y. Supp. 199, aff'd 190 N. Y. 533, 83 N. E. 1131.

If a dividend has been declared, but not paid to a stockholder, his remedy is by an action against the corporation to compel it to set off and pay to him his share. *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818, modifying on other grounds 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236.

That a stockholder has no right to maintain an action at law for a share of the corporate profits until a dividend has been declared, see § 3652, *supra*.

61 Arkansas. *Southwestern, A. & I. T. Ry. Co. v. Martin*, 57 Ark. 355, 21 S. W. 465.

Georgia. *Albany Fertilizer & Farm Improvement Co. v. Arnold*, 103 Ga. 145, 29 S. E. 695.

Illinois. *Hall v. Rose Hill & E. Road Co.*, 70 Ill. 673.

Massachusetts. *Ellis v. Essex Merrimack Bridge*, 2 Pick. 243.

Missouri. *Hill v. Atoka Coal & Mining Co.*, 21 S. W. 508.

New Jersey. *Jackson's Adm'rs v. Newark Plank Road Co.*, 31 N. J. L. 277.

New York. *In re Le Blanc*, 14 Hun 8, aff'd 75 N. Y. 598; *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417.

Pennsylvania. *West Chester & P. R. R. v. Jackson*, 77 Pa. St. 321.

Vermont. *Chaffee v. Rutland R. Co.*, 55 Vt. 110.

England. *In re Severn & W. & S. Bridge Ry. Co.*, 74 L. T. (N. S.) 219.

"When such a dividend has been declared nothing remains to be done except to pay over the money on demand, and when such is the case in debitatus assumpsit is a proper form of action"; or a recovery may be had on the common count for money had and received on the theory that the corporation has obtained money belonging to the stockholder which, in equity and good conscience, it has no right to retain. *Pease v. Chicago Crayon Co.*, 170 Ill. App. 234.

62 Gulf Coal & Coke Co. v. Musgrove, 195 Ala. 219, 70 So. 179.

stockholder, for the recovery of which, after demand of payment, an action at law may be maintained." ⁶³

Such an action may be maintained, not only by stockholders who have been recognized by the corporation as entitled to share in the dividend, but also by those who have been wrongfully denied the right to share therein, for the law imposes upon a corporation the duty to distribute all dividends which may be declared from time to time ratably on all of its capital stock, and from this duty the law implies a promise on the part of the corporation to each stockholder. ⁶⁴

In order that an action of assumpsit may be maintained, there must have been a demand upon the corporation for payment of the dividend, ⁶⁵ unless the corporation has rendered a demand unnecessary by refusing to recognize the plaintiff as a shareholder, ⁶⁶ or by refusing to pay the dividend to him. ⁶⁷

To sustain an action on the common counts for money had and received, it is necessary that a dividend shall have been declared payable out of money in the hands of the company. ⁶⁸

⁶³ King v. Paterson & H. River R. Co., 29 N. J. L. 82, aff'd 29 N. J. L. 504. See also § 3653, supra.

⁶⁴ Jackson's Adm'rs v. Newark Plank Road Co., 31 N. J. L. 277. See also Southwestern, A. & I. T. Ry. Co. v. Martin, 57 Ark. 355, 21 S. W. 465; Hill v. Atoka Coal & Mining Co. (Mo.), 21 S. W. 508.

⁶⁵ Bank of Louisville v. Gray, 84 Ky. 565, 2 S. W. 168; Hagar v. Union Nat. Bank, 63 Me. 509; State v. Baltimore & O. R. Co., 6 Gill (Md.) 363; Scott v. Central Railroad & Banking Co. of Georgia, 52 Barb. (N. Y.) 45.

Where a bank sued a stockholder on a note, and attached his shares of stock pending the action, and demand was made for payment of a dividend declared upon the attached shares, and refused, it was held that the stockholder, after settling the suit, could not maintain an action for the dividend without renewing his demand. Ralston v. Bank of California, 112 Cal. 215; Hagar v. Union Nat. Bank, 63 Me. 509. See also Bills v. Silver King Min. Co., 106 Cal. 9, 39 Pac. 43; Redhead v. Iowa Nat. Bank,

127 Iowa 572, 103 N. W. 796; Winchester & L. Turnpike Co. v. Wickliffe's Adm'r, 100 Ky. 531, 66 Am. St. Rep. 356, 38 S. W. 866.

In Breslin v. Fries-Breslin Co., 70 N. J. L. 274, 58 Atl. 313, it was held that the evidence was sufficient to show a sufficient demand and a refusal before suit brought.

⁶⁶ Robinson v. National Bank, 95 N. Y. 637.

⁶⁷ Redhead v. Iowa Nat. Bank, 127 Iowa 572, 103 N. W. 796.

⁶⁸ A dividend was declared, and was directed to be paid to the smaller stockholders in cash, and to the others partly in stock and partly in money, the company not being in funds to the full amount of the dividend. One of the latter class of stockholders refused to take payment to any extent in stock, and sued for money had and received. It was held that the action could not be maintained. State v. Baltimore & O. R. Co., 6 Gill (Md.) 363. As to this case, see Jackson's Adm'rs v. Newark Plank Road Co., 31 N. J. L. 277.

Payment of dividends by a corporation to a person who is not entitled to them does not release the corporation from liability. It remains liable to the person entitled to receive them.⁶⁹

An action at law by a stockholder against a corporation for the recovery of a proportion of a dividend should not be united with an action in equity against directors personally for an alleged conspiracy to illegally increase the capital stock. The former action is of course properly brought by the stockholder while the latter should be brought by and in the name of the corporation.⁷⁰

§ 3688. — Remedy in equity. It has been said that a stockholder may maintain a suit in equity to compel payment of a dividend which has been declared and set apart,⁷¹ but, so long as there is an adequate remedy at law by an action of assumpsit, the right to sue in equity is very doubtful.

Of course a stockholder is entitled to such relief in equity if there are other grounds for equitable jurisdiction.⁷² So, if the directors declare a dividend payable at such time as they direct, the dividend must be paid within a reasonable time; and if they refuse to pay the same, or to fix any time for payment, stockholders may sue in equity to compel payment.⁷³ And directors may be sued in equity as trustees *ex maleficio* where they refuse to pay dividends out of a fund set apart for that purpose and within their dominion.⁷⁴

The right to sue in equity to compel the declaration of a dividend has been considered in a previous section.⁷⁵

§ 3689. — Mandamus. Mandamus is not a proper remedy to compel the directors of a corporation to pay a dividend even after it has been declared,⁷⁶ although there is dictum to the effect that it would lie to compel the delivery of the checks or money to stockholders,

⁶⁹ *St. Romes v. Levee Steam Cotton Press*, 20 La. Ann. 381.

As to the liability of a corporation to a pledgee of its stock where it pays dividends to the pledgor after notice of the pledge, see § 3704, *infra*.

⁷⁰ *Searles v. Gebbie*, 115 N. Y. App. Div. 778, 101 N. Y. Supp. 199, *aff'd* 190 N. Y. 533, 83 N. E. 1131.

⁷¹ *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 657. See also *Keppel v. Petersburg R. Co.*, Chase 167, Fed. Cas. No. 7,722; *Beers v. Bridgeport Spring Co.*, 42 Conn. 17; *Cook County*

Brick Co. v. Kaehler, 83 Ill. App. 448.

⁷² See *Foss v. People's Gas Light & Coke Co.*, 241 Ill. 238, 89 N. E. 351, *aff'd* 145 Ill. App. 215.

⁷³ *Beers v. Bridgeport Spring Co.*, 42 Conn. 17.

⁷⁴ See § 3691, *infra*.

⁷⁵ See § 3656, *supra*.

⁷⁶ *People v. Central Car & Manufacturing Co.*, 41 Mich. 166, 49 N. W. 925.

This is especially true where there is any question as to the right of the person claiming them. *Id.*

where a dividend has not only been declared, but the money has been set apart in a bank for the payment, and checks drawn for delivery to the stockholders.⁷⁸

§ 3690. — Action against other stockholders. A person claiming to be a shareholder in a corporation, and entitled to a dividend, but who has not been recognized as such by the corporation in payment of the dividend, cannot maintain an action for money had and received against recognized shareholders for his share. He must enforce his rights by an action against the corporation itself.⁷⁹

§ 3691. — Action against officers of corporation. Ordinarily a stockholder cannot maintain an action against the treasurer or other officer of the corporation for refusing to pay him a dividend, although there were funds of the corporation in his hands sufficient for the payment of the dividend at the time of such refusal.⁸⁰ Nor are directors personally liable for the amount of a declared dividend unless they have converted the fund set apart for its payment to their own use, or have by some act changed their relation to it.⁸¹ But it has been held that the treasurer of a corporation, who holds money to pay a dividend which has been declared, and who refuses to pay the dividend on certain shares on the ground that he is himself the owner of the shares, is liable personally in an action of assumpsit for money had and received, brought in the name of the real owner of such shares, to recover the amount of the dividend.⁸² And it has also been held that where the amount of the dividend has been segregated or placed in a distinct fund controlled by the directors, who are improperly refusing to distribute the same, a suit in equity may be maintained against them as trustees of the fund *ex maleficio*.⁸³

§ 3692. — Set-off of dividend against debt due to corporation. When a stockholder is sued by the corporation upon a debt due from him to the corporation, he has a right to set off against the claim of the corporation any dividends which have been declared and are due to him.⁸⁴ And corporate by-laws sometimes expressly provide that

⁷⁸ *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 657. See also *King v. Paterson & H. River R. Co.*, 29 N. J. L. 504.

⁷⁹ *Peckham v. Van Wagenen*, 83 N. Y. 40, 38 Am. Rep. 392, aff'd 13 Jones & S. (N. Y.) 328.

⁸⁰ *French v. Fuller*, 23 Pick. (Mass.) 108. See also *Smith v. Poor*, 40 Me. 415.

⁸¹ *Searles v. Gebbie*, 115 N. Y. App. Div. 778, 101 N. Y. Supp. 199, aff'd 190 N. Y. 533, 83 N. E. 1131.

⁸² *Williams v. Fullerton*, 20 Vt. 346.

⁸³ *Searles v. Gebbie*, 115 N. Y. App. Div. 778, 101 N. Y. Supp. 199, aff'd 190 N. Y. 533, 83 N. E. 1131.

⁸⁴ *Crawford v. Roney*, 130 Ga. 515, 61 S. E. 117; *Whittington v. Farmers' Bank*, 5 Harr. & J. (Md.) 489; *North-*

dividends on stock not paid for in full shall be credited on the subscription.⁸⁵ It is otherwise, of course, if no dividend has yet been declared, although there may be surplus profits.⁸⁶ And on the theory that declared dividends unpaid are assets of the corporation and liable for its debts, it has been held that a stockholder who is garnisheed by a creditor of the corporation for the amount of his unpaid stock subscription is not entitled to offset the amount of such a dividend.⁸⁷

§ 3693. — Statute of limitations. Since the relation between a corporation and a stockholder with respect to his share of a dividend which has been declared by the corporation is that of debtor and creditor merely, and not that of trustee and cestui que trust, the statute of limitations runs against an action by a stockholder to recover his share in a dividend which has been declared,⁸⁸ even though he may

western Marble & Tile Co. v. Carlson, 116 Minn. 438, 133 N. W. 1014.

But stockholders who are indebted to the corporation on their original subscriptions and for stock purchased from it cannot reduce such liability as against creditors or a trustee in bankruptcy by declaring dividends on the basis of assets which are not profits and when the company is insolvent. Crawford v. Roney, 130 Ga. 515, 61 S. E. 117.

⁸⁵ Gellermann v. Atlas Foundry & Machine Co., 45 Wash. 114, 87 Pac. 1059.

⁸⁶ A debtor to a corporation cannot set off, on a judgment thereon against him, the dividend that will be coming to him as a stockholder when its affairs are wound up, even in equity, unless there is an express agreement to set off the debts against each other pro tanto. Ruckersville Bank v. Hemphill, 7 Ga. 396.

That there is no indebtedness on the part of a corporation to the stockholder which will sustain an action at law until a dividend has been declared, see § 3652, supra.

⁸⁷ Curry v. Woodward, 44 Ala. 305.

⁸⁸ California. Bills v. Silver King Min. Co., 106 Cal. 9, 39 Pac. 43.

Colorado. See Mountain Water Works Const. Co. v. Holme, 49 Colo. 412, 440, 113 Pac. 501.

Iowa. Redhead v. Iowa Nat. Bank, 127 Iowa 572, 103 N. W. 796.

Kentucky. Winchester & L. Turnpike Co. v. Wickliffe's Adm'r, 100 Ky. 531, 66 Am. St. Rep. 356, 38 S. W. 866.

New Hampshire. Hunt v. O'Shea, 69 N. H. 600, 45 Atl. 480.

New York. Kane v. Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417.

Oregon. Baillie v. Columbia Gold Min. Co., 166 Pac. 965.

England. In re Severn & W. & S. Bridge Ry. Co., 74 L. T. (N. S.) 219.

See also cases cited in the notes following.

The statute applies in cases where the dividends have been appropriated by the corporation. Com. v. Springfield, M. & H. Turnpike Co., 10 Bush (Ky.) 254, 257.

"The relationship of the stockholder and the corporation as to dividends declared is not that of trustee and cestui que trust. At the most there is but an implied trust in the corporation as to such dividends. As to implied trusts, the doctrine of laches and the statute of limitations

have been credited with his share on the books of the corporation.⁸⁹ But a state statute of limitations cannot operate to bar an action by the United States to recover dividends on stock owned by it.⁹⁰

Generally the action is governed, in the absence of other express statutory provision, by the statute governing actions on implied contract.⁹¹ But where the declaration is a part of the records of the corporation, the statute governing actions upon obligations in writing for the payment of money is sometimes held to apply.⁹² A claim for the amount of a dividend is not a claim on an open account within the meaning of the statute, where the amount is fixed in the resolution, and the stockholder admittedly owns a definite number of shares, and this is true although the corporation claims a set-off to the satisfaction of which the dividend due the stockholder might have been applied.⁹³

As in other cases, the statute begins to run when the cause of action accrues,⁹⁴ or, in other words, from the time when the dividend becomes payable.⁹⁵ Some courts hold that if the dividend is not payable on any specified day, and is therefore payable on demand, the statute does not begin to run until demand and refusal,⁹⁶ or until

are, in this forum, invokable as a defense." *Foss v. People's Gaslight & Coke Co.*, 145 Ill. App. 215, aff'd 241 Ill. 238, 89 N. E. 351.

⁸⁹ *In re Severn & W. & S. Bridge Ry. Co.*, 74 L. T. (N. S.) 219.

⁹⁰ *In bringing such an action it sues as a creditor and not as a stockholder.* *Chesapeake & D. Canal Co. v. United States*, 223 Fed. 926, L. R. A. 1916 B 734, rev'g on other grounds 206 Fed. 964.

⁹¹ *Com. v. Springfield, M. & H. Turnpike Co.*, 10 Bush (Ky.) 254, 257; *In re Severn & W. & S. Bridge Ry. Co.*, 74 L. T. (N. S.) 219. See also *Bills v. Silver King Min. Co.*, 106 Cal. 9, 39 Pac. 43; *Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501.

⁹² Where the declaration of a dividend is a part of the records of the corporation, and is signed by the proper officer, an action to recover a dividend is governed by the limitation of actions upon an obligation in writing for the payment of money.

Winchester & L. Turnpike Co. v. Wickliffe's Adm'r, 100 Ky. 531, 66 Am. St. Rep. 356, 38 S. W. 866.

In Ball v. Peper Cotton Press Co., 141 Mo. App. 26, 121 S. W. 798, it was held that a resolution declaring a dividend, as shown by the records of the meeting of the directors at which it was declared, accompanied by a credit of the amount due to the stockholders on the books of the company, was a writing for the payment of money, and was governed by the statute relative to such writings.

See also *Bills v. Silver King Min. Co.*, 106 Cal. 9, 39 Pac. 43.

⁹³ *Gulf Coal & Coke Co. v. Musgrove*, 195 Ala. 219, 70 So. 179.

⁹⁴ *Winchester & L. Turnpike Co. v. Wickliffe's Adm'r*, 100 Ky. 531, 66 Am. St. Rep. 356, 38 S. W. 866.

⁹⁵ See *Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501.

⁹⁶ *Armant v. New Orleans & C. R. Co.*, 41 La. Ann. 1020, 7 So. 35; *State v. Baltimore & O. R. Co.*, 6 Gill (Md.)

the stockholder has notice that his right to dividends is denied.⁹⁷ In support of this rule it is said that the stockholder "is under no obligation to draw or demand his dividends within any prescribed period," but "may leave them with the corporation, if he chooses, and be under no default."⁹⁸ "Though considered as a debt, as a shareholder's dividends are payable by the corporation only on demand, its holding of them until the demand is in the nature of a trust relation; and * * * the same rule which requires notice to a cestui que trust of the trustee's repudiation of the trust, to set limitation in motion against him, should govern in the case of a conversion by a corporation of dividends belonging to one of its stockholders."⁹⁹ The liability of the corporation to the stockholder under such circumstances has been compared to that of a bank to its depositors.¹

Other courts have held that even where the dividend is payable on demand, the statute begins to run at the time when it is declared.² In support of this rule it is said that the statute "begins to run from

363; Philadelphia, W. & B. R. Co. v. Cowell, 28 Pa. St. 329, 70 Am. Dec. 128. See also Bills v. Silver King Min. Co., 106 Cal. 9, 39 Pac. 43; Kobogum v. Jackson Iron Co., 76 Mich. 498, 43 N. W. 602; Yeaman v. Galveston City Co., 106 Tex. 389, 167 S. W. 710, — Tex. Civ. App. —, 173 S. W. 489.

⁹⁷ Philadelphia, W. & B. R. Co. v. Cowell, 28 Pa. St. 329, 70 Am. Dec. 128; Yeaman v. Galveston City Co., 106 Tex. 389, 167 S. W. 710, — Tex. Civ. App. —, 173 S. W. 489.

⁹⁸ Yeaman v. Galveston City Co., 106 Tex. 389, 167 S. W. 710.

⁹⁹ Yeaman v. Galveston City Co., 106 Tex. 389, 167 S. W. 710.

¹ Armant v. New Orleans & C. R. Co., 41 La. Ann. 1020, 7 So. 35; Larwill v. Burk, 19 Ohio Cir. Ct. 513; Yeaman v. Galveston City Co., 106 Tex. 389, 167 S. W. 710.

² Winchester & L. Turnpike Co. v. Wickliffe's Adm'r, 100 Ky. 531, 66 Am. St. Rep. 356, 38 S. W. 866.

Failure to make a demand does not suspend the running of the statute. Stearns v. Hibben Dry Goods Co., 11 Ohio Cir. Ct. (N. S.) 553. But see

Larwill v. Burke, 19 Ohio Cir. Ct. 513.

In Kentucky the rule is otherwise where the corporation is a bank, since it is a part of the business of a bank to receive and hold the money of its patrons payable on demand, and the statute runs only from the time of a demand. Bank of Louisville v. Gray, 84 Ky. 565, 2 S. W. 168, as explained in Winchester & L. Turnpike Co. v. Wickliffe's Adm'r, 100 Ky. 531, 66 Am. St. Rep. 356, 38 S. W. 866.

And it has also been held in that state that in an action for dividends the corporation cannot set up that the right of the plaintiff to claim the stock in question is barred by limitations, where there is no showing that he ever had any notice that his right to the stock was denied by the corporation or its stockholders. Owingsville & Mt. S. Turnpike Road Co. v. Bondurant's Adm'r, 107 Ky. 505, 54 S. W. 718.

In Foss v. People's Gaslight & Coke Co., 145 Ill. App. 215, aff'd 241 Ill. 238, 89 N. E. 351, it is said that the rule that the statute does not begin to run until there has been a de-

the time that the debtor is subject to be sued, or from the time that the debtor can, by his own act or of his own volition, become entitled to maintain an action,"³ and that, while a demand is necessary before the stockholder can maintain a suit, he cannot, by neglecting to make a demand, extend the time allowed by law in which to sue.⁴ In Louisiana it is held that prescription begins to run "from the period at which a stockholder becomes entitled to claim dividends declared in his favor."⁵

No particular form of demand is necessary to start the running of the statute where a demand is required.⁶

The strict rule of the statute is not applicable where there is a running account between the stockholder and the corporation on the corporate books, and there are items on both sides within the statutory period.⁷

mand does not obtain in Illinois. This was a suit in equity for an accounting and other relief, however, and it was held that the complainant had been guilty of laches either in making a demand or in the commencement of the suit, and hence was not entitled to relief.

³ Winchester & L. Turnpike Co. v. Wickliffe's Adm'r, 100 Ky. 531, 66 Am. St. Rep. 356, 38 S. W. 866. See generally Landis v. Saxton, 105 Mo. 486, 24 Am. St. Rep. 403, 16 S. W. 912.

⁴ "It is clear that the statute does not begin to run until the cause of action accrues; but the meaning of that is that whenever it is in the power of the creditor to enforce the payment of his demand, his cause of action has accrued, although he may be by law required to make a demand before he involves the debtor in a bill of costs. It may be said that the statute of limitations is a statute of repose, and should be so construed and enforced as to accomplish that object." Winchester & L. Turnpike Co. v. Wickliffe's Adm'r, 100 Ky. 531, 66 Am. St. Rep. 356, 38 S. W. 866. See also Foss v. People's Gaslight & Coke Co., 145 Ill. App. 215, aff'd 241 Ill. 238, 89 N. E. 351.

⁵ St. Romes v. Levee Steam Cotton Press Co., 20 La. Ann. 381.

⁶ In Bills v. Silver King Min. Co., 106 Cal. 9, 39 Pac. 43, stock certificates were issued to a trustee, who was the agent of the owner to collect the dividends. The owner died, and his administratrix applied to the corporation for information as to whether any dividend declared previous to his death remained unpaid, and was informed that all dividends so declared had been paid to his said agent, and that no money was due or unpaid on account thereof. It was held that this constituted a sufficient demand and refusal, if a demand and refusal were necessary.

⁷ Where there is a running account between a stockholder and the corporation on the corporate books, the stockholder being credited with his share of the profits and charged with the amounts withdrawn by him and being credited from time to time with the amounts remaining due him, and there are items on both sides within the statutory period, the strict rule of the statute is not applicable, and the corporation is not entitled to an instruction that the stockholder cannot recover any claim for money that be-

It has been held that where a corporation declares a dividend for the payment of taxes on its stock, it must be assumed that it intends that the dividend shall become available in time to enable the stockholders to pay such taxes before they become delinquent, and hence that the statute will begin to run from the last day when they could have been so paid.⁸

If the corporation, with the consent of the stockholder, retains the amount of a declared dividend as security for possible breaches of covenant on his part, and afterwards converts the money to its own use, the statute runs from the time of such conversion.⁹

The running of the statute cannot be avoided on the ground of fraud where the facts are sufficient to put a person of ordinary prudence and intelligence on inquiry as to the truth, and the failure of the stockholder to discover it is due to his own negligence.¹⁰

Independently of the statute of limitations, a presumption of payment may arise from lapse of time so as to place the burden of showing nonpayment on the stockholder.¹¹ And this rule applies in an action by the United States to recover a dividend on stock owned by it.¹²

§ 3694. — Laches and estoppel. Delay for a period short of that fixed by the statute of limitations will not estop a stockholder from maintaining an action to recover dividends declared where it does not appear that either the corporation or third persons have been misled or prejudiced thereby. And this is true, under such circumstances, though the plaintiff and his assignors constituted a majority

came due more than six years prior to the commencement of the suit. *Breslin v. Fries-Breslin Co.*, 70 N. J. L. 274, 58 Atl. 313.

⁸ *Redhead v. Iowa Nat. Bank*, 127 Iowa 572, 103 N. W. 796. It was further held in this case that if half of the tax is required to be paid before a certain date and the other half before a certain later date, the statute will commence to run as to each half respectively on the date before which it is required to be paid.

⁹ *Gulf Coal & Coke Co. v. Musgrove*, 195 Ala. 219, 70 So. 179.

¹⁰ As where the administratrix of a deceased stockholder is informed by

the corporation that all dividends declared before his death were paid to his agent, in whose name his stock stood as trustee, and makes no further inquiry or effort to discover the truth but permits the estate to be settled and distributed without any reference to such dividends. *Bills v. Silver King Min. Co.*, 106 Cal. 9, 39 Pac. 43.

¹¹ Such a presumption arises after 20 years. *Chesapeake & D. Canal Co. v. United States*, 223 Fed. 926, L. R. A. 1916 B 734, rev'g 206 Fed. 964.

¹² *Chesapeake & D. Canal Co. v. United States*, 223 Fed. 926, L. R. A. 1916 B 734, rev'g 206 Fed. 964.

of the board of directors of the corporation and might have ordered payment at any time.¹³

Unreasonable delay in making a demand or in afterwards commencing suit will bar relief in equity if unexplained.¹⁴ If the suit is brought within the time allowed for bringing the corresponding action at law, the burden devolves on the defendant to allege and prove laches,¹⁵ while if it is brought after that time, the plaintiff should explain the delay in filing his bill.¹⁶ The facts excusing the delay must be alleged. Mere conclusions of the pleader are not sufficient as against a demurrer.¹⁷

§ 3695. — Recovery of interest. When a stockholder demands payment of a dividend, and it is refused, he is entitled to recover interest from the time of such demand and refusal, but he is not entitled to interest before a demand and refusal,¹⁸ in the absence of an express or implied agreement to the contrary.¹⁹ Where a scrip dividend is declared, interest becomes payable upon the amount of the scrip from the time when it is issued, and hence the scrip certificates may properly provide for the payment of interest.²⁰

¹³ *Redhead v. Iowa Nat. Bank*, 127 Iowa 572, 103 N. W. 796.

¹⁴ *Citizens' Savings & Trust Co. v. Belleville & S. I. R. Co.*, 157 Fed. 73; *Foss v. People's Gas Light & Coke Co.*, 241 Ill. 238, 89 N. E. 351, aff'g 145 Ill. App. 215.

¹⁵ *Baillie v. Columbia Gold Min. Co.*, — Ore. —, 166 Pac. 965.

¹⁶ This is true of a suit based on the theory that equity will treat a misappropriation of corporate funds by majority stockholders as an equitable declaration of a dividend entitling plaintiff as a minority stockholder to his aliquot share of the moneys misappropriated. *Baillie v. Columbia Gold Min. Co.*, — Ore. —, 166 Pac. 965.

¹⁷ *Citizens' Savings & Trust Co. v. Belleville & S. I. R. Co.*, 157 Fed. 73.

¹⁸ *United States*. *Keppel v. Petersburg R. Co.*, Chase 167, Fed. Cas. No. 7,722.

Alabama. *Gulf Coal & Coke Co. v. Musgrove*, 195 Ala. 219, 70 So. 179.

Kentucky. *Cochran v. McGee*, 53

S. W. 519; *Bank of Louisville v. Gray*, 84 Ky. 565, 2 S. W. 168.

Maryland. *State v. Baltimore & O. R. Co.*, 6 Gill 363.

New York. *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157.

Pennsylvania. *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128.

¹⁹ Where each stockholder's share of the profits was merely credited to him on the corporate books, and the books showed that during a course of years interest had been credited up by the company upon the balances due the stockholders upon the books, it was held that it was a question for the jury whether there was an implied agreement on the part of the corporation to pay interest, evidenced by its course of bookkeeping. *Breslin v. Fries-Breslin Co.*, 70 N. J. L. 274, 58 Atl. 313.

²⁰ *Bankers' Trust Co. v. R. E. Dietz Co.*, 157 N. Y. App. Div. 594, 142 N. Y. Supp. 847.

In an action to recover past due

Provision is sometimes made in the charter and stock certificates for the payment of interest on overdue dividends on cumulative preferred stock.²¹

A stockholder is not entitled to interest on dividends for a period during which the corporation was prevented from paying him the same by attachments of his stock by third persons.²² But where an injunction restraining the corporation from collecting declared dividends due its stockholders is dissolved, the stockholders may recover simple interest on such dividends from the time when they were declared up to the time when the injunction was dissolved, by way of damages on the injunction bond.²³

§ 3696. — Effect of consolidation. When a corporation which is liable for dividends on its stock is consolidated with another corporation, and the consolidated corporation assumes all its liabilities, it is liable for the dividends.²⁴

§ 3697. Set-off of dividends against debts due from stockholders—
In general. Since a corporation is merely a debtor to its stockholders after a dividend is declared, it is well settled that it has the right of set-off as against stockholders who are indebted to it, and therefore, when a corporation is indebted to a stockholder for a dividend, and a debt is due to it from the stockholder, it may apply the dividend in satisfaction of the debt.²⁵

interest upon an instrument, issued without consideration, and representing a scrip dividend, the plaintiff must show that the dividend was legally declared. *Shelby v. New York Steam Co.*, 121 N. Y. Supp. 619.

²¹ *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13.

²² This is true although the money was, during such period, mingled with the general assets of the corporation, the corporation being ready and willing to pay over the same but for the attachments. *Mustard v. Union Nat. Bank*, 86 Me. 177, 29 Atl. 977.

²³ *Heck v. Bulkley* (Tenn.), 1 S. W. 612.

²⁴ *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157; *Chase v. Vandervilt*, 62 N. Y. 307.

As to the effect of consolidation generally, see the chapter on Consolidation, *infra*.

²⁵ **Kentucky.** See *Gratz v. Redd*, 4 B. Mon. 178, 191.

Maine. *Hagar v. Union Nat. Bank*, 63 Me. 509.

Maryland. *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032.

Massachusetts. *Sargent v. Franklin Ins. Co.*, 8 Pick. 90, 19 Am. Dec. 306.

New Jersey. *King v. Paterson & H. River R. Co.*, 29 N. J. L. 504.

New York. *Bates v. New York Ins. Co.*, 3 Johns. Cas. 238.

Pennsylvania. *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128.

Texas. *First Nat. Bank of Texarkana v. De Morse*, 26 S. W. 417.

It is necessary, of course, in order that the right of set-off may exist, that a debt shall be actually due from the stockholder to the corporation at the time the right of set-off is asserted.²⁶ And the debt must be due from the stockholder himself only, and not due jointly from him and another.²⁷ So, a corporation cannot apply dividends due to an individual stockholder to the payment of a debt due to the corporation from a partnership of which he is a member.²⁸ Conversely, the dividend due by the corporation must be payable by it to the person from whom the obligation to the corporation is demandable.²⁹

West Virginia. *Donnally v. Hearn-*
don, 41 W. Va. 519, 23 S. E. 646.

Compare *Ex parte Winsor*, 3 Story 411, Fed. Cas. No. 17,884; *Attorney General v. State Bank*, 1 Dev. & B. Eq. (N. C.) 545.

In Iowa banks are given the right, by statute, to retain so much of any dividend belonging to any shareholder as may be necessary to pay any taxes levied on his stock, the banks being required to pay such taxes. *Kennedy v. Citizens' Nat. Bank*, 128 Iowa 561, 104 N. W. 1021.

Under the Virginia Code, a judgment against a stockholder for damages for breach of contract may be set off against his action at law for dividends. *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947.

This right cannot be taken advantage of unless it is set up in the answer. *McGill v. Holmes*, Booth & Haydens, 23 N. Y. Misc. 524, 52 N. Y. Supp. 840.

²⁶ A corporation cannot collect out of a dividend, without the consent of the stockholder, an unauthorized assessment. *Ex parte Winsor*, Fed. Cas. No. 17,884.

Where a resolution of the directors of a bank provided that a dividend declared should be entered as a credit on the debt of any shareholder "whose indebtedness is not fully secured," it was held that the dividend

of a director could not be appropriated to the payment of a note upon which he was surety, where, when the dividend was declared, the note was secured by collateral, and several days afterwards the bank, with the consent of the surety, surrendered the collateral, and accepted from the principal, as security for the note and an additional debt of the principal, a trust deed of land reciting that the note was extended for twelve months. *Solomon v. First Nat. Bank*, 72 Miss. 854, 17 So. 383.

A corporation has no right to set off dividends against a debt guaranteed by a stockholder, but which is not yet due. *First Nat. Bank of Texarkana v. De Morse* (Tex. Civ. App.), 26 S. W. 417.

In *Consolidated Fruit Jar Co. v. Wisner*, 110 N. Y. App. Div. 99, 97 N. Y. Supp. 52, aff'd 188 N. Y. 624, 81 N. E. 1162, it was held that the facts did not show a voluntary payment so as to preclude a stockholder from recovering dividends withheld by the corporation on it being proved that he owed nothing to the corporation.

²⁷ *Rumney v. Detroit & M. Cattle Co.*, 129 Mich. 644, 89 N. W. 573.

²⁸ *American Nat. Bank v. Nashville Warehouse & Elevator Co.* (Tenn.), 36 S. W. 960.

²⁹ *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032.

§ 3698. — Effect of transfer of stock. The right of set-off exists only where the indebted shareholder owns the stock at the time the dividend is declared. If he has transferred it, either absolutely or by way of collateral security, before the declaration of the dividend, the corporation must pay the dividend to the transferee, notwithstanding its claim against the transferrer,³⁰ provided the transfer has been duly registered, or notice thereof has been given to the corporation,³¹ since a dividend declared after the transfer belongs to the assignee,³² and the corporation has no lien on shares of its stockholders to secure debts due by them to it.³³ It has been held that, as against an assignee, the corporation has no right to set off an indebtedness of the assignor against so-called liquidation dividends declared after the assignment, whether the indebtedness was incurred before³⁴ or after³⁵ such assignment, even though the transfer has not been recorded.

The corporation's right of set-off is not affected by transfers made after the dividend has been declared,³⁶ for under such circumstances, as we shall see, the dividend belongs to the transferrer.³⁷

§ 3699. Persons entitled to dividends in general. It is an undoubted general rule that, in the absence of agreement to the contrary, all persons who own shares of stock in a corporation at the time a dividend is declared are entitled, as a matter of absolute right,

³⁰ *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032; *American Nat. Bank v. Nashville Warehouse & Elevator Co.* (Tenn. Ch. App.), 36 S. W. 960. And see *Brent v. Bank of Washington*, 2 Cranch C. C. 517, Fed. Cas. No. 1,834. Compare *Bellevue Bank v. Higbee*, 4 Ohio Cir. Ct. 222.

In a New York case, where a stockholder in an insurance company, who had given notes to the company, transferred his stock, it was held that the company had a right to apply dividends accruing on the stock to the payment of one of the notes which fell due before it had any notice of the transfer, since until then the transfer was not good as against the company, but that it could not apply them to notes falling due after notice of the transfer. *Bates v. New York Ins.*

Co., 3 Johns. Cas. (N. Y.) 238.

The corporation will be deemed to have notice of a transfer of the stock disclosed by the record in a suit to which it became a party before the dividend was declared even though it was not then a going concern. *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032.

³¹ See § 3802, *infra*.

³² See § 3700, *infra*.

³³ That a corporation has no lien on shares, see § 3599, *supra*.

³⁴ *Bridges v. National Bank of Troy*, 185 N. Y. 146, 7 Ann. Cas. 285, 77 N. E. 1005.

³⁵ *Union Bank of Brooklyn v. United States Exch. Bank*, 143 N. Y. App. Div. 128, 127 N. Y. Supp. 661.

³⁶ *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032.

³⁷ See § 3700, *infra*.

to share ratably in the dividend in proportion to their respective shares,³⁸ without discrimination³⁹ and regardless of the time when their shares were acquired.⁴⁰ So one who receives stock from a corporation immediately before a dividend is declared has the same right as the other stockholders to share therein, unless he is excluded by the terms of his contract.⁴¹

"A person holding, as owner, the stock of a corporation, becomes thereby entitled to a proportionate share in the profits of the company, and consequently, a duty is imposed by law on the body corporate to distribute all dividends which, from time to time, may be declared, ratably on all its capital stock."⁴²

"Dividends may not be declared upon stock in the treasury of the corporation."⁴³

Of course a corporation holding stock in another corporation under power conferred by its charter has the same right to dividends as any other stockholder. And the same is true, even when a corporation exceeds its powers in subscribing for or purchasing stock in another corporation. If the contract has been fully executed, the corporation acquires title to the stock, and, as the owner thereof, is entitled to dividends.⁴⁴

38 Connecticut. *Phelps v. Farmers' & Mechanics' Bank*, 26 Conn. 269.

Georgia. *Central Railroad & Banking Co. v. Papot*, 59 Ga. 342.

Illinois. *Ryder v. Alton & S. R. Co.*, 13 Ill. 516.

Maine. *Goodwin v. Hardy*, 57 Me. 143, 99 Am. Dec. 758.

New Hampshire. *March v. Eastern R. Co.*, 43 N. H. 515.

New Jersey. *Jackson's Adm'rs v. Newark Plank Road Co.*, 31 N. J. L. 277.

New York. *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157; *Jones v. Terre Haute & R. R. Co.*, 57 N. Y. 196, aff'g 29 Barb. 353; *Hill v. Newichawanick Co.*, 8 Hun 459, aff'd 71 N. Y. 593.

Tennessee. *Brightwell v. Mallory*, 10 Yerg. 196.

A stockholder who is wrongfully refused the right to subscribe to his proportionate share of an issue of new stock, is not entitled to recover dividends thereon where it has been al-

lotted to another, since he is not the owner of the stock. *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156; *State v. Smith*, 48 Vt. 289.

³⁹ See § 3674, *supra*.

⁴⁰ *Jones v. Terre Haute & R. R. Co.*, 57 N. Y. 196, aff'g 29 Barb. (N. Y.) 353.

⁴¹ *Jones v. Terre Haute & R. R. Co.*, 29 Barb. (N. Y.) 353, aff'd 57 N. Y. 196, where the holder of bonds of a corporation convertible at any time into stock exchanged them for stock just before the declaration of a dividend.

⁴² *Jackson's Adm'rs v. Newark Plank Road Co.*, 31 N. J. L. 277.

⁴³ *Gearhart v. Standard Steel Car Co.*, 223 Pa. 385, 72 Atl. 699.

⁴⁴ *Germania Nat. Bank of New Orleans v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Bigbee & W. River Packet Co. v. Moore*, 121 Ala. 379, 25 So. 602; *Milbank v. New York, L. E. & W. R. Co.*, 64 How. Pr. (N. Y.) 20.

As to the power of a corporation to

The fact that a corporation has never issued a certificate of stock to a shareholder does not affect his right to dividends.⁴⁵

The right of a stockholder to dividends cannot be affected by a change in the by-laws made after he had become a stockholder and after dividends have accrued.⁴⁶

§ 3700. Rights on transfer of stock—General rule. As was explained in previous sections, the profits made by a corporation in the conduct of its business belong to the corporate body, and until a dividend has been declared, the individual stockholders have no legal right to any share therein, but after a dividend has been declared, each shareholder has a legal right to share in the dividend in proportion to his stock, and the relation between him and the corporation, to this extent, is that of debtor and creditor.⁴⁷ It follows from this that, when shares of stock are transferred, and there is no agreement to the contrary, the transferee will be entitled, as an incident to his ownership of the stock, and without any separate assignment, to all dividends declared after the transfer, though the profits out of which they are declared may have been earned by the corporation before the transfer, while the transferrer is entitled to all dividends declared before the transfer, although they may not be payable until afterwards.⁴⁸

take and hold stock in another corporation, see § 1116 et seq., supra.

⁴⁵ *Com. v. Springfield, M. & H. Turnpike Co.*, 10 Bush (Ky.) 257; *Ellis v. Essex Merrimack Bridge*, 2 Pick. (Mass.) 243; *Yeaman v. Galveston City Co.*, 106 Tex. 389, 167 S. W. 710.

That a person may be a stockholder although no certificate has ever been issued to him, see § 3427.

⁴⁶ *Gellermann v. Atlas Foundry & Machine Co.*, 45 Wash. 114, 87 Pac. 1059.

⁴⁷ See § 3652, supra.

⁴⁸ *United States. Bowers v. Post*, 209 Fed. 660, aff'd 220 Fed. 1006 (mem. dec.); *Wheeler v. Northwestern Sleigh Co.*, 39 Fed. 347.

California. *Cates v. Consolidated Realty Co.*, 25 Cal. App. 531, 144 Pac. 301.

Connecticut. *Cogswell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059,

aff'd 204 U. S. 1, 51 L. Ed. 343; *Phelps v. Farmers' & Mechanics' Bank*, 26 Conn. 269.

Georgia. *Mann v. Anderson*, 106 Ga. 818, 32 S. E. 870; *Central Railroad & Banking Co. v. Papot*, 59 Ga. 342.

Indiana. *Bright v. Lord*, 51 Ind. 272, 19 Am. Rep. 732.

Iowa. *Redhead v. Iowa Nat. Bank*, 127 Iowa 572, 103 N. W. 796.

Kansas. *Ryan v. Leavenworth, A. & N. W. Ry. Co.*, 21 Kan. 365.

Maine. *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428; *Goodwin v. Hardy*, 57 Me. 143, 99 Am. Dec. 758; *Bates v. Androscoggin & K. R. Co.*, 49 Me. 491.

Maryland. *Gemmill v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032; *Abercrombie v. Riddle*, 3 Md. Ch. 320.

Massachusetts. *In re Foote*, 22 Pick. 299.

Missouri. *McLaran v. Crescent*

In other words, a dividend belongs to the person who owns the stock when the dividend is declared.⁴⁹ The dividend is regarded as earned

Planing Mill Co., 117 Mo. App. 40, 93 S. W. 819. See also Price v. Morning Star Min. Co., 83 Mo. App. 470.

Nebraska. Farmers' & Merchants' Nat. Bank v. Mosher, 63 Neb. 130, 88 N. W. 552; Cook v. Monroe, 45 Neb. 349, 63 N. W. 800.

New Hampshire. March v. Eastern R. Co., 43 N. H. 515.

New York. Robertson v. De Brulatour, 188 N. Y. 301, 80 N. E. 938, aff'g 111 App. Div. 882, 98 N. Y. Supp. 15; Hopper v. Sage, 112 N. Y. 530, 8 Am. St. Rep. 771, 20 N. E. 350; In re Kernochan, 104 N. Y. 618, 11 N. E. 149; Jermain v. Lake Shore & M. S. Ry. Co., 91 N. Y. 483; Boardman v. Lake Shore & M. S. Ry. Co., 84 N. Y. 157, 178; Brundage v. Brundage, 60 N. Y. 544; Jones v. Terre Haute & R. R. Co., 57 N. Y. 196; Currie v. White, 45 N. Y. 822; Rowe v. White, 112 App. Div. 688, 98 N. Y. Supp. 729, aff'd 189 N. Y. 523, 82 N. E. 1132; Hill v. Newichawaniek Co., 8 Hun 459, aff'd 71 N. Y. 593; Tepfer v. Ideal Gas & Electrical Fixtures Co., 58 Misc. 396, 109 N. Y. Supp. 664; Kane v. Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417, aff'd 8 Cow. 360.

North Carolina. Burroughs & Springs v. North Carolina R. Co., 67 N. C. 376, 12 Am. Rep. 611.

Oregon. In re Wilson's Estate, 167 Pac. 580; Steel v. Island Milling Co., 47 Ore. 293, 83 Pac. 783.

Pennsylvania. Corgan v. George F. Lee Coal Co., 218 Pa. 386, 120 Am. St. Rep. 891, 11 Ann. Cas. 838, 67 Atl. 655. See also Coleman v. Columbia Oil Co., 51 Pa. St. 74.

Tennessee. Wallin v. Johnson City Lumber & Manufacturing Co., 136 Tenn. 124, L. R. A. 1917 B 323, 188 S. W. 577.

Utah. Clark v. Campbell, 23 Utah

569, 54 L. R. A. 508, 90 Am. St. Rep. 716, 65 Pac. 496.

Vermont. Lafountain & Woolson Co. v. Brown, 101 Atl. 36; King v. Follett, 3 Vt. 385.

Virginia. Kaufman v. Charlottesville Woolen Mills Co., 93 Va. 673, 25 S. E. 1003.

This rule applies to preferred stock. If a dividend on preferred stock is not declared until after the stock is transferred, it belongs to the transferee, although it should have been declared and paid before the transfer. Jermain v. Lake Shore & M. S. R. Co., 91 N. Y. 483.

The rule applies to stock dividends. Bowers v. Post, 209 Fed. 660, aff'd 220 Fed. 1006 (mem. dec.); Jermain v. Lake Shore & M. S. R. Co., 91 N. Y. 483; Coleman v. Columbia Oil Co., 51 Pa. St. 74; and other cases above cited.

The rule is the same in England. Black v. Homersham, 4 Exch. Div. 24.

⁴⁹ **Georgia.** Mann v. Anderson, 106 Ga. 818, 32 S. E. 870.

Illinois. Waterman v. Alden, 42 Ill. App. 294, rev'd on other grounds 144 Ill. 90, 30 N. E. 972.

Kentucky. Livingston County Bank v. First State Bank, 136 Ky. 546, 124 S. W. 829, 121 S. W. 451.

Maine. Goodwin v. Hardy, 57 Me. 143, 99 Am. Dec. 758.

Maryland. Miller v. Safe Deposit & Trust Co. of Baltimore, 127 Md. 610, 96 Atl. 766; Northern Cent. Dividend Cases, 126 Md. 16, 94 Atl. 338; Gemmell v. Davis, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 461.

Missouri. McLaran v. Crescent Planing Mill Co., 117 Mo. App. 40, 93 S. W. 819; Missouri Bapt. Sanitarium v. McCune, 112 Mo. App. 332, 87 S. W. 93.

at that time, and the law refuses to investigate the question when it was earned in fact.⁵⁰

"Stockholders," said Judge Jenkins in a federal case, "are, as to the property of the corporation, quasi partners, holding per my et per tout. The earnings of the corporation are part of the corporate property, held by the same tenure, and, until separated from the general mass, the interest of the stockholder therein passes with a transfer of the stock; and this, irrespective of the time during which earnings have accrued. By the declaration of a dividend, however, the earnings, to the extent declared, are separated from the general mass of property, and appropriated to the then stockholders, who become creditors of the corporation for the amount of the dividend. The relationship of the stockholder to the corporation, as to the amount of

New York. *Robertson v. De Brulart*, 188 N. Y. 301, 80 N. E. 938, aff'g 111 App. Div. 882, 98 N. Y. Supp. 15; *Hopper v. Sage*, 112 N. Y. 530, 8 Am. St. Rep. 771, 20 N. E. 350; *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157; *Tepfer v. Ideal Gas & Electrical Fixtures Co.*, 58 Misc. 396, 109 N. Y. Supp. 664.

Oregon. *In re Wilson's Estate*, 167 Pac. 580.

Tennessee. *Wallin v. Johnson City Lumber & Manufacturing Co.*, 136 Tenn. 124, L. R. A. 1917 B 323, 188 S. W. 577.

Utah. *Clark v. Campbell*, 23 Utah 569, 54 L. R. A. 508, 90 Am. St. Rep. 716, 65 Pac. 496.

Vermont. *Lafountain & Woolson Co. v. Brown*, 101 Atl. 36.

Virginia. *Gordon's Ex'rs v. Richmond, F. & P. R. Co.*, 78 Va. 501.

Wisconsin. *Zinn v. Germantown Farmers' Mut. Ins. Co.*, 132 Wis. 86, 111 N. W. 1107.

"The dividends follow the stock into the hands of the person who is the legal holder of the stock." *Guarantee Co. of North America v. East Rome Town Co.*, 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503.

The segregation of the earnings to the amount of the dividend takes place at the time when the dividend is de-

clared, although the time of payment is postponed. "The law at that time implies a promise on the part of the corporation to pay to the then stockholders their proportionate amounts as dividends." *Wallin v. Johnson City Lumber & Manufacturing Co.*, 136 Tenn. 124, L. R. A. 1917 B 323, 188 S. W. 577.

"A dividend is usually considered a parcel of the mass of corporate property until declared, and therefore incident to and parcel of the stock up to the time it is declared. Before its declaration it will pass with a sale or device of the stock. Whoever owns the stock prior to the declaration of the dividend owns the dividend also. The moment the dividend is declared, then it becomes separate and distinct from the stock, and the dividend falls to him who is the proprietor of the stock of which it was before incident. A transfer of stock passes all dividends declared subsequent to the transfer." *In re Wilson's Estate*, — Ore. —, 167 Pac. 580.

⁵⁰ *Tepfer v. Ideal Gas & Electrical Fixtures Co.*, 58 N. Y. Misc. 396, 109 N. Y. Supp. 664; *Corgan v. George F. Lee Coal Co.*, 218 Pa. 386, 120 Am. St. Rep. 891, 11 Ann. Cas. 838, 67 Atl. 655.

the dividend, is thus changed from one of partnership ownership to that of creditor. He thereafter stands to the corporation in a dual relation,—with respect to his stock, as partner and part owner of the corporate property; with respect to the dividend, as creditor upon a par with other creditors of the corporation. The severance of the earnings from the general mass of corporate property, and the promise to pay, arising from the declaration of the dividend, works this change. The earnings represented by the dividend, although the fruit of the general property of the company, are no longer represented by the stock, but become a debt of the company to the individual who at the time of the declaration of dividend was the owner of the stock. That the dividend is payable at a future date can work no distinction in the right. The debt exists from the time of the declaration of dividend, although payment is postponed for the convenience of the company. The right became fixed—absolute by the declaration. This right could, of course, be transferred with the stock by special agreement, but not otherwise. The dividend would not pass as an incident of the stock.”⁵¹ In an English case, dividends which have been declared are happily likened to fallen fruit, which does not pass under a sale or gift of the tree.⁵²

§ 3701. — Executory contracts to sell; sales for future delivery.

In the absence of an agreement to the contrary, the buyer under an executory contract to sell stock is not entitled to dividends until the legal title to the stock has passed to him,⁵³ which is not until delivery is made to him or is due to him and is offered to be made, unless there is something in the contract specifying or implying a contrary intention.⁵⁴ A contract to sell on demand does not transfer the stock, and the other party, after a demand and completion of the sale, has no right to a dividend declared before the demand, though not payable until afterwards.⁵⁵

Where there is a sale of stock in *præsenti* but the date of delivery and payment is postponed, the vendee is entitled to all dividends declared between the date of the agreement and the date of closing to

⁵¹ *Wheeler v. Northwestern Sleigh Co.*, 39 Fed. 347, quoted with approval in *Clark v. Campbell*, 23 Utah 569, 54 L. R. A. 508, 90 Am. St. Rep. 716, 65 Pac. 496.

⁵² *De Gendre v. Kent*, L. R. 4 Eq. 283, approved in *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819.

⁵³ *Gilfallan v. Gilfallan*, 168 Cal. 23, Ann. Cas. 1915 D 784, 141 Pac. 623.

⁵⁴ *Gilfallan v. Gilfallan*, 168 Cal. 23, Ann. Cas. 1915 D 784, 141 Pac. 623.

⁵⁵ *Bright v. Lord*, 51 Ind. 272, 19 Am. Rep. 732.

the purchaser.⁵⁶ And this is equally true whether the vendor actually owns the stock when the contract is made or not.⁵⁷ "If the seller, for speculative purposes, takes the chances of acquiring the shares in time for delivery, or if, having the shares at the time of sale, he deals with them till the time for delivery, he acts at his own risk."⁵⁸ On the other hand where stock is deposited in escrow to be delivered to the vendee if he pays a certain sum within a certain time, dividends declared before such payment is made belong to the vendor.⁵⁹ Of course the purchaser is not entitled to dividends declared after the purchase if he loses his right to the stock by failure to comply with the contract of purchase, for his right to the dividend depends upon his ownership of the stock.⁶⁰

Where the representative of a deceased stockholder refuses to recognize a contract right of the surviving stockholders to purchase the stock of the decedent until it is determined by the court, upon such determination the survivors are entitled to dividends declared in the

⁵⁶ *Currie v. White*, 45 N. Y. 822; *Lafountain & Woolson Co. v. Brown*, — Vt. —, 101 Atl. 36.

Where stock is sold, to be delivered at the option of the seller, the purchaser, and not the seller, is entitled to a dividend declared after the sale and before delivery. *Currie v. White*, 45 N. Y. 822; *Black v. Homersham*, 4 Exch. Div. 24.

Under such circumstances the purchaser is chargeable with interest from the date of the sale to the time of delivery and is therefore entitled to the dividends accruing during that time. *Currie v. White*, 45 N. Y. 822.

In *Rowe v. White*, 112 N. Y. App. Div. 688, 98 N. Y. Supp. 729, aff'd 189 N. Y. 523, 82 N. E. 1132, this rule was held not to apply where the owner of stock agreed to sell it to the defendant or to such corporation as he might indicate on the performance of certain conditions, and the stock was delivered to a corporation at the defendant's request, but the conditions named in the contract were not complied with and hence the request could not be regarded as made pursuant to it. Under such circumstances it was held that a dividend

declared between the time when the stock was delivered to the defendant indorsed in blank and the time when it was delivered by him to the corporation and the purchase price was paid by it belonged to the vendor.

⁵⁷ *Currie v. White*, 45 N. Y. 822.

"The purchaser cannot know whether the seller has the shares or not, nor do his rights depend upon that fact. They are the same as if the seller had the shares on hand, which he pretends to sell, and made a present sale of them postponing simply the actual delivery and keeping them on hand, in the meantime. On this theory the purchaser pays interest on the purchase money. He is, therefore, entitled to dividends accruing between the sale and delivery." *Currie v. White*, 45 N. Y. 822.

⁵⁸ *Currie v. White*, 45 N. Y. 822.

⁵⁹ Such payment does not relate back to the date of the agreement, unless under exceptional circumstances. *Clark v. Campbell*, 23 Utah 569, 54 L. R. A. 508, 90 Am. St. Rep. 716, 65 Pac. 496.

⁶⁰ *Phinizy v. Murray*, 83 Ga. 747, 6 L. R. A. 426, 20 Am. St. Rep. 342, 10 S. E. 358.

meantime on paying for the stock at the agreed rate with interest from the date of the decedent's death.⁶¹

One who acts as agent or intermediary in the sale of stock is not entitled to dividends declared between the date when the stock is delivered to him indorsed in blank for the purpose of consummating the sale and the date when such sale is consummated by delivery of the certificates to, and payment of the purchase price by, the vendee.⁶²

§ 3702. — Provisions of statute, charter or by-laws. The general rule stated in the preceding section⁶³ may be changed by statute, or by the corporation's charter or articles of association, or by the terms of the resolution declaring the dividend, as where the articles provide that a shareholder shall not receive any dividend after the period at which he ceases to be the owner of shares, but that dividends on such shares shall continue in suspense until some other person shall become the owner of them.⁶⁴ The effect in this regard of provisions requiring stock transfers to be registered on the books of the corporation is considered in other sections.⁶⁵

§ 3703. — Contract modifications. The general rule that the transferee of stock is entitled to all dividends declared after the transfer, and the transferor to all those declared before the transfer,⁶⁶ may be changed by the terms of the transfer or agreement of the parties.⁶⁷

⁶¹ *In re Lindsay's Estate*, 210 Pa. 224, 59 Atl. 1074.

⁶² *Rowe v. White*, 112 N. Y. App. Div. 688, 98 N. Y. Supp. 729, *aff'd* 189 N. Y. 523, 82 N. E. 1132. And this was held to be true though after the sale was consummated the blank indorsement was filled in with such agent's name and the transfer dated back to a day prior to that on which the dividend was declared.

⁶³ See § 3700, *supra*.

⁶⁴ *Clive v. Clive*, Kay, 600.

⁶⁵ See § 3784 *et seq.*, *infra*.

⁶⁶ See § 3700, *supra*.

⁶⁷ *Farmers' & Merchants' Nat. Bank v. Mosher*, 63 Neb. 130, 88 N. W. 552; *Lancaster Trust Co. v. Mason*, 152 N. C. 660, 136 Am. St. Rep. 851, 68 S. E. 235, modifying 151 N. C. 264, 65 S. E. 1015; *Kaufman v. Charlottes-*

ville Woolen Mills Co., 93 Va. 673, 25 S. E. 1003.

In *Hartley v. Pioneer Iron Works*, 181 N. Y. 73, 73 N. E. 576, *rev'g* 87 N. Y. App. Div. 107, 84 N. Y. Supp. 79, it was held that resolutions of the directors constituted a declaration of a dividend on all the stock of the corporation, including shares that it had purchased from a decedent and an agreement to sell this latter stock, and that the vendee of such stock was entitled to such dividend. And it was further held that where the dividend was credited to the vendee on the corporate books and was permitted to stand on the books for some eighteen months without objection, neither this credit nor a further dividend declared on all the stock could be defeated by changing the corporate books, mak-

So the contract may give the vendee a right to dividends previously declared,⁶⁸ or may give the vendor a right to subsequent dividends,⁶⁹ or may provide that one party or the other is to have all dividends declared up to a certain time.⁷⁰ The usages and rules of stock exchanges in this regard may also enter into and form a part of contracts of sale made through the agency of their members.⁷¹

Some courts have held that one who sells stock reserving the divi-

ing the latter dividend apparently relate to a time prior to the sale of the said stock, under a claim that the sale of said stock had been "ex-dividend."

⁶⁸ Under a contract for the sale of stock "including all dividends due or to become due thereon," the vendee is entitled to a stock dividend previously declared. *Rose v. Barclay*, 191 Pa. St. 594, 45 L. R. A. 392, 43 Atl. 385.

⁶⁹ Under a contract by which a party agreed to buy stock within a certain time if the owner should desire to sell, and which reserved to him all dividends declared during the time or the option, it was held that he was not entitled to a dividend declared before, though it was payable during the time of the option. *Hopper v. Sage*, 112 N. Y. 530, 8 Am. St. Rep. 771, 20 N. E. 350, aff'd 47 N. Y. Super. Ct. 77. But see *Harris v. Stevens*, 7 N. H. 454.

See also *Hancock v. Clark*, 68 Vt. 302, 35 Atl. 317, where the vendor of stock reserved the right to dividends thereon until payment therefor.

⁷⁰ An agreement by which the seller of shares is to receive all dividends up to a certain time does not entitle him to a dividend, declared after that time, of profits earned during the time within which he was entitled to dividends, because a shareholder has no right to the profits of the corporation until a division is made or a dividend is declared. *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449.

Where stock was assigned with a transfer of "all dividends made after the morning of the 23rd of September," both parties at the time expecting that a dividend would be made on the 22nd of the month, but in fact it was not made until after the morning of the 23rd, it was held that the dividend did not pass to the assignee. *Brewster v. Lathrop*, 15 Cal. 21.

⁷¹ *Hill v. Newichawanick Co.*, 8 Hun (N. Y.) 459, aff'd 71 N. Y. 593. In this case it is said: "It is understood that sales of stock made at the board of brokers in this city at any time before the day fixed for the closing of the books of transfer of the corporation or company declaring a dividend payable at a future day, carry with them the dividend so declared, and the price paid is regulated accordingly. After the books are closed, the sales are understood to be ex-dividend, and the price is correspondingly affected, by the fact that the seller retains and is to collect the dividend."

But a usage of the stock exchange cannot be shown where the contract was made at the office of one of the parties, by a broker who, as to it, was not acting as a member of the exchange, and was not shown to be a member, and where such usage would have been inconsistent with the rules of law and would have contradicted the plain terms and legal effect of the contract. *Hopper v. Sage*, 112 N. Y. 530, 8 Am. St. Rep. 771, 20 N. E. 350.

dends that may be declared by a certain date is not entitled to stock dividends, but only to cash dividends, so declared.⁷²

§ 3704. Rights as between pledgor and pledgee. In the absence of agreement to the contrary, a pledge of shares of stock as collateral security carries with it, as an incident of the pledgee's special ownership, the right to receive dividends afterwards declared, to be applied on the debt, or held in trust for the pledgor; ⁷⁵ and if the pledgor col-

⁷² Where two persons exchanged stock owned by them in different corporations, each reserving dividends declared for a certain month, and one of the corporations declared both a stock and a cash dividend in that month, it was held that the cash dividend belonged to the original owner of the stock, but that the stock dividend belonged to the new owner. *Kaufman v. Charlottesville Woolen Mills Co.*, 93 Va. 673, 25 S. E. 1003.

Where a contract for the sale of stock, made after the corporation had declared regular and extra cash dividends and a stock dividend, all payable in January, reserved "the January dividend" to the seller, it was held that this referred only to dividends payable in money, and hence that the seller was entitled to the regular and extra cash dividends, but that the stock dividend belonged to the purchaser, it appearing that neither party knew that it had been declared. *Lancaster Trust Co. v. Mason*, 152 N. C. 660, 136 Am. St. Rep. 851, 68 S. E. 235, modifying 151 N. C. 264, 65 S. E. 1015.

⁷³ **United States.** *Equitable Trust Co. v. National Bank of Commerce*, 211 Fed. 688.

California. *McAuley v. Moody*, 128 Cal. 202, 60 Pac. 778. See also *Gilfalian v. Gilfalian*, 168 Cal. 23, Ann. Cas. 1915 D 784, 141 Pac. 623.

Georgia. *Merchants & Mechanics Bank v. Boyd Co.*, 143 Ga. 755, 85 S. E. 914; *Reid v. Caldwell*, 120 Ga. 718, 48 S. E. 191; *Armour & Co. v. East Rome Town Co.*, 98 Ga. 458, 25 S. E.

504; *Guarantee Co. of North America v. East Rome Town Co.*, 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503.

Illinois. *Fairbank v. Merchants' Nat. Bank of Chicago*, 132 Ill. 120, 22 N. E. 524, rev'g on other grounds 30 Ill. App. 28.

Maryland. *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032.

Massachusetts. See *Farquhar v. Canada-Atlantic & Plant S. S. Co.*, 212 Mass. 278, 98 N. E. 1036.

Missouri. *Gaty v. Holliday*, 8 Mo. App. 118.

Nebraska. *Farmers' & Merchants' Nat. Bank v. Mosher*, 63 Neb. 130, 88 N. W. 552; *Central Nebraska Nat. Bank v. Wilder*, 32 Neb. 454, 49 N. W. 369.

New Hampshire. *Fourth Nat. Bank v. Manchester Real Estate & Manufacturing Co.*, 77 N. H. 481, 93 Atl. 661.

New York. *Booth v. Consolidated Fruit Jar Co.*, 62 Misc. 252, 114 N. Y. Supp. 1000.

Oregon. *Steel v. Island Milling Co.*, 47 Ore. 298, 83 Pac. 783.

Pennsylvania. *Boyd v. Conshocken Worsted Mills*, 149 Pa. St. 363, 24 Atl. 287.

South Carolina. *Maxwell v. National Bank of Greenville*, 70 S. C. 532, 3 Ann. Cas. 723, 50 S. E. 196.

Texas. *Fulton v. National Bank of Denison*, 26 Tex. Civ. App. 115, 62 S. W. 84.

Utah. *George R. Barse Live Stock Co. v. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. 630.

lects them, he will be required to account therefor to the pledgee.⁷⁴ But while it has been said that it is the duty as well as the right of the pledgee to collect them,⁷⁵ it has been held that his failure to do so will not cast upon him the duty of crediting the uncollected dividends on the debt.⁷⁶ Where the stock pledged is assigned by the pledgee, the assignee of the pledge cannot be held liable to the owner of the stock for dividends paid to the pledgee after the assignment.⁷⁷

If the transfer has been registered on the books of the company, or although not so registered, if the corporation has notice thereof, it will be liable to the pledgee if it pays such dividends to the pledgor.⁷⁸ As between the parties the failure to register the transfer on the books of the corporation does not affect the right of the pledgee to dividends.⁷⁹

Failure of a pledgee to demand a dividend before it is paid is not a waiver of his admitted right to a subsequent dividend which he does demand before payment.⁸⁰

Even after the debt has been satisfied the pledgee may recover from the corporation dividends accruing before that time, provided they have not already been paid to the pledgor.⁸¹ But payment to

“The general rule that the increase of the property is pledged with it, applies to dividends accruing on stock while it is held in pledge and gives them to the pledgee.” *Meredith Village Sav. Bank v. Marshall*, 68 N. H. 417, 44 Atl. 526.

“The pledge of the stock was a pledge of the dividends accruing on it during the continuance of the pledge, and gave the pledgee the legal title to both alike.” *Hunt v. Laconia & L. St. Ry. Co.*, 68 N. H. 561, 39 Atl. 437.

When the dividends amount to a sufficient sum to pay the debt, the pledgor is entitled to the stock. *Reid v. Caldwell*, 120 Ga. 718, 48 S. E. 191.

⁷⁴*Equitable Trust Co. v. National Bank of Commerce*, 211 Fed. 688; *Fairbank v. Merchants' Nat. Bank of Chicago*, 132 Ill. 120; 22 N. E. 524, rev'g on other grounds 30 Ill. App. 28.

He receives them to the pledgor's use, and may maintain an action against him for them. *Gaty v. Holliday*, 8 Mo. App. 118.

“When the pledgor receives them he holds them as the trustee of the pledgee, and is answerable for them to the pledgee in a suit for their recovery.” *Meredith Village Sav. Bank v. Marshall*, 68 N. H. 417, 44 Atl. 526.

⁷⁵*Armour & Co. v. East Rome Town Co.*, 98 Ga. 458, 25 S. E. 504; *Guarantee Co. of North America v. East Rome Town Co.*, 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503; *Gaty v. Holliday*, 8 Mo. App. 118.

⁷⁶The dividend is still the property of the pledgor. *McAulay v. Moody*, 128 Cal. 202, 60 Pac. 778.

⁷⁷*Maxwell v. National Bank of Greenville*, 70 S. C. 532, 3 Ann. Cas. 723, 50 S. E. 195.

⁷⁸As to effect of omission to register transfers, see § 3794 et seq., *infra*.

⁷⁹See § 3815, *infra*.

⁸⁰*Fourth Nat. Bank v. Manchester Real Estate & Manufacturing Co.*, 77 N. H. 481, 93 Atl. 661.

⁸¹As to such dividends the pledgee

the pledgor is a good defense to an action brought by the pledgee for that purpose.⁸²

The right of the pledgee to receive dividends extends only to those declared after the making of the pledge, and not to dividends previously declared.⁸³ And it follows that, where a renewal of a note and a pledge of stock given to secure it amounts to a payment of the old note and a release of the pledge securing it, the pledgee is not entitled to dividends declared before such renewal.⁸⁴ But a part payment of the debt and the giving of a new note for the balance will not have that effect where the effect of the transaction is not to create a new and distinct pledge, but the intent of the parties is rather to continue the original pledge in force.⁸⁵

Of course "the parties to the pledge may agree that the dividends may be drawn by the pledgor and held as his property."⁸⁶

An assignment of future dividends does not give the assignee a priority of right thereto over a previous pledgee of the stock, after the latter has demanded payment from the corporation.⁸⁷ But where the assignment is based upon a valuable consideration and the assignee has neither actual nor constructive notice of the pledge, the consent of the pledgee that a dividend may be paid to the assignee may estop him to recover the same from the latter.⁸⁸

is the trustee of the pledgor, and it is his right and duty to collect them, and if they are not paid to the pledgor he may demand of the pledgee an accounting for them. *Guarantee Co. of North America v. East Rome Town Co.*, 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503, followed in *Armour & Co. v. East Rome Town Co.*, 98 Ga. 458, 25 S. E. 504.

⁸² *Guarantee Co. of North America v. East Rome Town Co.*, 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503, followed in *Armour & Co. v. East Rome Town Co.*, 98 Ga. 458, 25 S. E. 504.

⁸³ *Fairbank v. Merchants' Nat. Bank of Chicago*, 132 Ill. 120, 22 N. E. 524, rev'g 30 Ill. App. 28.

See generally § 3700, supra.

⁸⁴ *Fairbank v. Merchants' Nat. Bank of Chicago*, 132 Ill. 120, 22 N. E. 524, rev'g 30 Ill. App. 28.

⁸⁵ *Boyd v. Conshocken Worsted Mills*, 149 Pa. St. 363, 24 Atl. 287.

⁸⁶ *Fourth Nat. Bank v. Manchester Real Estate & Manufacturing Co.*, 77 N. H. 481, 93 Atl. 661.

By express agreement the pledge may not include a pledge of the dividends. *Gaty v. Holliday*, 8 Mo. App. 118.

Of course, where, by a special contract the pledgor reserves the right to collect the dividends himself, the rule that the dividends belong to the pledgee does not apply. *Guarantee Co. of North America v. East Rome Town Co.*, 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503.

⁸⁷ *Fourth Nat. Bank v. Manchester Real Estate & Manufacturing Co.*, 77 N. H. 481, 93 Atl. 661.

⁸⁸ Where the president of the corporation pledges his stock and then assigns future dividends thereon to the treasurer of the corporation, and the pledgee consents to the payment of a dividend to the treasurer, the

§ 3705. Rights of legatees and distributees. Since dividends belong to the person who owns the stock at the time when they are declared,⁸⁹ and since "a legatee of shares takes the stock as it was at the time of the testator's death,"⁹⁰ a specific legatee of shares of stock is entitled to all dividends declared after the testator's death, although out of profits earned before, but he is not entitled, unless by express provision in the will, to dividends declared before the testator's death, although not payable until afterwards. Such dividends form part of the corpus of the estate, and go to the executor.⁹¹ It has, however, been held that so much of an extraordinary dividend as represents surplus accumulated before the testator's death goes to the residuary legatee rather than to a specific legatee of the stock.⁹² On the other hand it has been held that where the stock is doubled after the death of the testator and the new stock allotted to the stockholders on payment of a specified sum per share, a special legatee is entitled, as against the residuary legatee, to so much of the value of the new stock as grew out of the accumulated profit belonging to the old shares, and that where the new stock has been paid for by the administrator out of the funds of the estate, the specific legatee is entitled to have such stock transferred to him on repayment of that amount.⁹³

pledgee is estopped to question his disposition of it, and cannot recover it from him. *Fourth Nat. Bank v. Manchester Real Estate & Manufacturing Co.*, 77 N. H. 481, 93 Atl. 661.

⁸⁹ See § 3700, *supra*.

⁹⁰ *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819; *Missouri Bapt. Sanitarium v. McCune*, 112 Mo. App. 332, 87 S. W. 93; *In re Wilson's Estate*, — Ore. —, 167 Pac. 580.

⁹¹ *Connecticut. Phelps v. Farmers' & Mechanics' Bank*, 26 Conn. 269.

Missouri. McLaran v. Crescent Planing Mill Co., 117 Mo. App. 40, 93 S. W. 819; *Missouri Bapt. Sanitarium v. McCune*, 112 Mo. App. 332, 87 S. W. 93.

New York. In re Kernochan, 104 N. Y. 618, 11 N. E. 149; *In re Brandreth's Estate*, 64 App. Div. 566, 72 N. Y. Supp. 333; *In re Leavitt's Estate*, 86 Misc. 609, 148 N. Y. Supp.

758; *Brundage v. Brundage*, 65 Barb. 397, 1 Thomps. & C. 82, aff'd 60 N. Y. 544.

Oregon. In re Wilson's Estate, 167 Pac. 580.

England. De Gendre v. Kent, L. R. 4 Eq. 283.

"It is immaterial when the dividends accrued, whether before or after the death of the testator." *Missouri Bapt. Sanitarium v. McCune*, 112 Mo. App. 332, 87 S. W. 93.

Where the owner of stock dies before a scrip dividend is declared, the dividend goes to the legatee of the stock; but he is not entitled to a scrip dividend received by the testator. *Brundage v. Brundage*, 65 Barb. (N. Y.) 397, 1 Thomps. & C. 82, aff'd 60 N. Y. 544.

⁹² *In re Leavitt's Estate*, 86 N. Y. Misc. 609, 148 N. Y. Supp. 758.

⁹³ *Bushee v. Freeborn*, 11 R. I. 149,

A bequest of a specific sum to be paid from the proceeds of the sale of the stock is not a bequest of the stock itself, and in such case dividends declared before the sale takes place belong to the estate and not to the legatee.⁹⁴

In states where the title to the personal property of one who dies testate passes to his executor, the executor of course takes title to stock owned by the decedent at the time of his death,⁹⁵ and hence is entitled to dividends on such stock subsequently declared, and may sue to recover the same, until the stock is regularly assigned to the distributees by a decree of distribution. The pendency of an appeal from a decree of distribution suspends its efficacy, and the efficacy of an indorsement and delivery of the stock to the distributee in pursuance thereof, and until the appeal is determined the company has no right to transfer the stock on its books to the distributee nor to his assignees, and can derive no rights from so doing. If the decree is reversed, the right of the executor to the stock is restored and the matter stands as though no such decree had ever been made. And he may recover from the corporation dividends subsequently declared and paid by it to the distributee and his assignees where it had notice of the pendency of the appeal and of the reversal of the decree before such payments were made. And in code states he may maintain an action for that purpose regardless of whether his title to the stock is to be regarded as a legal or an equitable one.⁹⁶

The right to dividends as between a person entitled to the income and profits of stock and the remainderman is considered in a subsequent section.⁹⁷

§ 3706. Rights of trustees. A person holding stock as trustee is entitled to have the dividends paid to him as against the corporation, and such payment relieves the corporation from liability therefor to the cestui que trust.⁹⁸ But the cestui que trust may have the right to say how the dividends are to be disposed of.⁹⁹

⁹⁴ *Missouri Bapt. Sanitarium v. McCune*, 112 Mo. App. 332, 87 S. W. 93.

⁹⁵ See § 3429 et seq., supra.

⁹⁶ *Ashton v. Zeila Min. Co.*, 134 Cal. 408, 66 Pac. 494.

The objection that the assignees of the distributee were not made parties to such an action is waived if not taken advantage of by demurrer or answer. Nor are the assignees injured by failure to make them parties where

they might have intervened had they desired to do so. *Ashton v. Zeila Min. Co.*, 134 Cal. 408, 66 Pac. 494.

⁹⁷ See § 3711 et seq., infra.

⁹⁸ *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20; *Consolidated Fruit Jar Co. v. Wisner*, 110 N. Y. App. Div. 99, 97 N. Y. Supp. 52, aff'd 188 N. Y. 624, 81 N. E. 1162.

⁹⁹ *Farquhar v. Canada-Atlantic & Plant S. S. Co.*, 212 Mass. 278, 98 N. E. 1036.

§ 3707. Rights as between husband and wife. At common law, shares of stock owned by a married woman, and the right to dividends thereon, belong to the husband if he reduces them to possession, and dividends are reduced to possession by the husband if he receives them.¹ In most jurisdictions, however, the married woman's acts have changed the common law, and given married women their property free from the control of the husband; and where this is the case, a corporation has no right to pay a husband dividends on shares owned by his wife, unless she authorizes the payment.² In states where the community property doctrine obtains, dividends declared on stock which is the separate property of either spouse are community property.³

The right of a husband to dividends on his wife's stock is governed, in so far as the right of the corporation to pay the same is concerned, not by the law of the state in which they reside, but by the law of the domicile of the corporation.⁴

§ 3708. Attaching creditors. Where stock is attached, dividends subsequently accruing thereon are impounded equally with the stock itself,⁵ regardless of the time when the acquisitions out of which they are declared may have accrued,⁶ and pass to the purchaser of the stock at the execution sale.⁷ The right of the purchaser to them,

¹ See in this connection:

California. *Dow v. Gould & Curry* Silver Min. Co., 31 Cal. 629.

Maryland. *Brown v. Bokee*, 53 Md. 155.

New Hampshire. *Wells v. Tyler*, 5 Fost. 340.

New York. *Graham v. First Nat. Bank of Norfolk*, 20 Hun 326, aff'd 84 N. Y. 393, 38 Am. Rep. 528; *Burr v. Sherwood*, 3 Bradf. Surr. 85; *Searing v. Searing*, 9 Paige 283.

Pennsylvania. *Slaymaker v. Bank of Gettysburg*, 10 Pa. St. 373.

Virginia. *Harcum's Adm'r v. Hudnall*, 14 Gratt. 369.

A husband's receipt of dividends on his wife's stock is not a reduction of the stock to his possession. *Burr v. Sherwood*, 3 Bradf. Surr. (N. Y.) 85.

² 2 Clark & Marshall on Corporations, 1614.

³ *Bryan v. Sturgis*, 40 Tex. Civ. App. 307, 90 S. W. 704.

⁴ *Graham v. First Nat. Bank of Norfolk*, 20 Hun (N. Y.) 326, aff'd 84 N. Y. 393, 38 Am. Rep. 528.

⁵ **United States.** *Jacobus v. Monongahela Nat. Bank*, 35 Fed. 395. See also *Loewe v. Savings Bank*, 236 Fed. 444, L. R. A. 1917 B 938.

California. *Cates v. Consolidated Realty Co.*, 25 Cal. App. 531, 144 Pac. 301; *McCarthy v. Boothe*, 2 Cal. App. 170, 83 Pac. 175.

Maine. *Hagar v. Union Nat. Bank*, 63 Me. 509.

Nebraska. *Farmers' & Merchants' Nat. Bank v. Mosher*, 68 Neb. 713, 724, 100 N. W. 133, 94 N. W. 1003.

Tennessee. *Moore v. Gennett*, 2 Tenn. Ch. 375.

⁶ *Hagar v. Union Nat. Bank*, 63 Me. 509.

⁷ *Jacobus v. Monongahela Nat.*

however, retains its character as a right to the benefit of declared dividends, and remains separate from the stock,⁸ and hence, in accordance with the general rule,⁹ will not pass under an assignment of the stock by the purchaser, unless specifically included in the assignment.¹⁰

§ 3709. Interpleader. In case conflicting claims are made to dividends by the transferrer and the transferee of shares, or by the pledgor and pledgee, the corporation may file a bill of interpleader,¹¹ and if it fails to do so it will act at its peril in making payment to either claimant.¹² Making the corporation a party to a suit to set aside a transfer of shares of its stock is a demand and notice to it that the dividends on such stock are claimed by the plaintiff, especially where the petition seeks to have the corporation enjoined from paying them to the defendant, and if it does pay them to the defendant it will be liable therefor to the plaintiff in the event that he is ultimately successful in the suit.¹³

§ 3710. Assignment or transfer of dividends. The bona fide holder of a certificate of stock has the right to dispose of his dividends.¹⁴

Bank, 35 Fed. 395; *Cates v. Consolidated Realty Co.*, 25 Cal. App. 531, 144 Pac. 301; *Hagar v. Union Nat. Bank*, 63 Me. 509. See *Farmers' & Merchants' Nat. Bank v. Mosher*, 63 Neb. 130, 88 N. W. 552. See also *Loewe v. Savings Bank*, 236 Fed. 444, L. R. A. 1917 B 938.

⁸ *Cates v. Consolidated Realty Co.*, 25 Cal. App. 531, 144 Pac. 301.

⁹ See § 3700, *supra*.

¹⁰ *Cates v. Consolidated Realty Co.*, 25 Cal. App. 531, 144 Pac. 301.

¹¹ *Cross v. Eureka Lake & Y. Canal Co.*, 73 Cal. 302, 2 Am. St. Rep. 808, 14 Pac. 885; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454, *aff'd* 74 Mo. 77; *McCord v. Nabours*, 101 Tex. 494, 111 S. W. 144, 109 S. W. 913, *aff'g* (Tex. Civ. App.), 103 S. W. 469, 82 S. W. 153. See also *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20. Compare *Hinekey v. Pfister*, 83 Wis. 64, 53 N. W. 21.

¹² *McCord v. Nabours*, 101 Tex. 494, 111 S. W. 144, 109 S. W. 913, *aff'g* (Tex. Civ. App.), 103 S. W. 469, 82 S. W. 153.

¹³ *McCord v. Nabours*, 101 Tex. 494, 111 S. W. 144, 109 S. W. 913, *aff'g* (Tex. Civ. App.), 103 S. W. 469, 82 S. W. 153.

¹⁴ *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530; *Cogswell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059, *aff'd* 204 U. S. 1, 51 L. Ed. 343. See also *New Jersey Car Spring & Rubber Co. v. Fields*, 85 N. J. L. 217, 88 Atl. 1031.

In *Farquhar v. Canada-Atlantic & Plant S. S. Co.*, 212 Mass. 278, 98 N. E. 1036, it was held that an agreement between the promoters of the corporation and a person who purchased in their interest the entire stock of the company operated as an assignment and appropriation of their interest in the net earnings of the company to the reduction of their indebtedness to him, that such agree-

The fact that authority from the holder of a certificate to another to collect dividends is not on file with the corporation does not necessarily or inferentially imply that no such authority was given.¹⁵

§ 3711. Right to dividends as between life tenant and remainderman—Dividends declared before creation of the trust. Under a bequest or gift of the income and profits of shares of stock for life or years, the beneficiary is not entitled to dividends declared before, although not payable until after, the testator's death or the time of the gift. Such a dividend is a debt due from the corporation, and passes to the executor as a part of the estate. "As soon as the profits on shares of stock are ascertained and declared," said the New York court in such a case, "they cease to be the property of the company, and the owner of the shares becomes entitled to the dividend. It at once forms part of his estate. The fact that they are made payable at a future time is immaterial. The dividend to which the life tenant may be entitled as income, can only be that which the company declares after that relation is acquired. In this case the dividend represented profits or income, but had become a debt before the will took effect."¹⁶

§ 3712. — Ordinary cash dividends earned after creation of trust. When the owner of shares of stock makes a bequest or gift of the income and profits to a person for life, there can be no doubt that all ordinary cash dividends declared after creation of the trust will belong to the life tenant as income or profits, if they are declared out of profits earned by the corporation since the testator's death.¹⁷

ment was valid as between the parties though not formally assented to by the company, and that after payment had been made by the company to such person in accordance with the terms of the agreement and without objection, it was too late for one of the promoters or a person claiming under him to contend that the latter was entitled to the dividend.

¹⁵ *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530.

¹⁶ *In re Kernochan*, 104 N. Y. 618, 11 N. E. 149.

That dividends declared before the death of the testator go to the executor and not to a legatee, see § 3705, *supra*.

¹⁷ *Davis v. Jackson*, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21; *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl. 124; *Van Doren v. Olden*, 19 N. J. Eq. 176, 97 Am. Dec. 650; *Estate of Smith*, 140 Pa. St. 344, 23 Am. St. Rep. 237, 21 Atl. 438; *Earp's Appeal*, 28 Pa. St. 368.

An extra cash dividend will go to the life tenant where there is nothing to show that it was not a dividend of profits earned in the regular course of business, and during the term of the life estate. *Newport Trust Co. v. Van Rensselaer*, 32 R. I. 231, 35 L. R. A. (N. S.) 980, 78 Atl. 342.

The apportionment of dividends declared out of profits earned partly before and partly after the creation of the trust will be considered in subsequent sections.¹⁸

§ 3713. — Rule that all cash dividends go to life tenant. In a number of jurisdictions it is held that all cash dividends out of profits, declared after the testator's death, go to the life tenant, although they are payable out of profits earned by the corporation before his death, and although it may be, not an ordinary dividend, but an extraordinary or unusual dividend, payable out of profits which had been allowed to accumulate for a number of years before the testator's death. This is sometimes known as the Massachusetts rule, and prevails in that state,¹⁹ and in Connecticut,²⁰ Delaware,²¹ Georgia,²² Illinois,²³

¹⁸ See §§ 3717, 3718, 3719, *infra*.

¹⁹ *Talbot v. Milliken*, 221 Mass. 367, 108 N. E. 1060; *Boston Safe Deposit & Trust Co. v. Adams*, 219 Mass. 175, 106 N. E. 590; *Gray v. Hemmenway*, 206 Mass. 126, 138 Am. St. Rep. 377, 92 N. E. 31; *D'Ooge v. Leeds*, 176 Mass. 558, 57 N. E. 1025; *Reed v. Head*, 6 Allen (Mass.) 174. See also *Trefry v. Putnam*, — Mass. —, 116 N. E. 904.

A cash dividend on cumulative preferred stock goes to the life tenant though it includes the entire amount of past accumulated dividends which might have been declared thereon, since a preferred stockholder is not entitled to dividends as such until the same have been declared. *Boston Safe Deposit & Trust Co. v. Adams*, 219 Mass. 175, 106 N. E. 590.

²⁰ *Union & N. H. Trust Co. v. Taintor*, 85 Conn. 452, 83 Atl. 697; *Bishop v. Bishop*, 81 Conn. 509, 71 Atl. 583; *Green v. Bissell*, 79 Conn. 547, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287, 65 Atl. 1056; *Bulkeley v. Worthington Ecclesiastical Society*, 78 Conn. 526, 12 L. R. A. (N. S.) 785, 63 Atl. 351; *Boardman v. Boardman*, 78 Conn. 451, 12 L. R. A. (N. S.) 779, 62 Atl. 339; *Smith v. Dana*, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St.

Rep. 51, 60 Atl. 117; *Mills v. Britton*, 64 Conn. 4, 24 L. R. A. 536, 29 Atl. 231.

²¹ *Bryan v. Aiken*, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

²² *Millen v. Guerrard*, 67 Ga. 284, 44 Am. Rep. 720.

In *Jackson v. Maddox*, 136 Ga. 31, Ann. Cas. 1912 B 1216, 70 S. E. 865, it is said: "The idea, which has been sometimes advanced, of making an apportionment between a life-tenant and a remainderman according to the time when a fund was earned, rather than the time when a dividend was declared, has been repudiated by this court in *Mann v. Anderson*, 106 Ga. 818, 32 S. E. 870." The question involved in the latter case was as to an apportionment of a dividend declared after the death of the life tenant between his estate and the remainderman.

²³ *De Koven v. Alsop*, 205 Ill. 309, 63 L. R. A. 587, 68 N. E. 930, aff'g 107 Ill. App. 190.

The holding to this effect in *Waterman v. Alden*, 42 Ill. App. 294, was approved by the Supreme Court on appeal (144 Ill. 90, 30 N. E. 972), although the judgment of the Appellate Court was reversed on other grounds.

Kentucky,²⁴ Maine,²⁵ North Carolina²⁶ and Vermont.²⁷

It has been said that "the principle underlying these * * * decisions is that if the testator had lived the dividend would have been income to him no matter when the earnings were made, and what would have been income to him should be considered as intended by him to be income to his beneficiary for life if declared in dividend during her life."²⁸ Another reason sometimes given for rejecting the qualification that the life tenant is not entitled to so much of the income as was earned in the lifetime of the testator is that "too much difficulty and uncertainty would attend the practical operation of such a test."²⁹

Some of the courts adopting this rule have recognized that there possibly may be exceptions to it,³⁰ but have held that none will be made unless it is clearly demonstrated that the general rule would, under the conditions of the particular case, work inequity, and that some other determination of the conflicting claims would lead to results more in consonance with the strict rights of the parties.³¹

It has been held to apply to cash dividends declared as incidents to

²⁴ *Cox v. Gaulbert's Trustee*, 148 Ky. 407, 147 S. W. 25; *Hite's Devises v. Hite's Ex'r*, 93 Ky. 257, 19 L. R. A. 173, 40 Am. St. Rep. 189, 20 S. W. 778; *Chinn v. Courtney*, 14 Ky. L. Rep. 422.

²⁵ In *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428, it was held that, where a corporation declares a dividend on its stock payable in money, the stockholder at the time, whether a life tenant or a remainderman, is entitled to the whole dividend, irrespective of its source, amount, or the length of time in which it was earned.

In *Gilkey v. Paine*, 80 Me. 319, 14 Atl. 205, it was held that one entitled to the "net annual income" of stock was entitled to all dividends and bonuses distributed which represented surplus earnings.

²⁶ *Humphrey v. Lang*, 169 N. C. 601, L. R. A. 1916 B 626, 86 S. E. 526.

²⁷ *King v. Follett*, 3 Vt. 385.

²⁸ *Bryan v. Aiken*, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

²⁹ *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428.

"The difficulty attending such an inquiry, the impossibility of attaining accuracy, and of ascertaining the many sources from which the profit has been derived, are the reasons for this rule." *Hite's Devises v. Hite's Ex'r*, 93 Ky. 257, 19 L. R. A. 173, 40 Am. St. Rep. 189, 20 S. W. 778.

³⁰ See *Union & N. H. Trust Co. v. Taintor*, 85 Conn. 452, 83 Atl. 697; *Bishop v. Bishop*, 81 Conn. 509, 71 Atl. 583; *Boardman v. Boardman*, 73 Conn. 451, 12 L. R. A. (N. S.) 779, 62 Atl. 339.

³¹ *Boardman v. Boardman*, 78 Conn. 451, 12 L. R. A. (N. S.) 779, 62 Atl. 339.

In *Smith v. Dana*, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51, 60 Atl. 117, it is said that the rule is "one for general application, and to which few if any exceptions should be admitted," and that "it ought not to be, and is not, one which yields whenever an investigation might appear to indicate its failure in a given

the merger of two corporations, and for the immediate purpose of so adjusting the capital and assets of the merging institutions that the merger could be accomplished.³²

§ 3714. — Rule that all stock dividends are capital. In some jurisdictions it is held that a stock dividend on shares, although it may be declared out of profits earned after the death of the testator, becomes a part of the corpus of the estate, to be preserved for the remainderman, and does not go to the life beneficiary as income or profits. This is known as the Massachusetts rule. It obtains in that state,³³ and has also been adopted or recognized in Connecticut,³⁴

case to accomplish what might be conceived to be exact justice upon the basis of some theoretical view of the ultimate rights of persons asserting conflicting successive stock interest. One of the purposes of the rule is to put an end to all such investigations, under all ordinary conditions at least." Followed in *Boardman v. Boardman*, 78 Conn. 451, 12 L. R. A. (N. S.) 779, 62 Atl. 339.

³² *Boardman v. Boardman*, 78 Conn. 451, 12 L. R. A. (N. S.) 779, 62 Atl. 339; *Cox v. Gaulbert's Trustee*, 148 Ky. 407, 147 S. W. 25.

³³ *Talbot v. Milliken*, 221 Mass. 367, 108 N. E. 1060; *Gardiner v. Gardiner*, 212 Mass. 508, 99 N. E. 171; *Hyde v. Holmes*, 198 Mass. 287, 84 N. E. 318; *D'Ooge v. Leeds*, 176 Mass. 558, 57 N. E. 1025. See also *Trefry v. Putnam*, — Mass. —, 116 N. E. 904; *Davis v. Jackson*, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121; *Leland v. Hayden*, 102 Mass. 542; *Daland v. Williams*, 101 Mass. 571; *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705; *Atkins v. Albree*, 12 Allen (Mass.) 359.

³⁴ *Union & N. H. Trust Co. v. Taintor*, 85 Conn. 452, 83 Atl. 697; *Bishop v. Bishop*, 81 Conn. 509, 71 Atl. 583; *Green v. Bissell*, 79 Conn. 547, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287, 65 Atl. 1056; *Boardman v. Boardman*, 78 Conn. 451, 12 L.

R. A. (N. S.) 779, 62 Atl. 339; *Smith v. Dana*, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51, 60 Atl. 117; *Mills v. Britton*, 64 Conn. 4, 24 L. R. A. 536, 29 Atl. 231; *Spooner v. Phillips*, 62 Conn. 62, 16 L. R. A. 461, 24 Atl. 524; *Hotchkiss v. Brainerd Quarry Co.*, 58 Conn. 120, 19 Atl. 521; *Brinley v. Grou*, 50 Conn. 66, 47 Am. Rep. 618. See also *Bulkeley v. Worthington Ecclesiastical Society*, 78 Conn. 526, 12 L. R. A. (N. S.) 785, 63 Atl. 351.

In *Spooner v. Phillips*, 62 Conn. 62, 16 L. R. A. 461, 24 Atl. 524, it was held that, where an association increases its capital stock to represent profits actually invested in extending its business and increasing the value of its plant, and apports new shares pro rata among the existing shareholders, the new shares represent capital, and not "income" or "dividends," and do not pass by a gift of the original shares by deed of trust "to and for the use of" another, and "to pay over to her the dividends and income thereof" during her life, and on her decease "to reconvey and transfer said stock" to the donor.

In Connecticut it is now expressly provided by statute that all stock dividends shall belong to the trust fund, and shall not be deemed a part of the use or income, unless otherwise expressly declared in the instrument creating the trust, or unless the cor-

Illinois³⁵ and Rhode Island,³⁶ by the Supreme Court of the United States,³⁷ and by the Supreme Court of the District of Columbia,³⁸ has been approved by way of dictum in North Carolina,³⁹ and is the rule by statute in Georgia.⁴⁰ And it also seems to be the rule in England.⁴¹

poration expressly declares such dividend to be made from the earnings of the corporation since the formation of the trust. Gen. St. 1902, § 377.

³⁵ *Billings v. Warren*, 216 Ill. 281, 74 N. E. 1050; *Blinn v. Gillett*, 208 Ill. 473, 490, 100 Am. St. Rep. 234, 70 N. E. 704, aff'g 109 Ill. App. 75; *De Koven v. Alsop*, 205 Ill. 309, 63 L. R. A. 587, 68 N. E. 930, aff'g 107 Ill. App. 190.

The holding to this effect in *Waterman v. Alden*, 42 Ill. App. 294, was approved by the Supreme Court on appeal (144 Ill. 90, 30 N. E. 972), although the judgment of the Appellate Court was reversed on other grounds.

³⁶ *Greene v. Smith*, 17 R. I. 28, 19 Atl. 1081; *Petition of Brown*, 14 R. I. 371, 51 Am. Rep. 397. See also *Newport Trust Co. v. Van Rensselaer*, 32 R. I. 231, 35 L. R. A. (N. S.) 930, 78 Atl. 342, where there is dictum to this effect.

³⁷ *Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525, aff'g 4 Mackey (D. C.) 130, 54 Am. Rep. 262. In this case, a testatrix bequeathed 280 shares of stock in a gaslight company in trust to pay dividends, "without diminution of principal," to her daughter for life. The company having, from its earnings, doubled its original plant, issued, after the death of testatrix, additional shares of stock, representing this increase in the capital, and divided them among the stockholders in proportion to the original stock owned by them. The beneficiary claiming these additional shares absolutely, on the ground that they represented the profits or earnings of the original shares, and were, in effect, dividends, it was held that they

were in no sense dividends, and that it was the duty of the trustee to hold them, together with the original shares, for the benefit of the remainderman, paying only the dividends upon the whole number to the life legatee.

See the analysis and criticism of this case in *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739, where it is suggested that the real holding was that stock dividends are presumptively capital in the absence of a showing to the contrary, and that the case merely changed the rebuttable presumption of fact in favor of the life tenant to one against him, and repudiated the Massachusetts doctrine that the intention of the creator of the particular interest in the stock is immaterial.

³⁸ *Gibbons v. Mahon*, 4 Mackey (D. C.) 130, 54 Am. Rep. 262, aff'd 136 U. S. 549, 34 L. Ed. 525. See preceding note.

³⁹ *Humphrey v. Lang*, 169 N. C. 601, L. R. A. 1916 B 626, 86 S. E. 526. In this case the dividend in question was held to be a cash dividend and hence to belong to the life tenant.

⁴⁰ Ga. Code, 1911, § 3667. *Jackson v. Maddox*, 136 Ga. 31, Ann. Cas. 1912 B 1216, 70 S. E. 865; *Millen v. Guerrard*, 67 Ga. 284, 44 Am. Rep. 720.

⁴¹ "When a testator or settler," it was there said, "directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is

This doctrine proceeds on the ground that since, in the absence of any restraining statute, a corporation may treat and deal with the money earned by it either as an increase of its property, or as the profits of its business, so long as the corporation holds it as part of the corporate property, it is capital of the corporation, and the interest therein represented by each share of stock is capital, and not income of that share.⁴²

§ 3715. — What are stock and what are cash dividends. In those jurisdictions in which all stock dividends are ordinarily regarded as capital and go to the life tenant,⁴³ it is often necessary to determine whether a particular dividend is a stock or a cash dividend before it can be determined to whom it belongs. As we have seen in previous sections it is the characteristic feature of a stock dividend that the property of the corporation remains unchanged, but that each one of the shares of the increased capital stock represents a smaller fractional interest than before in the total amount of the corporate property;⁴⁴ while on the other hand a cash dividend does diminish the property of the corporation by exactly the amount of the dividend so paid out, but leaves the fractional interests represented by each share of the capital stock exactly what it was before.⁴⁵ It has been said that whether a dividend is the one or the other depends upon the substance and intent of the action of the corporation, as shown by its vote.⁴⁶

binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, inures to the benefit of all who are interested in the capital." Fry, J., in *Bouch v. Sproule*, 12 App. Cas. 385, 397. And see *In re Barton's Trust*, L. R. 5 Eq. 238.

For a review of the English authorities, see *Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525, aff'g 4 Mackey (D. C.) 130, 54 Am. Rep. 262; *Kalbach v. Clark*, 133 Iowa 215, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647, 110 N. W. 599; *McLouth v. Hunt*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, aff'g 92 Hun. (N. Y.) 607, 38 N. Y. Supp. 1146;

Pritchitt v. Nashville Trust Co., 96 Tenn. 472, 33 L. R. A. 856, 36 S. W. 1064; *In re Heaton's Estate*, 69 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21.

⁴² *Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525, aff'g 4 Mackey (D. C.) 130, 54 Am. Rep. 262; *De Koven v. Alsop*, 205 Ill. 309, 63 L. R. A. 587, 68 N. E. 930, aff'g 107 Ill. App. 190; *D'Ooge v. Leeds*, 176 Mass. 558, 57 N. E. 1025; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121.

⁴³ See § 3714, *supra*.

⁴⁴ See § 3684, *supra*.

⁴⁵ See § 3677, *supra*.

⁴⁶ *Gardiner v. Gardiner*, 212 Mass. 508, 99 N. E. 171; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121; *Lealand v. Hayden*, 102 Mass. 542, 551.

In applying the rule that cash dividends go to the life tenant "regard should be had not alone to the letter

The form of the dividend is not necessarily controlling.⁴⁷ And "the real nature of the transaction must be determined from what was done in carrying it out."⁴⁸ So "a dividend purporting to be made in cash will be regarded as a stock dividend when it manifestly was intended to be such,"⁴⁹ while, on the other hand, the fact that a cash dividend is misnamed a stock dividend in the votes of directors and stockholders authorizing and carrying into effect the distribution cannot change its character.⁵⁰ Nor will the mere fact that a dividend may first or last take the shape of certificates of stock necessarily make it a stock dividend.⁵¹

Where stockholders are given a right to receive a dividend in cash, or in lieu thereof, to subscribe for a new issue of stock to the amount of their interest in the accumulated earnings, at their election, it is in effect a cash dividend, which goes to the life tenant.⁵² And the same is true of a dividend of cash representing profits where the

of the vote of declaration, but also to the substance and intent of the corporate act as disclosed thereby." *Bulkeley v. Worthington Ecclesiastical Society*, 78 Conn. 526, 12 L. R. A. (N. S.) 785, 63 Atl. 351. And see, to the same effect, *Smith v. Dana*, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51, 60 Atl. 117.

⁴⁷ *Gardiner v. Gardiner*, 212 Mass. 508, 99 N. E. 171; *Leland v. Hayden*, 102 Mass. 542, 551.

⁴⁸ *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789.

⁴⁹ *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789.

⁵⁰ The fact that a cash dividend is misnamed a stock dividend in the votes of directors and stockholders authorizing and carrying into effect the distribution cannot change its character. *Green v. Bissell*, 79 Conn. 547, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287, 65 Atl. 1056.

⁵¹ *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789; *Leland v. Hayden*, 102 Mass. 542, 551.

⁵² *Ballantine v. Young*, 79 N. J. Eq. 70, 81 Atl. 119; *Humphrey v. Lang*, 169 N. C. 601, L. R. A. 1916 B 626, 86 S. E. 526.

Where the stockholder is at liberty to take and retain the cash dividend, or to take the new stock and treat the dividend as payment for it, the dividend cannot be said to be a stock dividend either in form or effect. *Cox v. Gaulbert's Trustee*, 148 Ky. 407, 147 S. W. 25; *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl. 124.

Where a dividend payable in cash was declared out of the profits of a corporation, it was held to be income as between life tenant and remainderman, although permanent improvements to an equal amount had previously been made by the corporation, and it was just sufficient to pay for a voted increase of the capital stock for which the stockholders were at liberty to subscribe in proportion to their shares. *Davis v. Jackson*, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21.

The holding to this effect in *Waterman v. Alden*, 42 Ill. App. 294, was approved by the Supreme Court on appeal (144 Ill. 90, 30 N. E. 972), although the judgment of the Appellate Court was reversed on other grounds. See also *De Koven v. Alsop*, 205 Ill. 309, 63 L. R. A. 587, 68 N. E. 930,

stockholder is at liberty to invest it at par in stock which is worth more than par, if he is also at liberty to keep the cash dividend and sell the right to subscribe for the stock.⁵³ Similarly, a dividend payable absolutely in cash is a cash dividend, although the stockholders are given the option to use a part of it in paying a subscription which they are invited to make to the stock of a new corporation having no legal connection with the one by which the dividend is declared.⁵⁴

But the contrary is true, and the dividend will be regarded as a stock dividend, where the stockholder cannot sell the right to take the stock if he keeps the cash dividend,⁵⁵ or where the dividend in cash is a mere form, and is required by the votes under which it is declared to be applied in payment of the new stock.⁵⁶ Similarly, where each stockholder is given the right to take his proportion of the new shares at par or to allow the directors to sell them and to take his dividends out of the avails, it is a stock dividend, whichever he does.⁵⁷ And a distribution of stock as a dividend is to be regarded as a stock dividend notwithstanding an agreement by all the stockholders as individuals, which was contemplated by the directors in making the dividend, whereby the new stock was at once converted into money, and, in effect, reached the stockholders in that form.⁵⁸ It has also been held that, where a corporation, which is unable to pay arrears of dividends on cumulative preferred stock, compromises with the holders thereof by reducing the amount of the dividend one-half and issuing double the amount of his stock to each stock-

aff'g 107 Ill. App. 190, where the holding in *Waterman v. Alden* is discussed and approved.

⁵³ *Hyde v. Holmes*, 198 Mass. 287, 84 N. E. 318; *Davis v. Jackson*, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21; *Newport Trust Co. v. Van Rensselaer*, 32 R. I. 231, 35 L. R. A. (N. S.) 930, 78 Atl. 342.

⁵⁴ *Gray v. Hemenway*, 206 Mass. 126, 138 Am. St. Rep. 377, 92 N. E. 31.

⁵⁵ *Daland v. Williams*, 101 Mass. 571.

⁵⁶ So, where a corporation passed a vote to increase its capital stock, and the board of directors, in pursuance thereof, declared that a dividend in cash should be payable to each stockholder, but that it should be applied by him in payment of the new shares,

and directed the treasurer of the corporation to issue certificates for the new shares to stockholders only, and the treasurer gave to each stockholder a check for his share of the dividend, which checks were surrendered by the stockholders in exchange for new shares, and destroyed, it was held that the dividend was in effect a stock dividend, and that a person entitled to the income of shares for life had no right thereto. *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121.

⁵⁷ In substance such a dividend "is a dividend of newly created stock with an option to have it turned into cash by a sale of the stock." *Leland v. Hayden*, 102 Mass. 542, 551.

⁵⁸ *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

holder, the new stock goes to the remainderman and not to the life tenant.⁵⁹

"Where the surplus or undivided profits already have been employed in the enlargement of the capital investment of the corporation and have become devoted to its physical plant, then a device to accomplish the transformation of such assets into stock obviously for the benefit of existing stockholders commonly will be treated as a stock and not a cash dividend."⁶⁰

"A stock dividend is generally understood as a distribution made by a corporation of shares of its own stock."⁶¹ And a dividend payable in the stock of another company in which the corporation has invested part of its surplus profits and which is held by it as an asset is a cash dividend and goes to the life tenant.⁶² And the same has been held to be true of a distribution by a corporation of shares of its own stock received by it in payment of a debt,⁶³ or in which it has legally invested its surplus-earnings, taking title thereto in the name of a trustee.⁶⁴

§ 3716. — Rule that form of dividend is immaterial. In some jurisdictions, no distinction at all is made between dividends payable in cash and dividends payable in stock or scrip entitling the holder to stock, so far as the respective rights of life beneficiary and remainderman are concerned; but it is held that a stock dividend declared on shares out of profits belongs to the person entitled to the income or profits, if, under the same circumstances, he would be entitled to a cash dividend. This rule, which is generally known as the Pennsylvania or American rule, obtains not only in Pennsylvania,⁶⁵ but is

⁵⁹ *Mills v. Britton*, 64 Conn. 4, 24 L. R. A. 536, 29 Atl. 231.

⁶⁰ *Talbot v. Milliken*, 221 Mass. 367, 108 N. E. 1060.

⁶¹ *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789.

⁶² *Union & N. H. Trust Co. v. Taintor*, 85 Conn. 452, 83 Atl. 697; *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789. See also *Leland v. Hayden*, 102 Mass. 542, 551.

⁶³ *Green v. Bissell*, 79 Conn. 547, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287, 65 Atl. 1056.

⁶⁴ *Leland v. Hayden*, 102 Mass. 542, 551.

⁶⁵ *In re Stokes' Estate*, 240 Pa.

277, 87 Atl. 971; *Estate of Smith*, 140 Pa. St. 344, 23 Am. St. Rep. 237, 21 Atl. 438. And see *Appeal of Philadelphia Trust, Safe-Deposit & Insurance Co. (Pa.)*, 16 Atl. 734; *Vinton's Appeal*, 99 Pa. St. 434, 44 Am. Rep. 116; *Moss' Appeal*, 83 Pa. St. 264, 24 Am. Rep. 164; *Wiltbank's Appeal*, 64 Pa. St. 256, 3 Am. Rep. 585; *Turpin's Estate*, 21 Wkly. N. Cas. (Pa.) 542.

"Where a corporation, having actually made profits, proceeds to distribute such profits among the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards

also in force in the states of Delaware,⁶⁶ Iowa,⁶⁷ Kentucky,⁶⁸ Minnesota,⁶⁹ New Hampshire,⁷⁰ New York.⁷¹ It likewise obtains in New

form and grasps the substance, would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits." Moss' Appeal, 83 Pa. St. 264, 24 Am. Rep. 164.

"The distribution of it among the stockholders in the form of new certificates has no effect whatever upon the equitable right to it. It makes no kind of difference whether this fund is secured by 540 or by 1,350 certificates. Its character cannot be changed by the evidence given to secure it." Earp's Appeal, 28 Pa. St. 368.

⁶⁶ Bryan v. Aiken, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

"All net earnings, however they may have been treated or used by the corporation during their accumulation, and regardless of the period during which they have accumulated, if declared as dividends out of net profits during the life tenancy, are given to the life tenant when declared, whether such dividends are made in cash or capital stock, provided that the principal of the trust is not diminished thereby." Bryan v. Aiken, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

⁶⁷ Kalbach v. Clark, 133 Iowa 215, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647, 110 N. W. 599. See also Lauman v. Foster, 157 Iowa 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14.

⁶⁸ Cox v. Gaulbert's Trustee, 148 Ky. 407, 147 S. W. 25; Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 19 L. R. A. 173, 40 Am. St. Rep. 189, 20 S. W. 778; Chinn v. Courtney, 14 Ky. L. Rep. 422.

"If the dividend be in fact a profit, although declared in stock, it should be held to be income." Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 19

L. R. A. 173, 40 Am. St. Rep. 189, 20 S. W. 778.

⁶⁹ Goodwin v. McGaughey, 108 Minn. 248, 122 N. W. 6.

⁷⁰ "The fact that a dividend is distributed in stock or in cash is of little, if of any, importance in determining whether it is income or capital." Holbrook v. Holbrook, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl. 124. In this case the dividend was held to be a cash dividend, but the court says that its conclusion would not have been different had it been deemed a stock dividend.

⁷¹ In re Baldwin, 209 N. Y. 601, 103 N. E. 734, aff'g 157 N. Y. App. Div. 897, 142 N. Y. Supp. 1107; In re Osborne, 209 N. Y. 450, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915 A 298, 103 N. E. 723, 823, modifying 153 N. Y. App. Div. 312, 138 N. Y. Supp. 18; Robertson v. De Brulatour, 188 N. Y. 301, 80 N. E. 938, aff'g 111 N. Y. App. Div. 882, 98 N. Y. Supp. 15; McLouth v. Hunt, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, aff'g 92 Hun (N. Y.) 607, 38 N. Y. Supp. 1146; In re Me-grue, 170 N. Y. App. Div. 653, 155 N. Y. Supp. 1059, aff'd 217 N. Y. 623, 111 N. E. 1091; In re Leask, 159 N. Y. App. Div. 102, 143 N. Y. Supp. 865, modifying 142 N. Y. Supp. 462; Riggs v. Cragg, 26 Hun (N. Y.) 89, rev'd 89 N. Y. 479, on the ground that the surrogate had no jurisdiction to decide the question; Goldsmith v. Swift, 25 Hun (N. Y.) 201; Simpson v. Moore, 30 Barb. (N. Y.) 637; Clarkson v. Clarkson, 18 Barb. (N. Y.) 646.

This is the general rule where the dividend is based upon an accumulation of earnings or profits. Lowry v. Farmers' Loan & Trust Co., 172 N. Y. 137, 64 N. E. 796, aff'g 56 N. Y. App. Div. 408, 67 N. Y. Supp. 759.

In De Koven v. Alsop, 205 Ill. 309,

Jersey,⁷² Maryland,⁷³ South Carolina,⁷⁴ Tennessee,⁷⁵ Vermont,⁷⁶ Wisconsin⁷⁷ and apparently in Maine.⁷⁸

63 L. R. A. 587, 68 N. E. 930, aff'g 107 Ill. App. 190, it is said that *McLouth v. Hunt*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, and *Lowry v. Farmers' Loan & Trust Co.*, 172 N. Y. 137, 64 N. E. 796, seem to have turned to some extent on the language used in creating the trusts.

⁷² *Ballantine v. Young*, 79 N. J. Eq. 70, 81 Atl. 119; *Ashhurst v. Field's Adm'r*, 26 N. J. Eq. 1, aff'd 29 N. J. Eq. 625.

In *Day v. Faulks*, 79 N. J. Eq. 66, 81 Atl. 354, aff'd 81 N. J. Eq. 173, 88 Atl. 384, the vice chancellor held on the authority of his decision in *Ballantine v. Young* that "stock dividends declared after the death of the testator, go, in so far as they represent earnings made since his death, to the life tenant." He further held that the life tenants were not entitled to the whole of the stock dividend in question. The life tenants alone appealed, and the Court of Errors and Appeals affirmed the decree (81 N. J. Eq. 173) on the ground that they were not entitled to the whole of the dividend.

⁷³ *Miller v. Safe Deposit & Trust Co. of Baltimore*, 127 Md. 610, 96 Atl. 766; *Northern Central Dividend Cases*, 126 Md. 16, 94 Atl. 338; *Atlantic Coast Line Dividend Cases*, 102 Md. 73, 61 Atl. 295; *Thomas v. Gregg*, 78 Md. 545, 44 Am. St. Rep. 310, 23 Atl. 565.

A stock dividend must be treated as income if it is based upon earnings, and if the company had the power to so distribute it, and such power was validly exercised. *Coudon v. Updegraf*, 117 Md. 71, 83 Atl. 145.

⁷⁴ *Wallace v. Wallace*, 90 S. C. 61, 72 S. E. 553.

⁷⁵ *Pritchitt v. Nashville Trust Co.*, 96 Tenn. 472, 33 L. R. A. 856, 36 S. W. 1064.

⁷⁶ In *re Heaton's Estate*, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21.

⁷⁷ *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

In *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739, it is said that it was not the intention of the court in *Pabst v. Goodrich*, 133 Wis. 43, 113 N. W. 398, "that a stock dividend as between two such ownerships goes any different than a cash dividend," but that that case "should be read merely as deciding merely that a dividend made as a means of distributing among stockholders surplus accumulated before the creation of the two interests in the stock, as regards such stock, went to the owner in remainder."

⁷⁸ In *Gilkey v. Paine*, 80 Me. 319, 14 Atl. 205, it is said that the Massachusetts rule has proved to be a very elastic one in the state of its origin, that "the effort in this country has been generally, to maintain the integrity of the capital, and to give all surplus earnings, in whatever form distributed, to the life tenant." It is further said that perhaps no better rule than this can be adopted, and that it is the one to which the court has endeavored to adhere in the case at bar. In this case the question was as to the right to shares of its own stock purchased by the corporation with its bonds and distributed to its stockholders, and it was held that they belonged to the remainderman.

In *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428, it is said by way of dictum that "the decided preponderance of authority probably concedes the point that dividends of stock go to the capital, under all ordinary circumstances." But the dividend involved in that case was a cash one, and the question was not involved or decided.

In support of this rule it has been said that, had the testator lived, the new shares would have been income to him upon his investment in the original shares, and that hence they are income to his estate, as owner of the same investment.⁷⁹ It has also been said that "the opposite view, when followed back to its source, will be found not to have been logically deduced and based on principle, but to be a mere arbitrary rule; framed largely, it would seem, for convenience of administration regardless of the liberty and inviolability of private contract rights."⁸⁰ And that it results in giving to corporate officers, by the mere form adopted by them for distributing surplus earnings, power to defeat the purpose and intention of the person creating the trust,⁸¹ "and would take from the ownership of property in the form of corporate stock freedom to dispose of it as the owner sees fit, as he may any other kind of property."⁸²

The fact that the dividend is in the form of preferred instead of common stock can make no difference in the application of the rule, so long as the transaction was in good faith with no intent to take advantage of the owner in remainder.⁸³

Of course the rule under discussion applies only where stock dividends are declared out of profits. If they represent corporate capital they go to the remainderman as in the case of other divisions of capital;⁸⁴ and, as in other cases,⁸⁵ the question, therefore, becomes one of fact as to the actual nature of the dividend.⁸⁶

⁷⁹ *Bryan v. Aiken*, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817; *Pritchitt v. Nashville Trust Co.*, 96 Tenn. 472, 33 L. R. A. 856, 36 S. W. 1064; *In re Heaton's Estate*, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21.

"In construing his will it is only reasonable to presume that the testator used the word 'income' in the sense it would have when applied to the stock while he was living; so that what would have been income to him, if living, should be regarded as income to his estate after his death." *In re Heaton's Estate*, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21.

⁸⁰ *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739. And see to the same effect, *In re Heaton's Estate*, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21.

⁸¹ *In re Heaton's Estate*, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21; *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

⁸² *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

⁸³ *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

⁸⁴ See § 3720, *infra*.

⁸⁵ See § 3726, *infra*.

⁸⁶ *Delaware*. *Bryan v. Aiken*, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

Iowa. *Kalbach v. Clark*, 133 Iowa 215, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647, 110 N. W. 599.

Maryland. *Thomas v. Gregg*, 78 Md. 545, 44 Am. St. Rep. 310, 28 Atl. 565.

New Hampshire. *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl. 124.

The rule must also be taken in connection with the rule that the life tenant is entitled to all dividends declared out of profits earned after the severance of the life estate from the ultimate ownership of the stock, while the remainderman is entitled to those declared out of those earned before that time, in jurisdictions where both of these doctrines obtain.⁸⁷

§ 3717. — Apportionment according to time when earned—General statement. In a number of jurisdictions it is held that the life tenant is entitled to all dividends declared out of profits earned after the testator's death, but that dividends out of profits which accumulated during the testator's lifetime belong to the corpus of his estate and go to the remainderman,⁸⁸ or, in other words, that a dividend declared after the right to the income has been severed from the ultimate ownership of the stock belongs to the person entitled to the income only in so far as it is derived from the earnings of the stock after such severance.⁸⁹ And, according to this doctrine, if a dividend is declared out of profits earned partly before and partly after the testator's death, it is apportioned between the life tenant and the

New York. *McLouth v. Hunt*, 154 N. Y. 179, 39 L. R. A. 230; 48 N. E. 548, aff'g 92 Hun 607, 38 N. Y. Supp. 1146.

⁸⁷See § 3717 et seq., *infra*.

⁸⁸**Minnesota.** *Goodwin v. McGaughey*, 108 Minn. 248, 122 N. W. 6.

New Hampshire. *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl. 124; *Lord v. Brooks*, 52 N. H. 72.

New Jersey. *Ashhurst v. Field's Adm'r*, 26 N. J. Eq. 1, aff'd 29 N. J. Eq. 625; *Van Doren v. Olden*, 19 N. J. Eq. 176, 97 Am. Dec. 650.

Pennsylvania. In *re Stokes' Estate*, 240 Pa. 288, 87 Atl. 975; *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 320; *Estate of Smith*, 140 Pa. St. 344, 23 Am. St. Rep. 237, 21 Atl. 438; *Estate of Oliver*, 136 Pa. St. 43, 9 L. R. A. 421, 20 Am. St. Rep. 894, 20 Atl. 527; *Biddle's Appeal*, 99 Pa. St. 278; *Wiltbank's Appeal*, 64 Pa. St. 256, 3 Am. Rep. 585; *Earp's Appeal*, 28 Pa. St. 368.

South Carolina. *Wallace v. Wal-*

lace, 90 S. C. 61, 72 S. E. 553; *Cobb v. Fant*, 36 S. C. 1, 14 S. E. 959.

Wisconsin. In *re Barron's Will*, 163 Wis. 275, 155 N. W. 1087; *Miller v. Payne*, 150 Wis. 354, 136 N. W. 811; *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739; *Pabst v. Goodrich*, 133 Wis. 43, 14 Ann. Cas. 824, 113 N. W. 398. (See explanation of this case in *Soehnlein v. Soehnlein*, 146 Wis. 330, 351, 131 N. W. 739.)

A profit made by a land company by the sale of a tract of land after the testator's death is to be regarded as made after that time where the increase in the value of the land is due to the discovery of ore thereon by third persons after that time. *Oliver's Estate*, 136 Pa. St. 43, 9 L. R. A. 421, 20 Am. St. Rep. 894, 20 Atl. 527.

⁸⁹*Brown v. Brown*, 72 N. J. Eq. 667, 65 Atl. 739; *Lister v. Weeks*, 60 N. J. Eq. 215, 225, 46 Atl. 558, aff'd 61 N. J. Eq. 675, 47 Atl. 1132; *Lang v. Lang's Ex'r*, 57 N. J. Eq. 325, 41 Atl. 705, modifying 56 N. J. Eq. 603, 40 Atl. 278.

remainderman.⁹⁰ Reasons given in support of this rule are that the undivided earnings, if any, give value to the stock, although not yet carried to the surplus account, and form part of the capital of the testator's estate just as much as if the stock had been converted into money on the day of his death.⁹¹ And it has been said that, while it perhaps may be difficult to apply the rule in some cases, "when properly applied it arrives at results which are absolutely just, and secures

⁹⁰ *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl. 124; *Brown v. Brown*, 72 N. J. Eq. 667, 65 Atl. 739; *Lister v. Weeks*, 60 N. J. Eq. 215, 225, 46 Atl. 558, aff'd 61 N. J. Eq. 675, 47 Atl. 1132; *Lang v. Lang's Ex'r*, 57 N. J. Eq. 325, 41 Atl. 705, modifying 56 N. J. Eq. 603, 40 Atl. 278; *Ashhurst v. Field's Adm'r*, 26 N. J. Eq. 1, aff'd 29 N. J. Eq. 625; *Van Doren v. Olden*, 19 N. J. Eq. 176, 97 Am. Dec. 650; *In re Stokes' Estate*, 240 Pa. 288, 87 Atl. 975; *In re Stokes' Estate*, 240 Pa. 277, 87 Atl. 971; *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 320; *Estate of Smith*, 140 Pa. St. 344, 23 Am. St. Rep. 237, 21 Atl. 438; *Biddle's Appeal*, 99 Pa. St. 278; *Earp's Appeal*, 28 Pa. St. 368; *In re Barron's Will*, 163 Wis. 275, 155 N. W. 1087; *Miller v. Payne*, 150 Wis. 354, 136 N. W. 811.

Surplus and undivided profits existing at the time of the death of the testator go into the corpus of the trust estate. The surplus cannot be regarded as income until it is declared as a dividend "for the obvious reason that what is surplus one year may be swept away as losses the next year." *In re Barron's Will*, 163 Wis. 275, 155 N. W. 1087.

"The dividend is apportionable in the ratio that the surplus at testator's death bears to the surplus accumulated thereafter up to the time the dividend was declared." *Ballantine v. Young*, 79 N. J. Eq. 70, 81 Atl. 119.

The division may be agreed upon and settled by the interested par-

ties. *In re Barron's Will*, 163 Wis. 275, 155 N. W. 1087.

⁹¹ *Lang v. Lang's Ex'r*, 57 N. J. Eq. 325, 41 Atl. 705, modifying 56 N. J. Eq. 602, 40 Atl. 278.

"Where trust funds, of which the income, interest, or profits are given to one person for life, and the principal bequeathed over upon the death of the life tenant, are invested either by the trustee, or at the death of the testator, in stock or shares of an incorporated company, the value of which consists in part of an accumulated surplus or undivided earnings laid up by the company, as is frequently the case, such additional value is part of the capital; that this, as well as the par value of the shares, must be kept by the trustee intact for the benefit of the remainderman; but the earnings on such capital, as well as upon the par value of the shares, belong to the life tenant." *Van Doren v. Olden*, 19 N. J. Eq. 176, 97 Am. Dec. 650.

"Where the profits of a manufacturing or banking corporation have been accumulating for many ears until the market value of the stock is more than double its original price, and the owner dies, directing the 'income' of his estate to be applied to particular objects for limited periods, these extraordinary accumulations are as much a part of his capital as any other portion of his estate, and must, therefore, be regarded as forming a part of the principal from which the future income is to arise." *Earp's Appeal*, 28 Pa. St. 368.

to the life tenant, and to those entitled in remainder, precisely what they of right are entitled to have, and this cannot be said of the practical operation of any other rule.”⁹²

The rule requiring an apportionment applies to stock dividends in those states where no distinction is made between stock and cash dividends in so far as the respective rights of life tenants and remaindermen are concerned,⁹³ although there is, of course, no room for its application in those jurisdictions where all stock dividends are regarded as capital and go to the remainderman.⁹⁴

In Maryland stock dividends are distributed and apportioned according to the time when the fund out of which they are declared was earned,⁹⁵ but all cash dividends declared during the continuance

⁹² *Smith's Estate*, 140 Pa. St. 344, 356, 23 Am. St. Rep. 237, 21 Atl. 438, quoted with approval in *In re Stokes' Estate*, 240 Pa. 277, 87 Atl. 971.

⁹³ *Minnesota*. *Goodwin v. McGaughey*, 108 Minn. 248, 122 N. W. 6.

New Hampshire. *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl. 124.

New Jersey. *Ballantine v. Young*, 79 N. J. Eq. 70, 81 Atl. 119.

New York. See § 3718, *infra* (next section).

Pennsylvania. *In re Stokes' Estate*, 240 Pa. 277, 87 Atl. 971; *Estate of Smith*, 140 Pa. St. 344, 23 Am. St. Rep. 237, 21 Atl. 438; *Earp's Appeal*, 28 Pa. St. 368.

Wisconsin. *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739; *Pabst v. Goodrich*, 133 Wis. 43, 14 Ann. Cas. 824, 113 N. W. 398. (See explanation of *Pabst v. Goodrich* in *Soehnlein v. Soehnlein*.)

In *Day v. Faulks*, 79 N. J. Eq. 66, 81 Atl. 354, the vice chancellor, following his decision in *Ballantine v. Young*, 79 N. J. Eq. 70, 81 Atl. 119, apportioned a stock dividend, and held that the life tenants were entitled to such a dividend in so far as it represented earnings made after the testator's death, but further held that they were not entitled to anything more than such earnings, and hence

that they were not entitled to the whole of the dividend in question because a part of it represented capital. The decree was affirmed on the latter ground on appeal by the life tenants (81 N. J. Eq. 173, 88 Atl. 384), the Court of Errors and Appeals holding that the general question whether a stock dividend, strictly so called, is to be apportioned between the life tenant and the remainderman was not presented for their decision because the remaindermen had not appealed.

For states in which no distinction is made between stock and cash dividends in so far as the respective rights of life tenants and remaindermen are concerned, see § 3716, *supra*.

Extraordinary stock dividends will, of course, be apportioned in those jurisdictions where extraordinary dividends are apportioned and ordinary ones are not. See § 3718, *infra*.

⁹⁴ See § 3714, *supra*.

⁹⁵ *Miller v. Safe Deposit & Trust Co. of Baltimore*, 127 Md. 610, 96 Atl. 766; *Northern Cent. Dividend Cases*, 126 Md. 16, 94 Atl. 338.

In *Thomas v. Gregg*, 78 Md. 545, 44 Am. St. Rep. 310, 28 Atl. 565, the directors had adopted a resolution reciting that the net earnings for three specified fiscal years, one of which ended before the testator's death, had amounted to a certain sum,

of the life tenancy go to the life tenant though they are extraordinary in character and regardless of the time when the fund was accumulated.⁹⁶ In that state it has been said that when a stock dividend "is

and that said sum had been used for permanent improvements and betterments, and that therefore a dividend payable in stock be declared covering said years. It was held that as the earnings for the specified fiscal year ending before the testator's death could be easily told, they should be treated as capital.

In *Coudon v. Updegraff*, 117 Md. 71, 83 Atl. 145, it was held that a stock dividend declared out of earnings must be treated as income. It does not appear from the opinion when the fund out of which the dividend was declared accumulated, and that point was not discussed, but the testator died in 1890, and the dividend was declared in 1901.

In *Foard v. Safe Deposit & Trust Co. of Baltimore*, 122 Md. 476, 89 Atl. 724, where a cash dividend declared out of funds accumulated during testator's lifetime was held to be corpus, *Coudon v. Updegraff* was distinguished on the ground that "it was not until the lapse of a long interval after the commencement of the trust that the dividend * * * was declared."

In *Coast Line Dividend Cases*, 102 Md. 73, 61 Atl. 295, the whole of a stock dividend was held to be income and to belong to a life tenant under a deed of trust. It does not clearly appear from the opinion when the fund was accumulated, but the dividend was declared more than ten years after the creation of the trust.

⁹⁶ In *Quinn v. Safe Deposit & Trust Co.*, 93 Md. 285, 53 L. R. A. 169, 48 Atl. 835, a sinking fund had been accumulated for the payment of certain bonds of a mortgagor which the corporation had indorsed. The bonds and mortgage were paid by another

company, and a part of the sinking fund was thereupon distributed to the stockholders of the first corporation in the form of a cash dividend. Under these circumstances it was held that the whole of such dividend belonged to the life tenant although almost all of the fund had been accumulated before the death of the testator. The court distinguishes *Thomas v. Gregg* on the ground that the fund out of which the stock dividend was declared in that case had been capitalized.

In *Northern Cent. Dividend Cases*, 126 Md. 16, 94 Atl. 338, it was held that the distribution of two extra cash dividends was governed by the rule in *Quinn v. Safe Deposit & Trust Co.*, and belonged to the life tenant regardless of when the fund out of which it was declared was earned.

In *Foard v. Safe Deposit & Trust Co. of Baltimore*, 122 Md. 476, 89 Atl. 724, the whole of an extraordinary cash dividend, declared out of the proceeds of the sale of stock bought with the earnings of the company prior to the death of the testator, was held to constitute a part of the corpus of the trust estate. In the course of its opinion the court says, "The cases in this state are in full accord with the Pennsylvania rule. In *Thomas v. Gregg*, 78 Md. 549, the Massachusetts rule was repudiated in favor of that in *Earp's Appeal*, and the case of *Quinn v. Safe Deposit & Trust Co.*, 93 Md. 285, was clearly distinguishable from the earlier cases as set forth in the opinion."

In *Ex parte Humbird*, 114 Md. 627, 80 Atl. 209, it is said by way of dictum that where a dividend is declared out of earnings accumulated in part before the creation of the trust, an

declared in the testator's lifetime, the stock thus acquired by him would normally constitute, like the original stock on account of which it was issued, a part of the corpus of the estate passing under the will. It has therefore been considered proper to inquire as to the extent to which, if at all, such a dividend was earned during a period when the testator as a stockholder had an interest in the corporate earnings, and when the dividend, if at once declared, would have become incorporated in the estate destined for the remainderman." ⁹⁷

Though a will requires all income received during a certain period after the testator's death to be added to the corpus of the estate, and though the fund out of which a dividend is declared is earned during that period, the dividend will go to the life tenant if it is not declared until after such period has expired. Such a dividend acquires its character as income "from the time and circumstances of its origin, and not from the terms of the trust under which it is applied to its intended object. Though it may be directed to be appropriated to corpus purposes, it is received as income by the trustees." ⁹⁸

§ 3718. — Ordinary and extraordinary dividends. Where the rule requiring apportionment obtains, it applies to extraordinary dividends,⁹⁹ and if their payment has impaired the surplus as it existed when the trust was created, the deficiency must be restored by

apportionment is proper and necessary.

In *Washington County Hospital Ass'n v. Hagerstown Trust Co.*, 124 Md. 1, L. R. A. 1915 A 738, 91 Atl. 787, where the question was as to the right to dividends declared out of the proceeds of the sale of lumber manufactured from standing timber, and it appeared that a portion of such lumber was manufactured during the lifetime of the testator, but that it was not sold or the proceeds received until after his death, it was held that the proceeds of it were not earned during his lifetime.

⁹⁷ *Miller v. Safe Deposit & Trust Co. of Baltimore*, 127 Md. 610, 96 Atl. 766.

⁹⁸ *Miller v. Safe Deposit & Trust Co. of Baltimore*, 127 Md. 610, 96 Atl. 766.

⁹⁹ *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl.

124; *Walker v. Walker*, 68 N. H. 407, 39 Atl. 432; *Lord v. Brooks*, 52 N. H. 72; *Ballantine v. Young*, 79 N. J. Eq. 70, 81 Atl. 119; *Brown v. Brown*, 72 N. J. Eq. 667, 65 Atl. 739; *Lang v. Lang's Ex'r*, 57 N. J. Eq. 325, 41 Atl. 705, modifying 56 N. J. Eq. 603, 40 Atl. 278; *Ashhurst v. Field's Adm'r*, 26 N. J. Eq. 1, aff'd 29 N. J. Eq. 625; *Van Doren v. Olden*, 19 N. J. Eq. 176, 97 Am. Dec. 650; *In re Stokes' Estate*, 240 Pa. 288, 87 Atl. 975; *In re Stokes' Estate*, 240 Pa. 277, 87 Atl. 971; *In re Barron's Will*, 163 Wis. 275, 155 N. W. 1087.

In *Ballantine v. Young*, 79 N. J. Eq. 70, 81 Atl. 119, a dividend of 200 per cent. was held to be an extraordinary dividend "for three reasons—first, it was declared in addition to the regular dividend; second, it was much larger, exceeding the net profits made in the preceding year, and third, it was evidently made for the special

additions from such dividends and what remains of them will then belong to the life tenant.¹

Some courts have made a distinction in this regard between extraordinary and ordinary or current dividends by enforcing apportionment of the former and not of the latter.² So the New York Court of Appeals has held that "ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust," "in conformity with the general rule that dividends are deemed to have been earned as of the date of their declaration," and that "extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they entrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund,"³ except where the instrument creating the trust shows a

purpose of enabling the stockholders to avail themselves of" the right to subscribe to a new issue of stock.

An extra dividend paid in cash is a cash dividend and belongs to income although the trustees add to it and apply it to the purchase of additional stock in the same corporation. In *re Barron's Will*, 163 Wis. 275, 155 N. W. 1087.

As a rule stock dividends cannot be called regular or ordinary dividends, but must be extraordinary ones. *Balantine v. Young*, 79 N. J. Eq. 70, 81 Atl. 119.

¹ *Lord v. Brooks*, 52 N. H. 72.

² See statement to this effect in *Lang v. Lang's Ex'r*, 57 N. J. Eq. 325, 41 Atl. 705, modifying 56 N. J. Eq. 603, 40 Atl. 278.

³ In *re Osborne*, 209 N. Y. 450, 477, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915 A 298, 103 N. E. 723, 823, modifying 153 N. Y. App. Div. 312, 138 N. Y. Supp. 18; In *re Balch's Estate*, 98 N. Y. Misc. 510, 162 N. Y. Supp. 940; In *re Tod*, 85 N. Y. Misc. 298, 147 N. Y. Supp. 161.

In *re Osborne*, 209 N. Y. 450, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915 A 298, 103 N. E. 723, 823, modifying 153 N. Y. App. Div. 312, 138 N. Y. Supp. 18, it was held that that part of an extraordinary stock dividend representing earnings after the creation of a testamentary trust should go to the life tenant and that part representing earnings before that time was a part of the capital of the trust.

And there was a similar holding in *re Megrue*, 170 N. Y. App. Div. 653, 155 N. Y. Supp. 1059, *aff'd* 217 N. Y. 623, 111 N. E. 1091.

In *re Osborne* was followed in *re Bishop's Estate*, 89 N. Y. Misc. 355, 151 N. Y. Supp. 768, and extraordinary stock dividends were directed to be apportioned in accordance with the rule there laid down. It was further held that an agreement as to the disposition of stock dividends was not enforceable as against the life tenants and did not stop them from claiming their share.

In *Thayer v. Burr*, 201 N. Y. 155, 94 N. E. 604, modifying 134 N. Y. App.

contrary intention.⁴ In so deciding the court says that "the distinction

Div. 889, 119 N. Y. Supp. 755, it was held that the life tenant was entitled to an extraordinary dividend payable in bonds and scrip in so far as it represented the earnings of the corporation but not in so far as it represented an increase in the value of the investments of the corporation. In *In re Osborne*, supra, it is said that the decision in this case "was intended to be a recognition of the right to an apportionment of the dividend so as to preserve the corpus of the trust estate. * * * The judgment of the court was based upon the necessity of preserving the trust fund as it existed at the creation of the trust, including accumulated earnings of the corporation prior to that date. It was not based upon the alleged right in the life estate man to all dividends so long as they did not in-trench upon the capital of the corporation."

In *In re Harteau*, 204 N. Y. 292, 97 N. E. 726, modifying 142 N. Y. App. Div. 904, 126 N. Y. Supp. 1131, it was held that the question whether an extraordinary cash dividend declared out of surplus "is to be deemed capital or income depends upon the time of the acquisition of the surplus which was divided." In this case the percentage of the dividend declared out of the increase in the surplus between the time of the testator's death and the time when the dividend was declared was held to be income.

The holdings in *In re Osborne* and *In re Harteau*, supra, are apparently in conflict with the holdings in *Robertson v. De Brulatour*, 188 N. Y. 301, 80 N. E. 938, aff'g 111 N. Y. App. Div. 882, 98 N. Y. Supp. 15, and *Lowry v. Farmers' Loan & Trust Co.*, 172 N. Y. 137, 64 N. E. 796, aff'g 56 N. Y. App. Div. 408, 67 N. Y. Supp. 759, but the court, in *In re Osborne*, after reviewing these cases says that they

might well have proceeded on the language of the wills involved as evidencing an intention that the whole of the dividends involved should go to the life tenants, "for it was entirely within the power of a testator to make that income which by law without testamentary disposition would be principal." In this connection the court further says, "Recognizing as we must that a testator or maker of a trust may if he chooses provide that a part of the principal of a trust fund be paid to a life beneficiary of the trust, and that the courts must carry out such intention, all of the decisions in this state can be sustained without violating the right when it is not so controlled by the instrument creating the trust, to have the principal of the trust fund kept unimpaired by the division of accumulated surplus among life beneficiaries." The court in this case also reviewed and distinguished the holdings in *In re Kernochan*, 104 N. Y. 618, 11 N. E. 149; *Riggs v. Cragg*, 26 Hun (N. Y.) 89, rev'd 89 N. Y. 479; *Goldsmith v. Swift*, 25 Hun (N. Y.) 201; *Simpson v. Moore*, 30 Barb. (N. Y.) 637; *Clarkson v. Clarkson*, 18 Barb. (N. Y.) 646; *In re Woodruff's Estate*, Tuck. Surr. (N. Y.) 58.

In *re Baldwin*, 209 N. Y. 601, 103 N. E. 734, aff'g 157 N. Y. App. Div. 897, 142 N. Y. Supp. 1107, it was held that upon the evidence it would be assumed that the earnings upon which a stock dividend was based were accumulated after the creation of the trust, and that it was the intention of the testator that the beneficiaries should have them.

⁴ The testator or maker of a trust may make that income which by law, without such disposition, would be principal, and the courts must carry out such intention. In *re Osborne*, 209 N. Y. 450, 50 L. R. A. (N. S.)

between ordinary and extraordinary dividends is necessary to make a workable rule and at the same time preserve the integrity of the trust fund,"⁵ and holds that "in each case the court should look into the facts, circumstances and nature of the transaction and determine the nature of the dividend and the rights of the contending parties according to justice and equity."⁶

The distinction was also apparently adopted in an early Pennsylvania case.⁷

The New Jersey Court of Errors and Appeals, on the other hand, has apparently repudiated this distinction and adopted the rule that an apportionment will be required regardless of whether the dividend is ordinary or extraordinary.⁸

510, Ann. Cas. 1915 A 298, 103 N. E. 723, 823, modifying 153 N. Y. App. Div. 312, 138 N. Y. Supp. 18.

See also § 3727, *infra*.

⁵ In *re Osborne*, 209 N. Y. 450, 477, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915 A 298, 103 N. E. 723, 823, modifying 153 N. Y. App. Div. 312, 138 N. Y. Supp. 18.

⁶ In *re Osborne*, 209 N. Y. 450, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915 A 298, 103 N. E. 723, 823, modifying 153 N. Y. App. Div. 312, 138 N. Y. Supp. 18, quoted and followed in *In re Balch's Estate*, 98 N. Y. Misc. 510, 162 N. Y. Supp. 940.

⁷ In *Earp's Appeal*, 28 Pa. St. 368, it is said "in ordinary dividends on stock, periodically declared, the intervals between the times of payment are so brief, and the sums divided so small, that no great injustice can be done in following the rule of convenience, while, on the other hand, the necessity for it is usually very strong, arising from the difficulty of ascertaining the exact amount of profits made during fractions of the period." In this case it is also said that the rule forbidding apportionment in respect of time in cases of periodical payments becoming due at fixed periods is founded on convenience, and not on the equitable rights of the parties in interest, and is therefore

subject to exceptions whenever the purposes of justice require the correction of injuries arising from the uniformity of the law.

⁸ In *Lang v. Lang's Ex'r*, 57 N. J. Eq. 325, 41 Atl. 705, modifying 56 N. J. Eq. 603, 40 Atl. 278, after referring to the fact that a distinction has been made extraordinary and ordinary or current dividends by enforcing apportionment of those of the first class and not of the others, the court says: "I cannot assent to the idea that some dividends should stand on a different footing from others. To hold that where a life estate begins one day before a dividend is declared the entire dividend shall go to the life tenant may be convenient, but certainly is unjust." This language was quoted by the vice chancellor in *Brown v. Brown*, 72 N. J. Eq. 667, 65 Atl. 739. It is to be noted, however, that in both these cases the dividends were extraordinary ones.

In *Ballantine v. Young*, 79 N. J. Eq. 70, 81 Atl. 119, the vice chancellor says, "The distinction has been adverted to, apparently with approval by the court of errors and appeals in the *Lang* case, and I do not feel at liberty to disregard it." But in this case also the dividend in question was held to be an extraordinary one.

And in Maryland, as we have seen, all cash dividends declared during the continuance of the life tenancy go to the life tenant though they are extraordinary in character and regardless of the time when the fund was accumulated, while stock dividends are apportioned according to the time when they were earned.⁹

In England, the rule was at one time that ordinary or usual dividends declared after a testator's death, whether out of profits earned before or after his death, are income, and not principal, and go to the tenant for life of shares, but that extraordinary or unusual dividends form part of the corpus of the estate, and go to the remainderman;¹⁰ but there are later cases in which the life tenant has been held to be entitled to an extraordinary cash dividend.¹¹

§ 3719. — Method of making apportionment. In making the apportionment the essential thing is to find the value of the estate at the time of the testator's death, and to preserve it from diminution.¹² The remainderman is entitled to just what the stock was actually worth at the time of the severance of the income from the ultimate ownership of the shares; no more and no less.¹³ And whether he is entitled to the whole or any part of a particular dividend is to be determined by ascertaining the difference in the value of the stock at the time when the severance took place and its value after the declaration of the dividend. If the value is less at the latter time than at the former the capital is deemed to have been impaired to that extent, and enough of the dividend must be applied to the corpus of the estate to make the capital equal to what it was when the severance took place.¹⁴ But if the stock is found to be as valuable after the declaration of the dividend as it was when the trust was created, or of greater value, the capital has not been decreased, and the whole of the dividend goes to the life tenant.¹⁵

⁹ See § 3717, *supra*.

¹⁰ *Bates v. Mackinley*, 31 Beav. 280. See *In re Hopkins' Trusts*, L. R. 18 Eq. 696, 30 L. T. (N. S.) 627; *Barclay v. Wainewright*, 14 Ves. 66; *Paris v. Paris*, 10 Ves. 185. See also *Kalbach v. Clark*, 133 Iowa 215, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647, 110 N. W. 599, and *In re Heaton's Estate*, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21, for statements as to the English rule.

¹¹ See *Sugden v. Alsbury*, 45 Ch. Div. 237, and *Ellis v. Barfield*, 64 L.

T. (N. S.) 625. See also *In re Heaton's Estate*, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21.

¹² *In re Stokes' Estate*, 240 Pa. 277, 87 Atl. 971. To the same effect, see *In re Stokes' Estate*, 240 Pa. 288, 87 Atl. 975.

¹³ *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 320.

¹⁴ *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 320.

¹⁵ *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 320.

The actual intrinsic value of the stock, to be ascertained from the amount and value of the corporate assets at the time of the severance and after the declaration of the dividend, will govern, rather than its market value.¹⁶ And hence a decrease in the market price of the stock after the declaration of the dividend is not of itself sufficient to show any impairment of the trust fund.¹⁷ Nor will the fact that the market value of the original stock was not affected, or was only slightly affected, by an increase of stock and its distribution in the form of a cash dividend prevent the increase from being regarded as capital.¹⁸ But "the market value may aid in the ascertainment of the actual value, and is therefore properly received in evidence on that issue."¹⁹ Whether or not there has been a decrease in value cannot be ascertained by comparing the gross amounts standing to the credit of the profit and loss account of the corporation at the respective periods.²⁰

¹⁶ *In re Stokes' Estate*, 240 Pa. 288, 87 Atl. 975; *In re Stokes' Estate*, 240 Pa. 277, 87 Atl. 971; *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 320; *Smith's Estate*, 140 Pa. St. 344, 23 Am. St. Rep. 237, 21 Atl. 438; *Moss' Appeal*, 83 Pa. St. 264, 24 Am. Rep. 164.

"Of course the payment of any dividend by a corporation in active operation, takes away a portion of the assets which have been temporarily increased by the earnings, and just to that extent the value of the shares in the market may be lessened. But that fact is of no relevancy in determining the question of whether the dividend is to be regarded as income, to the life tenant, or as capital for the remainderman. That question is to be determined by the origin of the fund from which the dividend is paid." *In re Robinson's Trust*, 218 Pa. 481, 67 Atl. 775.

¹⁷ *In re Stokes' Estate*, 240 Pa. 288, 87 Atl. 975.

The excess market value of the stock over its par value at the date of the declaration of the dividend will not be credited to the corpus of the fund. *Northern Cent. Dividend Cases*, 126 Md. 16, 94 Atl. 338.

¹⁸ *Smith's Estate*, 140 Pa. St. 344, 23 Am. St. Rep. 237, 21 Atl. 438.

¹⁹ *Smith's Estate*, 140 Pa. St. 344, 23 Am. St. Rep. 237, 21 Atl. 438, quoted with approval in *In re Stokes' Estate*, 240 Pa. 288, 87 Atl. 975; *In re Stokes' Estate*, 240 Pa. 277, 87 Atl. 971; *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 320.

²⁰ Where the amount standing upon the books of the company to the credit of profit and loss, and which has been previously earned and expended in permanent additions to and improvements of the corporate property, is distributed in the form of dividend obligations or certificates of indebtedness, the question whether there has been a decrease in the value of the stock cannot be ascertained by comparing the gross amounts standing on the corporate books to the credit of the profit and loss account at the time of the creation of the trust and at the time when the dividend obligations and certificates of indebtedness were issued, since this will not afford any real index to the value of the stock at the respective periods. The amounts expended in permanent additions to and improvements of the property would have to be charged against the earnings, and would leave that much less to go to the credit of the profit and

In Pennsylvania the dividend is distributed in the proportions that the amounts earned before and after the death of the testator respectively bear to the total amount of the dividend.²¹

The following rules for apportioning extraordinary dividends have been laid down by the New York Court of Appeals: "The intrinsic value of the trust investment is to be ascertained by dividing the capital and the surplus of the corporation existing at the time of the creation of the trust by the number of shares of the corporation then outstanding, which gives the value of each share, and that amount must be multiplied by the number of shares held in the trust. The value of the investment represented by the original shares after the dividend has been made is ascertained by exactly the same method. The difference between the two shows the impairment of the corpus of the trust. If the dividend is of money the amount of that difference is to be retained by the trustee as capital, and the remainder paid to the life beneficiary. If the dividend is in stock the amount of impairment in money must be divided by the intrinsic value of a share of the new stock, and the quotient gives the number of shares to be retained to make the impairment good—the remaining shares going to the life beneficiary. Market value, good will and like considerations cannot be considered in apportioning a dividend."²² In ascertaining the value of the investment represented by the original shares after a stock dividend has been made, the surplus of the corporation is to be computed as of the date when the dividend was authorized, although the new certificates were not delivered until later. And where the directors declare a stock dividend previously authorized at a meeting of the stockholders, and later at the same

loss account. *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 320.

²¹ So where the amount of the surplus earned after the death of the testator bears to the amount of the dividend the decimal proportion of .5132, the life tenant is entitled to .5132 of the dividend and .4868 of it should be apportioned to the principal of the trust fund. *In re Stokes' Estate*, 240 Pa. 277, 87 Atl. 971.

²² *In re Osborne*, 209 N. Y. 450, 485, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915 A 298, 103 N. E. 723, 823, modifying 153 N. Y. App. Div. 312, 138 N. Y. Supp. 18.

In re Harteau, 204 N. Y. 292, 97

N. E. 726, modifying 142 N. Y. App. Div. 904, 126 N. Y. Supp. 1131, where an extraordinary cash dividend was declared out of surplus, the court found that the difference between the surplus at the time of the testator's death and at the time when the dividend was declared was 89 per cent. of the total dividend, and consequently held that 89 per cent. of that portion of the dividend which went to the executors must be regarded as income.

The foregoing holdings were followed in *In re Tod*, 85 N. Y. Misc. 298, 147 N. Y. Supp. 161.

meeting declare a cash dividend, the amount of the cash dividend cannot be considered as having been deducted from the surplus of the corporation before the declaration of the stock dividend, but the valuation will be based on the surplus as it existed after the declaration of the stock dividend and before the declaration of the cash dividend.²³

In New Jersey, for the purpose of making an apportionment, it will be presumed, in the absence of a showing to the contrary, that the earnings out of which the dividend is declared have been made uniformly, day by day, since the last similar dividend was declared,²⁴ and this presumption should be applied to the dividends upon those earnings. And it follows that the dividend cannot be applied on the earliest earnings after the last previous dividend, in the absence of any showing as to the actual rate of earnings after the severance. The parties in interest may, however, overcome this presumption of a uniform rate of earnings by showing that they were in fact made differently.²⁵

§ 3720. — Dividends declared out of capital. As a rule, dividends declared by a corporation out of its capital, or funds representing capital, are not income or profits, and do not go to the life beneficiary, but are part of the principal which must be preserved for the remainderman.²⁶ And, as a rule, dividends which in part represent

²³ *In re Osborne*, 166 N. Y. App. Div. 547, 152 N. Y. Supp. 48.

²⁴ *Lang v. Lang's Ex'r*, 57 N. J. Eq. 325, 41 Atl. 705, modifying 56 N. J. Eq. 603, 40 Atl. 278.

In this case it was further held that trustees who act on this presumption, without notice to the contrary, will be protected.

²⁵ *Lang v. Lang's Ex'r*, 57 N. J. Eq. 325, 41 Atl. 705, modifying 56 N. J. Eq. 603, 40 Atl. 278.

²⁶ *United States*. See *Mercer v. Buchanan*, 137 Fed. 1019 (mem. dec.), rev'g 132 Fed. 501.

Connecticut. *Boardman v. Boardman*, 78 Conn. 451, 12 L. R. A. (N. S.) 779, 62 Atl. 339.

Kentucky. See *Cox v. Gaulbert's Trustee*, 148 Ky. 407, 147 S. W. 25.

Maryland. *Ex parte Humbird*, 114 Md. 627, 80 Atl. 209.

Massachusetts. *Gifford v. Thompson*, 115 Mass. 478; *Heard v. Eldredge*, 109 Mass. 258, 12 Am. Rep. 687.

New Hampshire. *Walker v. Walker*, 68 N. H. 407, 39 Atl. 432; *Wheeler v. Perry*, 18 N. H. 307.

New York. *In re James*, 78 Hun 121, 28 N. Y. Supp. 992, aff'd 146 N. Y. 78, 48 Am. St. Rep. 774, 40 N. E. 876; *In re Skillman*, 24 Abb. N. Cas. 41, 9 N. Y. Supp. 469.

Pennsylvania. *Eisner's Estate*, 175 Pa. St. 143, 34 Atl. 577; *Vinton's Appeal*, 99 Pa. St. 434, 44 Am. Rep. 116.

If dividends are really divisions of capital they constitute principal and should not be treated as income in the absence of a contrary intention on the part of the creator of the trust. *Estate of Wells*, 156 Wis. 294, 144 N. W. 174.

And see *In re Megrue*, 170 N. Y.

earnings and in part capital will be apportioned between the life tenant and the remainderman.²⁷ So a distribution of the proceeds of the sale of the property or franchises of the corporation in which its capital is invested is to be regarded as a distribution of capital rather than income or profits, and will go to the remainderman rather than the life tenant.²⁸ This is true, for example, where the corporation distributes money received by it as compensation for property in which its capital is invested and which has been taken from it under the power of eminent domain.²⁹

Similarly, where a corporation ceases business and sells all its property, with a view to distribution among its stockholders, or when a corporation is dissolved, and its assets so distributed, the dividend goes to the remainderman, and not to the life tenant of shares.³⁰ There is authority to the effect that the entire dividend is capital and goes to

App. Div. 653, 155 N. Y. Supp. 1059, aff'd 217 N. Y. 623, 111 N. E. 1091, where it was conceded that stock of its subsidiary companies divided by the Standard Oil Company among its stockholders in consequence of the federal government's suit against it became a part of the capital of the trust.

²⁷ Thayer v. Burr, 201 N. Y. 155, 94 N. E. 604, modifying 134 N. Y. App. Div. 889, 119 N. Y. Supp. 755.

Where the capital stock of a corporation was reduced by returning half of it to the stockholders, with a premium of 40 per cent. to be paid out of surplus, it was held that the premium paid out of surplus was income, and belonged to the life beneficiary of shares. In re Warren, 33 N. Y. St. Rep. 584, 11 N. Y. Supp. 787.

See also *infra*, this section.

²⁸ Ex parte Humbird, 114 Md. 627, 80 Atl. 209; Wheeler v. Perry, 18 N. H. 307; In re James, 78 Hun (N. Y.) 121, 28 N. Y. Supp. 992, aff'd 146 N. Y. 78, 48 Am. St. Rep. 774, 40 N. E. 876; In re Skillman, 24 Abb. N. Cas. (N. Y.) 41, 9 N. Y. Supp. 469; Vinton's Appeal, 99 Pa. St. 434, 44 Am. Rep. 116.

A division of money derived from a sale of a portion of the corporate

property which was purchased and represented by the issue of capital stock, is not a division of earnings, but of capital, and goes to the remainderman. Walker v. Walker, 68 N. H. 407, 39 Atl. 432.

In Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 19 L. R. A. 173, 40 Am. St. Rep. 189, 20 S. W. 778, it was held that a dividend declared out of profits made by the sale of real estate that the corporation owned at the time of the testator's death was capital and not income.

The will involved in Estate of Wells, 156 Wis. 294, 144 N. W. 174, expressly provided that all portions of any dividend paid from the sale of corporate property should be regarded as principal, and as merely a division among the stockholders of the property of the corporation.

²⁹ Heard v. Eldredge, 109 Mass. 258, 12 Am. Rep. 687.

³⁰ Connecticut. Bishop v. Bishop, 81 Conn. 509, 71 Atl. 583; Curtis v. Osborne, 79 Conn. 555, 65 Atl. 968; Bulkeley v. Worthington Ecclesiastical Society, 78 Conn. 526, 12 L. R. A. (N. S.) 785, 63 Atl. 351. See also Smith v. Dana, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51, 60 Atl. 117.

the remainderman under such circumstances, although a part of it

Illinois. *Blinn v. Gillett*, 208 Ill. 473, 100 Am. St. Rep. 234, 70 N. E. 704, aff'g 109 Ill. App. 75.

Maine. See *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428.

Massachusetts. *Brownell v. Anthony*, 189 Mass. 442, 75 N. E. 746; *Gifford v. Thompson*, 115 Mass. 478.

New Hampshire. *Wheeler v. Perry*, 18 N. H. 307.

New York. In re *Rogers*, 161 N. Y. 108, 55 N. E. 393, aff'g 22 App. Div. 428, 48 N. Y. Supp. 175; In re *Stevens*, 111 App. Div. 773, 98 N. Y. Supp. 28, aff'g 46 Misc. 623, 95 N. Y. Supp. 297, judgment modified on other grounds 187 N. Y. 471, 12 L. R. A. (N. S.) 814, 10 Ann. Cas. 511, 80 N. E. 358.

Ohio. *Wilberding v. Miller*, 88 Ohio St. 609, L. R. A. 1916 A 718, 106 N. E. 665.

"The necessities of the situation compel the adoption, for general application, of the rule that assets distributed by corporations in liquidation are to be regarded as capital and not income, as the one which is on the whole the most safe, just and practical in its operation of any which can be devised." *Bulkeley v. Worthington Ecclesiastical Society*, 78 Conn. 526, 12 L. R. A. (N. S.) 785, 63 Atl. 351.

Where a corporation sells its plant for stock in a new corporation which it distributes to its stockholders, such stock is capital and belongs to the remainderman. In re *Rogers*, 161 N. Y. 108, 55 N. E. 393, aff'g 22 N. Y. App. Div. 428, 48 N. Y. Supp. 175.

Where the additional shares are issued only for the purpose of equalizing the value of the interests of stockholders in two corporations about to be consolidated, they belong to the principal, and not to the income. *Goldsmith v. Swift*, 25 Hun (N. Y.) 201.

Where the corporation with the consent of its stockholders transfers all of its assets to a new company, each stockholder receiving two shares in the new company for one in the old, the stock in the new company belongs to the corpus of the trust fund. *Wilberding v. Miller*, 88 Ohio St. 609, L. R. A. 1916 A 718, 106 N. E. 665.

Where two corporations consolidated under an agreement that the assets of each should be liquidated separately; that the surplus of the new corporation should be made up from the surplus assets of the consolidating corporations in proportion to their respective capitals, and that after thus ascertaining what the bank, having the smaller percentage of surplus, would contribute, the excess above such proportionate contribution remaining from the assets of the other corporation should be distributed pro rata among those who were its stockholders at the date of the consolidation, it was held that the money so distributed was part of the principal of the trust fund. *Curtis v. Osborne*, 79 Conn. 555, 65 Atl. 968.

Where substantially all of the stockholders of a mining company sold their stock under an agreement that certain assets of the company, including a reserved surplus known as a coal land renewal fund, should not pass to the purchaser but that the former stockholders should receive the benefit of them, and such assets were turned into cash and distributed to such former stockholders in the form of a cash dividend, it was held that there was in effect a liquidation of the affairs of the company as they had been conducted under the old management, and that such dividend was therefore to be regarded as a part of the accumulated property or "floating capital" of the corporation distributed in liquidation, and be-

represents undivided earnings.³¹ But, according to the better opinion, there should be an apportionment, so much of the dividends as represents profits going to the life beneficiary, and so much as represents capital going to the remainderman.³²

"Any dividend derived from a mere enhancement of the value of assets representing capital from sources other than the accumulation of earnings belongs to the remainderman and not to the life tenant. It represents corpus, not income." ³³ So a dividend which, in whole or in part, represents the natural growth and increase in the value of the corporate plant and business is to that extent capital, whether such growth and increase took place before or after the trust was created.³⁴ Nor is the life tenant entitled to that part of a dividend

longed wholly to the capital of the trust fund. *Second Universalist Church of Stamford v. Colegrove*, 74 Conn. 79, 49 Atl. 902.

³¹ *Gifford v. Thompson*, 115 Mass. 478.

"The distributive share of the assets of a corporation received by trustees on the liquidation and dissolution of the company belongs to the trust fund, although the assets so distributed included a surplus which the company had accumulated from its earnings and had invested, used, and held in the promotion of its business, acting in good faith and for the best interests of all concerned." *Wilberding v. Miller*, 88 Ohio St. 609, L. R. A. 1916 A 718, 106 N. E. 665. In this case it was held that where the corporation transferred to a new company all its assets, including a large surplus which it had accumulated in its business and invested in its plant, machinery, and other assets used in the business, much of which was done in the lifetime of the testator, each stockholder receiving two shares in the new company for one in the old, the entire stock received by the trustees in the new company belonged to the corpus of the trust fund.

³² *In re Rogers*, 161 N. Y. 108, 55 N. E. 393, aff'g 22 N. Y. App. Div. 428,

48 N. Y. Supp. 175; *Cobb v. Fant*, 36 S. C. 1, 14 S. E. 959. See also *Mercer v. Buchanan*, 137 Fed. 1019 (mem. dec.), rev'g 132 Fed. 501.

Under a will bequeathing dividends, issues and profits of certain stock for certain purposes on dissolution of the corporation and sale of its assets, the plant, good will, franchises and working capital will be deemed to constitute principal, and the invested surplus, surplus cash capital, and accumulated surplus earnings to constitute dividends, issues and profits. *In re Stevens*, 111 N. Y. App. Div. 773, 98 N. Y. Supp. 28, aff'g 46 N. Y. Misc. 623, 95 N. Y. Supp. 297, judgment modified on other grounds 187 N. Y. 471, 12 L. R. A. (N. S.) 814, 10 Ann. Cas. 511, 80 N. E. 358.

A division of the reserve fund of a bank upon the expiration of its charter is to be regarded as income where it was derived from net earnings. *Lord v. Brooks*, 52 N. H. 72.

In *Cobb v. Fant*, 36 S. C. 1, 14 S. E. 959, accumulated profits distributed on dissolution of the corporation were held to belong to the life beneficiary under a deed of trust.

³³ *Miller v. Payne*, 150 Wis. 354, 136 N. W. 811. To same effect, see *Ex parte Humbird*, 114 Md. 627, 80 Atl. 209.

³⁴ *Poole v. Union Trust Co.*, 191

which represents merely the increased or enhanced value of securities held by the corporation.³⁵

Assets charged to profit and loss account belong to corpus, and any recoveries subsequently made on assets so charged off also belong to corpus.³⁶ And where the par value of the stock is reduced in consequence of supposed losses, new stock issued to shareholders on recovery of the sums supposed to have been lost, and representing the amount so recovered, cannot be regarded as income or profits.³⁷

The rule under discussion is equally applicable in the case of stock dividends, and they belong to the remainderman rather than the life tenant where they represent capital,³⁸ even in those jurisdictions where no distinction is made between cash and stock dividends in so far as the respective rights of the life tenant and remainderman are concerned.³⁹ So if the corporation issues stock as capital and appropriates its surplus as an increase of its capital stock such issue inures to the benefit of the remainderman.⁴⁰ And the same is true of a stock dividend representing earnings capitalized during the testator's lifetime,⁴¹ or representing the natural growth or increase in the value of the permanent corporate property,⁴² and of distribu-

Mich. 162, 157 N. W. 430; *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl. 124.

³⁵ "It is very plain that the life tenant was not entitled to this increase in the value of the corpus of the trust any more than she would have been chargeable for any depreciation in the value of the corpus." *Thayer v. Burr*, 201 N. Y. 155, 94 N. E. 604, modifying 134 N. Y. App. Div. 889, 119 N. Y. Supp. 755.

³⁶ *Miller v. Payne*, 150 Wis. 354, 136 N. W. 811.

³⁷ *Parker v. Mason*, 8 R. I. 427.

³⁸ *Poole v. Union Trust Co.*, 191 Mich. 162, 157 N. W. 430.

³⁹ *Hite's Devises v. Hite's Ex'r*, 93 Ky. 257, 19 L. R. A. 173, 40 Am. St. Rep. 189, 20 S. W. 778; *Thomas v. Gregg*, 78 Md. 545, 44 Am. St. Rep. 310, 28 Atl. 565; *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl. 124; *Day v. Faulks*, 79 N. J. Eq. 66, 81 Atl. 354, aff'd 81 N. J. Eq. 173, 88 Atl. 384.

For states in which no such distinc-

tion is made, see § 3716, *supra*.

⁴⁰ *Chester v. Buffalo Car Mfg. Co.*, 94 N. Y. App. Div. 612, 88 N. Y. Supp. 1094, 70 N. Y. App. Div. 443, 75 N. Y. Supp. 428. The judgment in this case was affirmed by the Court of Appeals (183 N. Y. 425, 26 N. E. 480) on the ground that the plaintiff, who claimed under the life tenant, was barred by the final discharge of the executors and other proceedings in the surrogate court from claiming that the increase of stock was a mere dividend.

⁴¹ *Estate of Smith*, 140 Pa. St. 344, 23 Am. St. Rep. 237, 21 Atl. 438.

⁴² Stock dividends which do not represent earnings, but merely an enhancement in the value of the corporate assets, from causes other than the accumulation of earnings, apparently due to good management and the growth of trade, belong to the corpus of the trust estate, no matter when such enhancement took place. *Poole v. Union Trust Co.*, 191 Mich. 162, 157 N. W. 430.

"If * * * the so-called stock

tions of shares of its own stock purchased by the corporation on the credit of its bonds,⁴³ or of additional stock received by the corporation on the exchange of its stock for that of a consolidated corporation created by the consolidation of it and another company, and which represents the difference in value of the old stock over the new.⁴⁴ In New Jersey it has been held that the new stock represents not only the capitalized earnings, but, like the old stock, the entire property of the corporation, and that therefore the life tenant is not entitled to the whole of it, but only to so much of it as represents earnings.⁴⁵

dividends represent the corporate capital—that is, represent nothing but the natural growth or increase in the value of the permanent property, so that there is merely a change in the form of ownership—such stock should go to the remainderman, for in such cases the dividend is a dividend of capital, representing simply an increase in the value of the physical property, good will, or other thing of tangible value.” *Kalbach v. Clark*, 133 Iowa 215, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647, 110 N. W. 599, quoted with approval in *Bryan v. Aiken*, — Del. —, 86 Atl. 674, rev’g — Del. Ch. —, 82 Atl. 817; *Lauman v. Foster*, 157 Iowa 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14.

⁴³ This is true although such stock, when distributed, is charged to the profit and loss account. *Gilkey v. Paine*, 80 Me. 319, 14 Atl. 205.

⁴⁴ *Clarkson v. Clarkson*, 18 Barb. (N. Y.) 646.

⁴⁵ *Day v. Faulks*, 79 N. J. Eq. 66, 81 Atl. 354, aff’d 81 N. J. Eq. 173, 88 Atl. 384. In the course of his opinion in this case the vice chancellor says that what is really done when a stock dividend is declared is to issue new certificates whose face value is a certain sum and at the same time to put that sum permanently and irrevocably into capital. These new certificates, from the very beginning, represent, not only the sum thus capitalized, but, like the old certificates, the entire

property of the corporation. If the life tenant gets all the new stock, he gets something that represents not a share of the earnings only, but of the entire property. To the extent that the stock represents the surplus so capitalized he gets earnings; “beyond that he gets principal, except in so far as the stock represents undivided earnings still in the treasury (a comparatively small matter), to which, however, if the company does not distribute them in his lifetime, he is not entitled.” He further says that the rule giving stock dividends to the life tenant “ought not to be extended beyond its reason. The ground upon which the rule is based is that the life tenant ought to have the earnings when the company makes a disposition of them. Its reason will go no further than to charge the earnings on the new stock. This will at once effectuate the intention of the testator and obviate the injustice, if it be an injustice, of letting capitalized earnings go to the remainderman.” In affirming the decree below the Court of Errors and Appeals says: “We agree with the vice chancellor that it would be inequitable to award the whole stock dividend to the life tenants, and that for two reasons—first, because stock dividends are not dividends set aside as earnings by the corporation; second, because to permit the new stock to go to the life tenant would lessen the proportionate inter-

§ 3721. — Where corporate property is of a wasting nature. The rule that distributions, of capital or of funds representing capital, go to the remainderman is generally held not to apply where the nature of a corporation is such that its ordinary business is to sell property in which its capital is invested, and distribute the proceeds among its stockholders; ⁴⁶ as, for example, in the case of a corporation engaged in the business of buying and selling real estate at a profit,⁴⁷

est of the estate in the corporation, a result that cannot have been contemplated by the testator. The difficulties which courts of the highest standing have found in apportioning a stock dividend apply with increased force against a claim of the life tenant to the whole."

The court further says that there is language in the opinion of Ashhurst v. Potter, 29 N. J. Eq. 625, 635, sustaining the view that the life tenant is entitled to the whole of such a dividend, but that the question was evidently not considered by him since the controversy was not between life tenant and remainderman.

⁴⁶ Washington County Hospital Ass'n v. Hagerstown Trust Co., 124 Md. 1, L. R. A. 1915 A 738, 91 Atl. 787; Ex parte Humbird, 114 Md. 627, 80 Atl. 209.

⁴⁷ Reed v. Head, 6 Allen (Mass.) 174.

This is true of dividends declared out of profits earned by the sale of land by an unincorporated joint stock company formed to deal in land, where its capital is not impaired by their payment. Thomson's Estate, 153 Pa. St. 332, 26 Atl. 652, 653; Oliver's Estate, 136 Pa. St. 43, 9 L. R. A. 421, 20 Am. St. Rep. 894, 20 Atl. 527.

Profits made by a bank on the sale of coal lands bought by it like any other assets belong to the life tenant. Miller v. Payne, 150 Wis. 354, 136 N. W. 811.

In In re James, 146 N. Y. 78, 48 Am. St. Rep. 774, 40 N. E. 876, aff'g 78 Hun (N. Y.) 121, 28 N. Y. Supp. 992,

testator owned stock in three railroad construction companies. Two of them built and sold railways and received land grants in payment, which they sold from time to time and distributed the proceeds as dividends. The other built and sold a railway and received in part payment a certificate of indebtedness secured by a mortgage on land. This land was sold from time to time, the company releasing its mortgages and receiving sums of money, partly from sales of land and partly from interest on deferred payments on sales, which it distributed as dividends. These companies had no other business or property than that named. It was held that all of such dividends were income and belonged to the life tenant, but this holding was based largely on the wording of the will and the evident intention of the testator.

Profits accruing to a trading corporation in real estate would be considered income and would go to the life tenant, whether derived from an enhancement of the value of real estate held by it, or from rents and profits in excess of cost of maintenance. Miller v. Payne, 150 Wis. 354, 136 N. W. 811. In this case the corporation was held not to be a trading corporation in real estate within the meaning of the exception though its articles authorized it to buy, sell, improve and lease real property, where it appeared that it was organized by the directors of a bank to aid the bank by taking over real estate owned by it, that it never bought any real es-

or in the business of manufacturing standing timber, in which its capital is invested, into lumber and selling the latter.⁴⁸ And, there was a like decision where a manufacturing corporation sold patent rights in which a part of its capital had been invested, and castings, and declared a dividend in cash out of the proceeds.⁴⁹ But there seems to be some authority to the effect that where the trust property is of a wasting nature, such as mining stock or land stock, the life tenant will be entitled to receive only the current rate of interest on the value of the trust property, and the remainder of the dividends will become a part of the principal of the trust fund, to be invested anew by the trustee, in the absence of a clear expression of the testator's intention to the contrary.⁵⁰

§ 3722. — Accumulations of surplus; invested surplus. The fact that profits are not immediately distributed in dividends, but are permitted to accumulate in the form of surplus, does not entitle the capital interest to them as an accretion to capital when they are subsequently distributed in the form of dividends,⁵¹ at least unless they have been

tate after the death of the testator, that it sold property from time to time when it could do so to advantage, and that its sole purpose was to close out all the properties as soon as practicable, distribute the proceeds among its stockholders, and dissolve the corporation.

In *Ex parte Humbird*, 114 Md. 627, 80 Atl. 209, it was held that a dividend declared out of the proceeds of the sale of timberland was capital although the corporation had power under its charter to buy and sell land and growing timber for a profit, it appearing that it had never engaged in the business of doing so.

⁴⁸ *Washington County Hospital Ass'n v. Hagerstown Trust Co.*, 124 Md. 1, L. R. A. 1915 A 738, 91 Atl. 787.

⁴⁹ *Harvard College v. Amory*, 9 Pick. (Mass.) 446. See also *In re James*, 146 N. Y. 78, 48 Am. St. Rep. 774, 40 N. E. 876.

⁵⁰ See *Estate of Wells*, 156 Wis. 294, 144 N. W. 174.

⁵¹ *Connecticut. Boardman v. Board-*

man, 78 Conn. 451, 12 L. R. A. (N. S.) 779, 62 Atl. 339; *Smith v. Dana*, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51, 60 Atl. 117.

Delaware. *Bryan v. Aiken*, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

Georgia. *Jackson v. Maddox*, 136 Ga. 31, Ann. Cas. 1912 B 1216, 70 S. E. 865; *Millen v. Guerrard*, 67 Ga. 284, 44 Am. Rep. 790.

Maryland. *Thomas v. Gregg*, 78 Md. 545, 44 Am. St. Rep. 310, 28 Atl. 565.

Massachusetts. *Gray v. Hemenway*, 206 Mass. 126, 138 Am. St. Rep. 377, 92 N. E. 31.

New Hampshire. *Lord v. Brooks*, 52 N. H. 72.

New York. *Robertson v. De Brulattour*, 188 N. Y. 301, 80 N. E. 938, aff'g 111 App. Div. 882, 98 N. Y. Supp. 15; *McLouth v. Hunt*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, aff'g 92 Hun 607, 38 N. Y. Supp. 1146.

In *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428, it was held that where a so-called "renewal fund" of a gaslight company was

permanently capitalized.⁵² And this has been held to be true although such accumulated surplus has been invested in permanent works, property, improvements, or acquisitions or business extensions.⁵³ "When

distributed among its stockholders in the form of cash dividends, such dividends belonged to the life tenant.

In *Quinn v. Safe Deposit & Trust Co.*, 93 Md. 285, 53 L. R. A. 169, 48 Atl. 835, the whole of a dividend declared out of a sinking fund which had been accumulated mostly during the lifetime of the testator was held to be income and to belong to the life tenant.

⁵² *Hazeltine v. Belfast & M. L. R. Co.*, 79 Me. 411, 416, 1 Am. St. Rep. 330, 10 Atl. 328.

The corporation has the undoubted right to withhold the earnings and to capitalize them permanently if it deems it necessary or proper in the conduct of its business to do so. In determining whether this has been done the court may consider the nature and character of the entire transaction, and necessarily the intention of the company is a very material element of the transaction. *Bryan v. Aiken*, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

"When it is possible for the court to ascertain to any certainty whether the distribution in the stock dividend includes net earnings, and, if so, what proportion, and also whether such earnings were intended to be made a part of the capital or merely to be used temporarily with the intention on the part of the directors of refunding them to the shareholders as income, we think it is the duty of the court to make such investigations and dispose of the stock in an equitable way between the tenants for life and the remaindermen." *Thomas v. Gregg*, 78 Md. 545, 44 Am. St. Rep. 310, 28 Atl. 565.

⁵³ *Thomas v. Gregg*, 78 Md. 545, 44 Am. St. Rep. 310, 28 Atl. 565; *Robert-*

son v. De Brulatour, 188 N. Y. 301, 80 N. E. 938, aff'g 111 N. Y. App. Div. 882, 98 N. Y. Supp. 15. See also *Poole v. Union Trust Co.*, 191 Mich. 162, 157 N. W. 430.

"It may be regarded as settled law, we think, that although a corporation has the right to set apart or reserve a portion of its net earnings for a period of years, and treat them as capital, retaining them in its treasury, or expending them in the purchase of securities, or real estate for the company, yet if it subsequently divides such net earnings among the stockholders by declaring a dividend in cash, in stock, or in both, based upon such earnings, it is a distribution of profits." *Bryan v. Aiken*, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817. In this case accumulated profits were held not to have been capitalized by appropriating them to permanent improvements. It was said that in view of the fact that the company still regarded the fund as net earnings and sought to distribute it as such, it was reasonable to believe that the appropriation of them was more in the nature of a loan or temporary use than a permanent capitalization.

Profits which are so invested do not thereby become permanent additions to capital beyond the recall of the directors and possessing the quality of capital in the strict sense, and when the property in which they are invested is sold, and the proceeds are distributed by way of a cash dividend, such dividend goes to the life tenant rather than to the remainderman. There is nothing in the nature of a liquidation or a return of capital to the stockholders in such a transaction. *Smith v. Dana*, 77 Conn. 543,

the necessity for the reservation ceases, and the reserve fund is divided among the shareholders, the question whether it was income or capital depends upon its origin for their source is not changed by the delay in distribution. If it was originally taken from the net earnings it belongs to the tenant for life if distributed in his lifetime.”⁵⁴ “In such case the accumulated income, as well as the securities and real

60 Atl. 117. In this case it was so held in respect to the distribution of the proceeds of the sale of an electric light and gas plant which had been operated by a corporation, but was taken over by a city under the power of eminent domain. In the course of its opinion in this case the court says: “The quality and incidents of surplus, however invested or employed, are not the same as those of capital within the strict meaning of that word. Capital, in that sense, constitutes a fund so set apart and devoted to the corporate uses and the security of creditors that the law jealously guards it from the encroachment of directors in the declaration of dividends. It is placed beyond their reach for that purpose, and no way is left open to them to return it to the share owners. Its dedication is irrevocable, and it must ever remain a fund held in trust for creditors, unless some judicial or other process authorized by legislation intervenes. Of it, it may well be said, ‘Once capital always capital.’ It is not so of undistributed profits or surplus in any form. They may be effectually dedicated to corporate uses through the processes of a stock dividend, but until so dedicated they are not removed from the reach and control of directors. The manner of utilization may be changed, investments altered, permanent property sold and turned into cash, and experimental or other enterprises abandoned with a realization upon the investments therein, all at the discretion of directors, with no such artificial consequence that the assets thus employed change their character as

the result of the process. Investment in permanent works does not and ought not to capitalize. Directors can in their discretion, fairly exercised, withhold profits and employ them in the conduct or enlargement of business. By the same right they ought to be able to, and can, withdraw from any action which will enable the assets thus employed to be returned to their original condition as funds available for distribution to those to whom they might have been originally divided as dividends. Capital of this kind does not bear the perpetual stamp of capital. It simply constitutes a portion of the corporate assets which are within the discretionary control of the directors, which they may use for the corporate advantage in such ways as have the approval of their judgment, or, if that course seems wiser, cease using and by proper action withdraw from the corporate resources.”

Dividend obligations and certificates of indebtedness, avowedly issued to make good to shareholders earnings made after the creation of the trust, which from year to year, instead of being distributed as dividends, have been applied to the permanent improvement and betterment of the properties, belong to the life tenant, where it is not shown that issuing them lessened the value of the stock below what it was at the time of the creation of the trust. *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 320; *In re Robinson's Trust*, 218 Pa. 481, 67 Atl. 775.

⁵⁴ *Bryan v. Aiken*, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817, quoted with approval in *In*

estate purchased, are all assets of the corporation, but the earnings are not regarded as capital although they may have been treated by the corporation as such prior to the distribution."⁵⁵

These rules are equally applicable where such surplus is distributed in the form of stock dividends in those states where no distinction is made between cash and stock dividends, in so far as the respective rights of the life beneficiary and remainderman are concerned,⁵⁶ while the contrary would of course be true in those jurisdictions adopting the Massachusetts rule under which all stock dividends go to the remainderman.⁵⁷

§ 3723. — Dividends in bonds or certificates of indebtedness. Dividends declared out of profits go to the person entitled to the income and profits of shares, although they are paid, not in cash, but in bonds of the company or certificates of indebtedness,⁵⁸ or notes,⁵⁹ or in certificates of deposit of the bank declaring the dividend.⁶⁰

But a distribution to stockholders in the form of corporate bonds, running for a definite period, and which are its unlimited obligations and, as such, a charge upon all its assets, is not the declaration of a cash dividend, and hence bonds so distributed belong to the remainderman and not to the life tenant.⁶¹ And a dividend in bonds which in part represents earnings and in part the increased or enhanced market

re Heaton's Estate, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21. And see to the same effect, Lord v. Brooks, 52 N. H. 72.

Of course the rule of apportionment of dividends between life tenant and remainderman would apply to such dividends in those states where it obtains, if the surplus was accumulated partly before and partly after the testator's death. See § 3717, supra.

⁵⁵ Bryan v. Aiken, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

⁵⁶ Bryan v. Aiken, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817; Thomas v. Gregg, 78 Md. 545, 44 Am. St. Rep. 310, 28 Atl. 565; McLouth v. Hunt, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, aff'g 92 Hun (N. Y.) 607, 38 N. Y. Supp. 1146.

For states in which no distinction is made between stock and cash dividends, see § 3716, supra.

⁵⁷ See § 3714, supra.

⁵⁸ Jackson v. Maddox, 136 Ga. 31, Ann. Cas. 1912 B 1216, 70 S. E. 865; Millen v. Guerrard, 67 Ga. 284, 44 Am. Rep. 720; Atlantic Coast Line Dividend Cases, 102 Md. 73, 61 Atl. 295; Thayer v. Burr, 201 N. Y. 155, 94 N. E. 604, modifying 134 N. Y. App. Div. 889, 119 N. Y. Supp. 755; In re Baldwin, 74 N. Y. Misc. 341, 133 N. Y. Supp. 1109; Boyer's Appeal, 224 Pa. 144, 73 Atl. 320; In re Robinson's Trust, 218 Pa. 481, 67 Atl. 775.

⁵⁹ If declared and paid out of an accumulated surplus of net earnings, it is a cash, and not a stock, dividend though it is payable in the notes of the company rather than in actual money. Boston Safe Deposit & Trust Co. v. Adams, 219 Mass. 175, 106 N. E. 590.

⁶⁰ Humphrey v. Lang, 169 N. C. 601, L. R. A. 1916 B 626, 86 S. E. 526.

⁶¹ Bishop v. Bishop, 81 Conn. 509, 71 Atl. 583.

value of securities held by the corporation will be apportioned between the life tenant and the remainderman.⁶²

§ 3724. — Right to subscribe for shares, etc., and proceeds of sale thereof. According to the weight of authority, where the capital stock of a corporation is increased under legislative authority, the privilege or right which the shareholders have to subscribe for the new shares is appurtenant to the original stock, and does not belong to the person entitled to the income of the shares.⁶³ And if such

⁶² *Thayer v. Burr*, 201 N. Y. 155, 94 N. E. 604, modifying 134 N. Y. App. Div. 889, 119 N. Y. Supp. 755.

⁶³ *Connecticut*. *Brinley v. Grou*, 50 Conn. 66, 47 Am. Rep. 618.

Illinois. *De Koven v. Alsop*, 205 Ill. 309, 63 L. R. A. 587, 68 N. E. 930, aff'g 107 Ill. App. 190.

Iowa. *Lauman v. Foster*, 157 Iowa 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14.

Kentucky. *Hite's Devises v. Hite's Ex'r*, 93 Ky. 257, 19 L. R. A. 173, 40 Am. St. Rep. 189, 20 S. W. 778.

Massachusetts. *Hyde v. Holmes*, 198 Mass. 287, 84 N. E. 318; *Davis v. Jackson*, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21. See also *Trefry v. Putnam*, 116 N. E. 904.

New Jersey. *Ballantine v. Young*, 79 N. J. Eq. 70, 81 Atl. 119; *Brown v. Brown*, 72 N. J. Eq. 667, 65 Atl. 739.

New York. *Robertson v. De Brulattour*, 188 N. Y. 301, 80 N. E. 938; aff'g 111 App. Div. 882, 98 N. Y. Supp. 15; *In re Kernochan*, 104 N. Y. 618, 11 N. E. 149.

Pennsylvania. *Eisner's Estate*, 175 Pa. St. 143, 34 Atl. 577; *Thomson's Estate*, 153 Pa. St. 332, 26 Atl. 652, 653; *Biddle's Appeal*, 99 Pa. St. 278.

Rhode Island. *Greene v. Smith*, 17 R. I. 28, 19 Atl. 1081.

"We are of the opinion that the value of the rights to subscribe for an increase of stock, to be issued by a corporation under such conditions, must be treated as property capital-

ized by the corporation. The value of the new stock is made up of the par value which is paid in by the subscriber, and an additional sum equal to the difference between its par value and its market value. This additional sum inheres in the new stock to be issued, and is a part of the capital of the corporation. It cannot be used or availed of otherwise than as a mere right or privilege, except in connection with the ownership of the new stock, which is capital. An increase of capital by the corporation, which represents not only the amount then paid in, but also a value necessarily included in the capital because the stock is worth more than its par value, is in the nature of a stock dividend by the corporation, to the amount of this additional value represented by the rights to subscribe." *Hyde v. Holmes*, 198 Mass. 287, 84 N. E. 318.

"This right stands upon a different footing from the claim to a stock dividend. It is a mere incident of the old stock. It is a right appurtenant to it, and as such, is a part of the capital. It cannot be fairly considered as income, but is inherent in the shares of stock in their creation. While the value of the right must depend essentially upon the success of the business of the company, this does not alter the nature of the right, and the stock is properly a part of the corpus of the estate of the owner." *Hite's Devises v. Hite's*

right and privilege is sold by a trustee who holds shares on which a person is entitled to the income for life, the proceeds of the sales go, not to the life tenant, but to the remainderman.⁶⁴

In New Hampshire it is held that, in the absence of evidence showing the fact, there is a presumption that the right to take new stock, if of value, or the proceeds of the sale thereof, is capital and belongs

Ex'r, 93 Ky. 257, 19 L. R. A. 173, 40 Am. St. Rep. 189, 20 S. W. 778.

Where a corporation, having a surplus of earnings, increased its stock, and permitted the stockholders to subscribe at par for as many shares as they held of the old stock, and an estate holding one hundred shares sold sixty of the options, with which it purchased forty new shares, it was held that these were capital, and not income, under a will bequeathing the stock subject to a life use of the income. *Moss' Appeal*, 83 Pa. St. 264, 24 Am. Rep. 164.

⁶⁴ *Connecticut*. *Brinley v. Grou*, 50 Conn. 66, 47 Am. Rep. 618.

Illinois. *De Koven v. Alsop*, 205 Ill. 309, 63 L. R. A. 587, 68 N. E. 930, aff'g 107 Ill. App. 190.

Iowa. *Lauman v. Foster*, 157 Iowa 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14.

Massachusetts. *Hyde v. Holmes*, 198 Mass. 287, 84 N. E. 318; *Davis v. Jackson*, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21; *Atkins v. Albree*, 12 Allen 359.

New Jersey. *Brown v. Brown*, 72 N. J. Eq. 667, 65 Atl. 739.

New York. *Robertson v. De Brulattour*, 188 N. Y. 301, 80 N. E. 938, aff'g 111 App. Div. 882, 98 N. Y. Supp. 15.

Pennsylvania. *Eisner's Estate*, 175 Pa. St. 143, 34 Atl. 577; *Biddle's Appeal*, 99 Pa. St. 278; *Moss' Appeal*, 83 Pa. St. 264, 24 Am. St. Rep. 164.

Rhode Island. *Greene v. Smith*, 17 R. I. 28, 19 Atl. 1081.

In *Biddle's Appeal*, 99 Pa. St. 278, it was held that where a corporation increased its capital stock by offering

to stockholders the option of subscribing at par to the stock, in the proportion of one share for every two shares held, the proceeds of a sale of an option by one holding stock in trust to collect the income for the use of another for life are to be accounted capital, and not income, in so far as they relate to the beneficiary.

But in *Wiltbank's Appeal*, 64 Pa. St. 256, 3 Am. Rep. 585, it was held that, where a corporation ordered a distribution of increased stock to stockholders on the payment of so much per share, and one holding stock in trust to pay the income to another for life sold the privilege to subscribe, the proceeds of sale should be regarded as income, and not as capital, where there was no serious diminution in the value of old stock caused by the new issue. And the same was held to be true of a profit realized by a sale of stock purchased by the trustee under such a right with his own money.

In *Eisner's Estate*, 175 Pa. St. 143, 149, 34 Atl. 577, it is said: "Wiltbank's Appeal has never been overruled, although it has not been followed where the subscribers acquired their right as such by reason of their being already holders of stock, the intrinsic value of which would manifestly be impaired by increasing the number of stockholders."

In *Moss' Appeal*, 83 Pa. St. 264, 24 Am. Rep. 164, *Wiltbank's Appeal* is distinguished on the ground that there was no serious diminution of the value of the old stock caused by the new issue.

to the corpus, and that it will be so treated,⁶⁵ but that if it appears that such rights represent surplus earnings, they will be regarded as a distribution of income.⁶⁶

In Wisconsin it has been held that where such rights accruing on stock purchased by the trustees in part represent surplus earnings and undivided profits, the proceeds of their sale should ordinarily be divided between corpus and income in the proportion that the amount of such surplus and profits existing at the time when the stock was acquired bear to the amount existing when the stock was increased, but that when no sufficient data upon which to make the division are furnished to the court, the whole amount will be treated as ordinary profit on investment made by the trustees. And it has also been held in that state that where it is not shown whether the corporation had any surplus or undivided profits, or the amount of its original stock or the amount of the increase, it will be presumed that the proceeds of the sale of such rights represent good will or other increment to the original capital of the corporation, increasing the value of the shares above the value at which they were offered to the stockholders to this extent, and that therefore the money so received belongs to corpus.⁶⁷

Where the trustee takes the new stock, pays for it out of the principal of the trust fund, and afterwards sells it, the profits are capital to be added to the trust fund for the benefit of the remainderman.⁶⁸ The trustee has no right to use cash dividends in purchasing the new stock,⁶⁹ and if he does so the stock so purchased will be regarded as a dividend as between the life tenant and the remainderman to the extent that the dividend so applied belonged to the former.⁷⁰ But any

⁶⁵ *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl. 124; *Walker v. Walker*, 68 N. H. 407, 39 Atl. 432; *Law v. Alley*, 67 N. H. 93, 29 Atl. 636; *Peirce v. Burroughs*, 58 N. H. 302.

"The capital in the hands of the executor existed before the income of that capital; and in the absence of all evidence on the question whether a certain fund or piece of property in his hands is capital or income the presumption of fact is that it is capital." *Law v. Alley*, 67 N. H. 93, 29 Atl. 636; *Peirce v. Burroughs*, 58 N. H. 302.

Where the new shares are worth more than par, the right to buy them

at par is a valuable right. *Peirce v. Burroughs*, 58 N. H. 302.

⁶⁶ *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl. 124.

⁶⁷ *In re Barron's Will*, 163 Wis. 275, 155 N. W. 1087.

⁶⁸ *Lauman v. Foster*, 157 Iowa 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14.

⁶⁹ *Hyde v. Holmes*, 198 Mass. 287, 84 N. E. 318.

⁷⁰ Where a corporation increases its stock and gives existing stockholders the right to subscribe to the increase in proportion to their holdings, and at the same time declares a dividend and provides that the right to subscribe to the new stock and the right

profit made out of the transaction belongs to the remainderman. So if the stock is worth a premium and the right is to subscribe for it at par, the premium belongs to him. And if the stock is retained by the trustee under such circumstances, the life tenant is entitled to a charge upon it for such part of the cash dividend used in its purchase as belonged to him, and so much of it as may be necessary may be sold to satisfy such charge.⁷¹ Or if the trustee had on hand, at the time when the dividend was declared and the stock increased, sufficient cash funds belonging to the principal of the trust fund to have paid for the stock, and still has such cash at the time of the decree, he may be required to devote it to that purpose, and to pay the amount of the dividend to the life tenant, with a proper adjustment of the income that has since accrued and of interest, as if the dividend had been paid to the life tenant when it was declared.⁷² Similarly, if the trustee has no right to retain the stock under the instrument creating the trust, and therefore sells it, the life tenant is entitled to an amount of the proceeds equal to his share of the dividend used in the purchase of the stock, and the balance is to be treated as capital.⁷³ If, on the other hand, the right has been exercised by the life tenant, he will be required to account for the profit as a part of the capital of the estate.⁷⁴

to receive the dividend shall accrue simultaneously, and the trustee subscribes for his proportion of the new stock and pays for it with the dividend, such stock will be regarded as a dividend as between the life tenant and remainderman. *Brown v. Brown*, 72 N. J. Eq. 667, 65 Atl. 739.

If stockholders are given the right, at their election, to take the amount of a dividend in cash or to apply it to the purchase of new stock at par, and a trustee, who has no right to invest the trust fund in stock, takes the new stock at the request and for the benefit of the life tenant, and as her agent, the stock belongs to her. *Cox v. Gaulbert's Trustee*, 148 Ky. 407, 147 S. W. 25.

If the dividend used by the trustees in the purchase of the new stock is apportionable between capital and income, the proceeds of the sale of such stock must be apportioned in

the same manner. In *re Harteau*, 204 N. Y. 292, 97 N. E. 726, modifying 142 N. Y. App. Div. 904, 126 N. Y. Supp. 1131.

See also dictum to this effect in *Lauman v. Foster*, 157 Iowa 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14.

⁷¹ *Ballantine v. Young*, 79 N. J. Eq. 70, 81 Atl. 119.

⁷² *Hyde v. Holmes*, 198 Mass. 287, 84 N. E. 318.

⁷³ *Malam v. Hitchens*, L. R. [1894] 3 Ch. Div. 578.

⁷⁴ The life tenant should not be required to restore stock received by him under such rights, but its value should be ascertained as of the time when the rights were given, and the life tenant required to account for the profit as a part of the capital of the estate. *Hite's Devises v. Hite's Ex'r*, 93 Ky. 257, 19 L. R. A. 173, 40 Am. St. Rep. 189, 20 S. W. 778.

The life tenant is, of course, entitled to the income from such accretions to the corpus.⁷⁵

Other options and privileges appurtenant to the stock, such as an option or privilege to subscribe for a purchase stock or bonds in another corporation, are generally held to be a part of the corpus of the estate, and to belong to the remainderman.⁷⁶ But there is authority to the effect that the proceeds of the sale of a right to subscribe to the stock of another corporation is income and not principal, and belongs to the life tenant.⁷⁷ And where such a right is exercised by the trustee and the stock is paid for out of a cash dividend which is apportionable between the life tenant and remainderman the stock belongs to them in the same proportion.⁷⁸

§ 3725. — Proceeds of shares sold. When a trust fund, the proceeds or income of which is to be paid to one person for life, with remainder to another, is invested in shares of stock, and the stock is sold, the proceeds of the sale are principal, and do not go to the life beneficiary, except in so far as they represent accumulated profits.⁷⁹

Since dividends belong to the person who owns the stock at the time when they are declared,⁸⁰ to entitle the life tenant to any part of the accumulated earnings of the corporation, it is essential that a dividend be declared by the corporation while the shares are held in trust. If no dividend is so declared, and in the absence of an express direction

⁷⁵ *Hyde v. Holmes*, 198 Mass. 287, 84 N. E. 318; *Eisner's Estate*, 175 Pa. St. 143, 34 Atl. 577.

He is entitled to the dividends on the new stock if the rights are exercised, or to the income on the proceeds of the sale of such rights. *Lauman v. Foster*, 157 Iowa 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14.

⁷⁶ *Ballantine v. Young*, 79 N. J. Eq. 70, 81 Atl. 119; *In re Kernochan*, 104 N. Y. 618, 11 N. E. 149.

⁷⁷ *Eisner's Estate*, 175 Pa. St. 143, 34 Atl. 577. The reason given in this case for so holding is that the stock held in trust cannot be reduced in value or affected by the increase in the number of shareholders of the other company.

In *Thompson's Estate*, 153 Pa. St. 332, 26 Atl. 652, 653, however, it was held that where stockholders were

given the right to take bonds in another company at par in proportion to their holdings, and the stock of such other company was thrown in as a bonus to those who subscribed for such bonds, the proceeds of the sale or such right were not income.

⁷⁸ *In re Stokes' Estate*, 240 Pa. 288, 87 Atl. 975; *In re Stokes' Estate*, 240 Pa. 277, 87 Atl. 971.

⁷⁹ *In re Kernochan*, 104 N. Y. 618, 11 N. E. 149. As to the apportionment in such a case, the stock being sold cum dividend, see *Bulkeley v. Stephens*, [1896] 2 Ch. 241.

A premium received upon the sale of shares held in trust does not constitute income, but belongs to the corpus of the estate. *Guthrie's Trustee v. Akers*, 157 Ky. 649, 163 S. W. 1117.

⁸⁰ See § 3700, *supra*.

by the testator to the contrary, the accumulated earnings cannot be rendered subject to appropriation by the life tenant as income by a sale of the shares for that purpose.⁸¹ And hence an increase in the book value of the shares between the creation of the trust and the date of their sale, resulting from the action of the directors in setting aside a part of the corporate earnings to surplus is not income, but is to be regarded as a part of the corpus of the estate.⁸²

Whether or not subscription rights and the proceeds of their sale are to be regarded as capital or income has been considered in a prior section.⁸³

§ 3726. — Method of determining whether dividends represent income or capital. Under the Massachusetts rule which regards all cash dividends as income⁸⁴ and all stock dividends as capital,⁸⁵ "everything is made to turn upon the action of the corporation."⁸⁶ The Supreme Court of the United States, which, as we have seen, has adopted the Massachusetts rule,⁸⁷ has said that the question whether a distribution of earnings "is an apportionment of additional stock representing capital or a division of profits and income, depends upon the substance and intent of the corporation, as manifested by its vote or resolution."⁸⁸ And this statement has been quoted with approval by some of the courts which have adopted the Pennsylvania or American rule, and it has been pointed out that under it stock dividends which

⁸¹ Guthrie's Trustee v. Akers, 157 Ky. 649, 163 S. W. 1117.

Undistributed surplus and undivided profits cannot be regarded as income, and the life tenant is not entitled to have the shares sold and to have the difference between the money invested therein and the selling price, representing the share of such surplus and profits apportionable to the stock held in trust, paid to him. *Tubb v. Fowler*, 118 Tenn. 325, 99 S. W. 988.

⁸² Guthrie's Trustee v. Akers, 157 Ky. 649, 163 S. W. 1117.

⁸³ See § 3724, supra.

⁸⁴ See § 3713, supra.

⁸⁵ See § 3714, supra.

⁸⁶ *D'Ooge v. Leeds*, 176 Mass. 558, 57 N. E. 1025.

⁸⁷ See § 3714, supra.

⁸⁸ *Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525, aff'g 4 Mackey (D. C.) 130, 54 Am. Rep. 262.

See analysis and criticism of this case in *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739, where the apparent inconsistencies in the opinion are pointed out, and it is said that, "out of the ambiguity can be read, pretty clearly, the idea that, presumptively, a stock dividend is to be regarded as capital, and so to pass * * * to the owner in remainder, according to the presumed intention of the creator of the two interests, nothing appearing efficiently to the contrary; thus only changing the rebuttable presumption of fact in favor of the life or term tenant as most courts hold, to such a presumption against him, and repudiating the Massachusetts doctrine that the intention of the creator of the particular interest in the stock is immaterial."

the corporation expressly declares represent profits may properly go to the life tenants.⁸⁹ In an early English case it was said that "what the company says is income shall be income and what it says is capital shall be capital."⁹⁰

On the other hand, the courts adopting the Pennsylvania or American rule have generally held that whether a particular dividend is to be regarded as income, to the life tenant, or as capital for the remainderman is to be determined by the origin of the fund from which the dividend is paid.⁹¹ They say that the court is not bound by the name given to the dividend by the corporation, the medium fixed for its payment, or the form in which it is declared,⁹² or the cor-

⁸⁹ Northern Cent. Dividend Cases, 126 Md. 16, 94 Atl. 338; Atlantic Coast Line Dividend Cases, 102 Md. 73, 61 Atl. 295; Quinn v. Safe Deposit & Trust Co., 93 Md. 285, 53 L. R. A. 169, 48 Atl. 835.

It was also quoted in McLouth v. Hunt, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, aff'g 92 Hun (N. Y.) 607, 38 N. Y. Supp. 1146, where it was held that under this rule a stock dividend was a distribution of profits.

Declarations by the directors and stockholders that stock dividends represent earnings are conclusive, and the court is not required to enter upon an examination and revision of the accounts of the corporation in order to determine whether such is actually the case. Northern Cent. Dividend Cases, 126 Md. 16, 94 Atl. 338.

⁹⁰ Bouch v. Sproule, 12 App. Cas. 385, quoted in Quinn v. Safe Deposit & Trust Co., 93 Md. 285, 53 L. R. A. 169, 48 Atl. 835.

⁹¹ Delaware. Bryan v. Aiken, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

Kentucky. Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 19 L. R. A. 173, 40 Am. St. Rep. 189, 20 S. W. 778.

Maryland. Ex parte Humbird, 114 Md. 627, 80 Atl. 209.

New Hampshire. Holbrook v. Holbrook, 74 N. H. 201, 12 L. R. A. (N.

S.) 768, 66 Atl. 124; Lord v. Brooks, 52 N. H. 72.

New York. In re Osborne, 209 N. Y. 450, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915 A 298, 103 N. E. 723, 823, modifying 153 App. Div. 312, 138 N. Y. Supp. 18.

Pennsylvania. In re Robinson's Trust, 218 Pa. 481, 67 Atl. 775.

Vermont. In re Heaton's Estate, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21.

Wisconsin. Soehnlein v. Soehnlein, 146 Wis. 330, 131 N. W. 739.

⁹² Delaware. Bryan v. Aiken, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

Iowa. Kalbach v. Clark, 133 Iowa 215, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647, 110 N. W. 599.

Kentucky. Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 19 L. R. A. 173, 40 Am. St. Rep. 189, 20 S. W. 778.

Maryland. Ex parte Humbird, 114 Md. 627, 80 Atl. 209.

New York. In re Osborne, 209 N. Y. 450, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915 A 298, 103 N. E. 723, 823, modifying 153 App. Div. 312, 138 N. Y. Supp. 18; Robertson v. De Brulatour, 188 N. Y. 301, 80 N. E. 938, aff'g 111 App. Div. 882, 98 N. Y. Supp. 15; Lowry v. Farmers' Loan & Trust Co., 172 N. Y. 137, 64 N. E. 796, aff'g 56 App. Div. 408, 67 N. Y. Supp. 759.

Tennessee. Pritchitt v. Nashville

poration's method of bookkeeping,⁹³ but will regard the substance of the transaction rather than the form in which the corporation has seen fit to clothe it,⁹⁴ "and may and should examine the nature of

Trust Co., 96 Tenn. 472, 33 L. R. A. 856, 36 S. W. 1064.

Vermont. In re Heaton's Estate, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21.

Wisconsin. Soehlein v. Soehlein, 146 Wis. 330, 131 N. W. 739.

The corporation cannot "bind the courts as to the proper ownership of it, and by the mode of payment substitute its will for that of the testator, and favor the life tenant or the remainderman as it may desire." Hite's Devises v. Hite's Ex'r, 93 Ky. 257, 19 L. R. A. 173, 40 Am. St. Rep. 189, 20 S. W. 778.

"The mere adoption by the corporation of a resolution cannot change accumulated earnings into capital, as between the life tenant and remainderman." McLouth v. Hunt, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, aff'g 92 Hun (N. Y.) 607, 38 N. Y. Supp. 1146.

"As between the company and the shareholder the action of the directors in determining whether the earnings shall be capitalized in stock dividends, or paid out in cash, is conclusive; but when once declared, although in the form of stock, it is the province of the law to determine whether they belong to the corpus of an estate and are to benefit the remainderman, or whether they shall go to the life tenant as income." Hite's Devises v. Hite's Ex'r, 93 Ky. 257, 19 L. R. A. 173, 40 Am. St. Rep. 189, 20 S. W. 778, quoted with approval in Bryan v. Aiken, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817; Pritchett v. Nashville Trust Co., 96 Tenn. 472, 33 L. R. A. 856, 36 S. W. 1064.

"For all corporate purposes the corporation may doubtless convert earnings into capital, when such

power is conferred by its charter, but when a question arises between life tenants and remaindermen concerning the ownership of the earnings thus converted the action of the corporation will not conclude the courts." McLouth v. Hunt, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, aff'g 92 Hun (N. Y.) 607, 38 N. Y. Supp. 1146.

A testamentary provision of this character cannot in this way be voted up or down, increased or diminished, at the election of the corporation. McLouth v. Hunt, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, aff'g 92 Hun (N. Y.) 607, 38 N. Y. Supp. 1146.

"A railway corporation cannot alter the wills of its stockholders by calling a dividend stock or calling it earnings. Whether the dividend is the capital of a remainderman, or the income of a life tenant is a question which a mere bequest of a life estate and remainder does not submit to the decision of the railroad." Peirce v. Burroughs, 58 N. H. 302.

The fact that a dividend is charged against and paid out of a fund denominated undivided profits is not conclusive between the life tenant and remainderman. Miller v. Payne, 150 Wis. 354, 136 N. W. 811.

But if the corporate action "is based upon facts, and is not purely arbitrary, it will, and should, be controlling." Lowry v. Farmers' Loan & Trust Co., 172 N. Y. 137, 64 N. E. 796, aff'g 56 N. Y. App. Div. 408, 67 N. Y. Supp. 759.

⁹³ Robertson v. De Brulatour, 188 N. Y. 301, 80 N. E. 938, aff'g 111 N. Y. App. Div. 882, 98 N. Y. Supp. 15. See also Bryan v. Aiken, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

⁹⁴ Hite's Devises v. Hite's Ex'r, 93 Ky. 257, 19 L. R. A. 173, 40 Am. St.

the corporate transaction as well as the character of the dividend declared, for the purpose of determining whether the dividend is in fact a distribution of net earnings or an apportionment of new capital." ⁹⁵ And even in Massachusetts it has been said that "the court always looks at the substance of the transaction rather than its form, and does not suffer itself to be trammelled by the names used. If in its essence the payment is one out of capital, then it is treated as such no matter how it may be denominated. But if in truth it is a

Rep. 189, 20 S. W. 778; *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl. 124; *McLouth v. Hunt*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, aff'g 92 Hun (N. Y.) 607, 38 N. Y. Supp. 1146; *In re Heaton's Estate*, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21.

⁹⁵ *Bryan v. Aiken*, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

"In each case the court should look into the facts, circumstances and nature of the transaction and determine the nature of the dividend and the rights of the contending parties according to justice and equity." *In re Osborne*, 209 N. Y. 450, 50 L. R. A. (N. S.) 50, Ann. Cas. 1915 A 298, 103 N. E. 723, 823, modifying 153 N. Y. App. Div. 312, 138 N. Y. Supp. 18.

"The method pursued by this court in determining whether a given dividend is capital or income, there being no express provision as to the matter in the trust instrument, is to inquire into the actual nature and source of the dividend." *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl. 124.

"The court must look into the substance and effect of the transaction unless it is willing to permit a distribution of capital that was never intended by the testator." *Day v. Faulks*, 79 N. J. Eq. 66, 81 Atl. 354, aff'd 81 N. J. Eq. 173, 88 Atl. 384.

"The transaction through which the property of the corporation is be-

ing distributed * * * is to be looked into, in order that its true nature may appear and that a determination may be reached, whether capital, or an accumulation of profits on the capital, is being divided among the stockholders." *Lowry v. Farmers' Loan & Trust Co.*, 172 N. Y. 137, 64 N. E. 796, aff'g 56 N. Y. App. Div. 408, 67 N. Y. Supp. 759. And see to the same effect, *Robertson v. De Brulatour*, 188 N. Y. 301, 80 N. E. 938, aff'g 111 N. Y. App. Div. 882, 96 N. Y. Supp. 15.

"When it is possible for the court to ascertain to any certainty whether the distribution in the stock dividend includes net earnings, and, if so, what proportion, and also whether such earnings were intended to be made a part of the capital or merely to be used temporarily with the intention on the part of the directors of refunding them to the shareholders as income, we think it is the duty of the court to make such investigations and dispose of the stock in an equitable way between the tenants for life and the remaindermen." *Thomas v. Gregg*, 78 Md. 546, 44 Am. St. Rep. 310, 28 Atl. 565, quoted with approval in *In re Heaton's Estate*, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21.

In determining whether or not the corporation has permanently capitalized earnings by appropriating them to improvements, the court may consider the nature and character of the entire transaction, and necessarily the intention of the company is a very

payment of earnings, then it is deemed income.”⁹⁶ And also that “the simple question in every case is whether the distribution made by the corporation is of money to be spent as income, or is of capital to be held as an investment in the corporation.”⁹⁷

Whether the payment of the dividend to the life tenant would decrease the capital of the testator’s estate, or, in other words, diminish the principal of the trust fund, is an important consideration in determining to whom the dividend shall go, since it must be deemed to have been the intention of the testator, as well as the meaning of the law, that while all of the net earnings, profits and dividends from the property included in the trust should go to the tenant for life, the capital itself should be kept undiminished for the benefit of the remainderman.⁹⁸ And, as we have seen, whether a dividend has or has not decreased the actual value of the stock is often deemed controlling in determining to whom it belongs.⁹⁹

In Delaware it has been held that the issuance of new stock to the life tenant cannot diminish the value of the stock held for the remainderman if the capital of the corporation, that is to say, its permanent property, has been correspondingly increased, as where the net earnings represented by the new shares are used by the corporation in the purchase of additional real estate, and, for betterments and improvements.¹

Where a will makes the decision of the executors and trustees as to what part of any dividend shall be considered as income received from profits and what part principal, their decision is conclusive in the absence of fraud, bad faith, or mere arbitrary action, and will not be set aside for mere error of judgment on their part;² subject to the qualification, however, that under the Massachusetts rule stock dividends, even though declared out of profits, are always regarded as part of the corpus of the estate and go to the remainderman.³

“As between remainderman and life tenant it is immaterial what the

material element of the transaction. *Bryan v. Aiken*, — Del. —, 86 Atl. 674, rev’g — Del. Ch. —, 82 Atl. 817.

⁹⁶ *Talbot v. Milliken*, 221 Mass. 367, 108 N. E. 1060. In this case it is further said: “The circumstance that in the vote declaring the special dividend, the payment is referred to as a distribution and not a dividend is of slight consequence.”

⁹⁷ *D’Ooge v. Leeds*, 176 Mass. 558, 57 N. E. 1025, quoted with approval

in *Talbot v. Milliken*, 221 Mass. 367, 108 N. E. 1060.

⁹⁸ *Bryan v. Aiken*, — Del. —, 86 Atl. 674, rev’g — Del. Ch. —, 82 Atl. 817.

⁹⁹ See § 3719, *supra*.

¹ *Bryan v. Aiken*, — Del. —, 86 Atl. 674, rev’g — Del. Ch. —, 82 Atl. 817.

² *Estate of Wells*, 156 Wis. 294, 144 N. W. 174.

³ See § 3714, *supra*.

latter does with the dividend declared." And the right of the life tenant to it is not affected by the fact that all the stockholders convey their interest in the dividend to trustees to purchase all the stock of another corporation which became ancillary to the one declaring the dividend.⁴

§ 3727. — **Intention of testator or donor.** Ordinarily, when a question arises as to whether certain dividends go to the life beneficiary of shares or to the remainderman, the determination of the question depends primarily upon the intention of the testator or donor, and the intention, when once ascertained from the language of the will or other instrument, and the surrounding circumstances, must be given effect,⁵ and each should be given just what the donor intended

⁴ *Miller v. Payne*, 150 Wis. 354, 136 N. W. 811.

⁵ *United States*. *Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525, aff'g 4 Mackey (D. C.) 130, 54 Am. Rep. 262.

Delaware. See *Bryan v. Aiken*, 86 Atl. 674, rev'g — *Del. Ch.* —, 82 Atl. 817.

Illinois. *Blinn v. Gillett*, 208 Ill. 473, 100 Am. St. Rep. 234, 70 N. E. 704, aff'g 109 Ill. App. 75.

Maryland. *Thomas v. Gregg*, 78 Md. 545, 44 Am. St. Rep. 310, 28 Atl. 565. See also *Atlantic Coast Line Dividend Cases*, 102 Md. 73, 61 Atl. 295.

New Hampshire. *Lord v. Brooks*, 52 N. H. 72.

New York. In re *Osborne*, 209 N. Y. 450, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915 A 298, 103 N. E. 723, 823, modifying 153 App. Div. 312, 138 N. Y. Supp. 18; In re *James*, 146 N. Y. 78, 48 Am. St. Rep. 774, 40 N. E. 876, aff'g 78 Hun 121, 28 N. Y. Supp. 992; In re *Baleh's Estate*, 98 Misc. 510, 162 N. Y. Supp. 940; In re *Tod*, 85 Misc. 298, 147 N. Y. Supp. 161. See also In re *Baldwin*, 209 N. Y. 601, 103 N. E. 734, aff'g 157 App. Div. 897, 142 N. Y. Supp. 1107.

Ohio. *Wilberding v. Miller*, 88 Ohio St. 609, L. R. A. 1916 A 718, 106 N. E. 665.

Pennsylvania. In re *Robinson's Trust*, 218 Pa. 481, 67 Atl. 775.

South Carolina. *Wallace v. Wallace*, 90 S. C. 61, 72 S. E. 553.

Vermont. In re *Heaton's Estate*, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21.

Wisconsin. *Estate of Wells*, 156 Wis. 294, 144 N. W. 174; *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

"The right to them [dividends], as between the beneficiary of the trust and the remaindermen, will depend, primarily, upon the testator's intention, as it may be gathered from the will, and, then, if that is deemed to be expressed ambiguously or indefinitely, upon the subject, resort must be had to the facts, in order to discover whether the particular dividend was a distribution by the corporation of accumulated earnings and profits, or of that which was capital." *Robertson v. De Brulatour*, 188 N. Y. 301, 80 N. E. 938, aff'g 111 N. Y. App. Div. 882, 98 N. Y. Supp. 15.

The question is "not to be determined by any arbitrary rule, but by ascertaining, when that can be done, the meaning and intention of the testatrix, to be derived from the language employed in the creation of the trust, from the relations of the par-

each to have.⁶

The testator or donor may make that income which would otherwise be principal, and may, if he chooses, provide that a part of the principal of the trust fund shall be paid to the life beneficiary.⁷ And if the instrument creating the trust shows an intent on his part that any particular additions to the estate shall be treated in a particular manner, effect will be given to such intent.⁸

It has been held that when the testator "has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question

ties to each other, their condition and all the surrounding facts and circumstances of the case." *McLouth v. Hunt*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, aff'g 92 Hun (N. Y.) 607, 38 N. Y. Supp. 1146.

The language in which the gift is made to the beneficiary of a trust or the life tenant of an estate must be regarded in order to arrive at the testator's intention in the matter. *Lowry v. Farmers' Loan & Trust Co.*, 172 N. Y. 137, 64 N. E. 796, aff'g 56 N. Y. App. Div. 408, 67 N. Y. Supp. 759.

Where a will gave a person the income for life of shares of stock in a corporation, the only income from which was from the sale of lands received by the corporation in payment of work upon railroads constructed by it, it was held that dividends paid by the corporation out of the proceeds of such sales should be treated as income, and went to the life beneficiary, and not to the remainderman, such, in the opinion of the court, being clearly the intention of the testator. *In re James*, 146 N. Y. 78, 48 Am. St. Rep. 774, 40 N. E. 876.

In *Wallace v. Wallace*, 90 S. C. 61, 72 S. E. 553, testator devised property in trust to pay "the annual income, interest or profits" thereof to a certain person for life. The trustee in-

vested some of the property in stock, on which stock dividends were declared, and which was sold by him at a profit after the death of the beneficiary. It was held that the accretion of the stock, as shown by the difference in its value at the time of its acquisition by the trust estate and at the time of the death of the life tenant, due to accumulations in the interval of earnings, represented in part by extra shares declared as stock dividends, and in part by the increase in the book value of the shares from the retention of earnings undistributed, passed to the devisees of the life tenant and not to the remainderman.

In *Lowry v. Farmers' Loan & Trust Co.*, 172 N. Y. 137, 64 N. E. 796, aff'g 56 N. Y. App. Div. 408, 67 N. Y. Supp. 759, it was held that a bequest of the "rents, issues and profits" for life entitled the life beneficiary to a stock dividend based on accumulated net surplus.

⁶ *Boyers' Appeal*, 224 Pa. 144, 73 Atl. 320.

⁷ *In re Osborne*, 209 N. Y. 450, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915 A 298, 103 N. E. 723, 823, modifying 153 N. Y. App. Div. 312, 138 N. Y. Supp. 18.

⁸ *Foard v. Safe Deposit & Trust Co.*, of Baltimore, 122 Md. 476, 89 Atl. 724.

should depend upon the regular action of the corporation with regard to all its shares."⁹ On the other hand, it has been held that where the testator or donor has not efficiently manifested to the contrary, "the presumption is that he intends the term owner to enjoy all the income incidents of the stock during such term."¹⁰

It has been pointed out in a number of cases that the so-called Massachusetts rule whereby all cash dividends go to the life tenant¹¹ and all stock dividends to the remainderman,¹² may operate to defeat the intention of the testator or donor,¹³ and this has been frankly admitted by some of the courts which have adopted it. So the Massachusetts court has said, "While this arbitrary rule may sometimes defeat the intention of the testator, in most cases it accomplishes the results intended, and there were practical considerations as well as principles which required the adoption of it."¹⁴

The terms "income" and "dividends" as used in instruments of the character under consideration have been held to mean substantially the same thing.¹⁵ And the same has been held to be true of the terms "income," "net income," "profits," "interest," "increase," and the like.¹⁶ And the words "dividends, issues and profits" have been

⁹ *Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525, aff'g 4 Mackey (D. C.) 130, 54 Am. Rep. 262. See also to the same effect, *Wilberding v. Miller*, 88 Ohio St. 609, L. R. A. 1916 A 718, 106 N. E. 665.

But see the criticism of this holding in *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

¹⁰ *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

¹¹ See § 3713, *supra*.

¹² See § 3714, *supra*.

¹³ See *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739, where it is said that "by the Massachusetts rule, the intention of the creator of the term and remainder over is immaterial."

¹⁴ *D'Ooge v. Leeds*, 176 Mass. 558, 67 N. E. 1025.

¹⁵ *Jackson v. Maddox*, 136 Ga. 31, Ann. Cas. 1912 B 1216, 70 S. E. 865; *Millen v. Guerrard*, 67 Ga. 284, 44 Am. Rep. 720; *Lauman v. Foster*, 157 Iowa 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14.

In *Lord v. Brooks*, 52 N. H. 72, the words "dividends" and "income," as used in a deed of trust were held to mean the same thing, and to include a cash dividend declared by a bank out of its surplus on the expiration of its charter.

In *Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525, aff'g 4 Mackey (D. C.) 130, 54 Am. Rep. 262, it was held that, "Upon the face of the will, it is manifest that the testatrix used the word 'dividends' as having the same scope and meaning as 'income' and 'interest,' and nothing more; and intended that the plaintiff, as equitable legatee for life, should take the income, and the income only, of the shares owned by the testatrix at the time of her death; and that the whole capital of those shares, unimpaired, should go to the defendant as legatee in remainder."

¹⁶ In *Bishop v. Bishop*, 81 Conn. 509, 71 Atl. 583, it was held to be evident from the will that in using various forms of expression in describing the

held to mean practically "income or earnings."¹⁷ "Interest" and "earnings" have been held to be synonymous with each other and with "income" in its ordinary meaning.¹⁸ The term "scrip of any description" has been held to include so-called "dividend obligations."¹⁹ But, on the other hand, it has been held that the terms "dividends, income and profits" are not necessarily co-extensive or identical.²⁰

§ 3728. — Presumptions and burden of proof. Since it is presumed that all dividends represent profits,²¹ it has been held by a number of courts that every dividend presumptively belongs to the beneficial holder of the shares when it is declared, and therefore presumptively belongs to the life tenant rather than to the remainderman.²²

interests of life tenants, such as "the net amount of the increase, income, profits and interest," "the net increase, income, profit and interest," "income," "net income and profits," and "net income, profits and interest," the testatrix did not intend to create preferences or to discriminate between the various life beneficiaries, but that whatever the formula used, she intended to comprehend income as distinguished from principal, and that only.

In *Boardman v. Boardman*, 78 Conn. 451, 12 L. R. A. (N. S.) 779, 62 Atl. 339, the words "the dividends, rents and profits" in a will were assumed to be synonymous with "use and income," without deciding the question.

In *Stewart v. Phelps*, 71 N. Y. App. Div. 91, 75 N. Y. Supp. 526, the testator was held to have used the terms "net income, issues and profits" interchangeably, and to have merely intended to give the life beneficiary the annual income received from the trust estate.

¹⁷In *re Stevens*, 111 N. Y. App. Div. 773, 98 N. Y. Supp. 28, aff'g 46 N. Y. Misc. 623, 95 N. Y. Supp. 297, judgment modified on other grounds 187 N. Y. 471, 12 L. R. A. (N. S.) 814, 10 Ann. Cas. 511, 80 N. E. 358.

¹⁸*Ex parte Humbird*, 114 Md. 627, 80 Atl. 209.

¹⁹Where a deed of trust assigned stock to the trustee "to receive any dividends which may be made on the shares of stock above mentioned, whether in money or scrip of any description, and pay over, or transfer the same" to the beneficiary, it was held that the term "scrip of any description" included so-called "dividend obligations," issued as a method of dividing among the stockholders profits previously appropriated to the purchase of real estate and in making permanent improvements, and that it was the intention of the grantor that they should go to the life tenant. In *re Robinson's Trust*, 218 Pa. 481, 67 Atl. 775.

²⁰It is to be presumed that the donor meant by the use of them to indicate "pretty much everything in the way of advantage or benefit which might accrue from the stock, without decreasing the original value of the capital which it represented." They are broad enough to include "dividend obligations" and "certificates of indebtedness" covering a distribution of profits previously expended in betterments and improvements. *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 320.

²¹See § 3658, *supra*.

²²*Delaware*. *Bryan v. Aiken*, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

And, as a rule, this is equally true whether the dividend is in cash, scrip, or new stock in those states where the Pennsylvania or American rule obtains, and no distinction is made between cash and stock dividends in determining the relative rights of the life tenant and remainderman.²³ But in New Hampshire, while cash dividends are presumptively income²⁴ it has been held that stock dividends are presumptively capital.²⁵ And under the Massachusetts rule, as we have seen, stock dividends always go to the remainderman, even though they are declared out of profits earned after the separation of the income from the ownership of the shares.²⁶

The presumption that dividends belong to the life tenant, where it obtains, may be overcome upon inquiry into the real substance of the transaction.²⁷ But the burden is on the remainderman to show that a dividend was of capital,²⁸ or that its declaration im-

Iowa. *Kalbach v. Clark*, 133 Iowa 215, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647, 110 N. W. 599. See also *Lauman v. Foster*, 157 Iowa 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14.

New York. In re Leask, 159 App. Div. 102, 143 N. Y. Supp. 865, modifying 142 N. Y. Supp. 462.

Pennsylvania. In re Stokes' Estate, 240 Pa. 277, 87 Atl. 971; *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 320; In re Robinson's Trust, 218 Pa. 481, 67 Atl. 775.

Rhode Island. *Newport Trust Co. v. Van Rennselaer*, 32 R. I. 231, 35 L. R. A. (N. S.) 930, 78 Atl. 342.

Wisconsin. See In re Barron's Will, 163 Wis. 275, 155 N. W. 1087; *Miller v. Payne*, 150 Wis. 354, 136 N. W. 811; *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

²³ **Delaware.** *Bryan v. Aiken*, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 617.

Iowa. *Kalbach v. Clark*, 133 Iowa 215, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647, 110 N. W. 599. See also *Lauman v. Foster*, 157 Iowa 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14.

New York. In re Leask, 159 App. Div. 102, 143 N. Y. Supp. 865, modifying 142 N. Y. Supp. 462.

Pennsylvania. In re Robinson's Trust, 218 Pa. 481, 67 Atl. 775.

Wisconsin. See *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

For a list of the states in which no such distinction is made, see § 3716, supra.

²⁴ Extra cash dividends declared and paid are presumed to be income unless there is evidence to the contrary. *Walker v. Walker*, 68 N. H. 407, 39 Atl. 432.

²⁵ See *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 Atl. 124.

See also *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739, where it is suggested that this was the real holding in *Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525.

²⁶ See § 3714, supra.

²⁷ In re Leask, 159 N. Y. App. Div. 102, 143 N. Y. Supp. 865, modifying 142 N. Y. Supp. 462; In re Robinson's Trust, 218 Pa. 481, 67 Atl. 775.

²⁸ *Bryan v. Aiken*, — Del. Ch. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 617; *Kalbach v. Clark*, 133 Iowa 215, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647, 110 N. W. 599; In re Leask, 159 N. Y. App. Div. 102, 143 N. Y. Supp. 865, modifying 142 N. Y. Supp. 462.

paired the principal of the trust estate.²⁹ And this is true of cash dividends under the Massachusetts rule.³⁰

§ 3729. — Rights on death of life tenant. Upon the death of a person entitled to the income and profits of shares of stock for life, his executor or administrator is clearly entitled to dividends declared during his lifetime.³¹

It would seem equally clear that all dividends declared after his death, although declared out of profits earned by the corporation during his life, would go to the remainderman, and the weight of authority is to this effect.³² There are decisions, however, to the contrary. In a Massachusetts case, it was held that a bequest of the income of shares in a corporation to the testator's widow for life, for her own support and the education of her children, included a dividend declared thereon after her death for a period which expired

Where the dividend purports to have been declared out of undivided profits, the burden is on the remainderman to show that it was not. *Miller v. Payne*, 150 Wis. 354, 136 N. W. 811.

²⁹ *In re Stokes' Estate*, 240 Pa. 277, 87 Atl. 971.

The burden is on him to show that its declaration decreased the value of the stock below what it was when the trust was created. *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 320.

³⁰ The burden is upon the remainderman to show that, in any particular instance, the operation of the rule will take from the capital its rightful due. *Union & N. H. Trust Co. v. Taintor*, 85 Conn. 452, 83 Atl. 697.

In other words, the burden is on him to show that the application of the rule would wrongfully injure the capital interest by a diversion therefrom of something to which it is entitled, or in some other manner. *Boardman v. Boardman*, 78 Conn. 451, 12 L. R. A. (N. S.) 779, 62 Atl. 339.

³¹ The remainderman has no interest in such dividends, and they go to the administrator or executor of the life tenant rather than to his heirs at law. *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20. But in this case

it was held that an action brought by the trustee to recover dividends which was pending at the time of the life tenant's death would not abate in the absence of a showing that there was any administration upon the life tenant's estate.

³² *Thompson v. Hudgins*, 116 Ala. 93, 22 So. 916; *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20; *Mann v. Anderson*, 106 Ga. 818, 32 S. E. 870; *Chinn v. Courtney*, 14 Ky. L. Rep. 422. See also *Northern Cent. Dividend Cases*, 126 Md. 16, 94 Atl. 338.

The dividend belongs to the next beneficiary, and not to the life tenant because, not having been declared during his lifetime, it is not income of the trust estate received during his lifetime, and it is not apportionable. *In re Barron's Will*, 163 Wis. 275, 155 N. W. 1087.

In *Mann v. Anderson*, 106 Ga. 818, 32 S. E. 870, it was held that, if the life beneficiary dies before a dividend is declared, the dividend, when declared, is not to be apportioned between his estate and the remainderman, unless the will or other instrument creating the trust clearly shows such an intention.

during her life, although the shares still stood in the name of the testator's estate.³³

And in a South Carolina case, where a donee, to whom the dividends on certain stock were given for life, payable semiannually, died before a semiannual dividend was declared, it was held that the dividend, when declared, should be apportioned, and the amount which had accrued at the donee's death should be paid to his executor.³⁴ In that state it has also been held that where stock is purchased with the trust funds during the life of the beneficiary and is sold at a profit after his death, the increase in its value during the life of the beneficiary, due to the accumulation and retention of undistributed earnings, belongs to the devisees of the life tenant rather than to the remainderman.³⁵

§ 3730. Remedies for unlawful payment of dividends—Injunction.

If the directors of a corporation threaten to pay a dividend when there are no profits out of which it may lawfully be paid, any stockholder may maintain a suit in equity on behalf of himself and other stockholders to enjoin them.³⁶ It has also been held that such a suit may be maintained by a creditor of the corporation.³⁷ "Dividends," it was said by Judge Jackson in a late case, "can be rightfully paid only out of profits. Corporations are liable to be enjoined by shareholders or creditors from making a distribution, in dividends, of capital."³⁸ A court of equity will not interfere, however, if the declaration or payment of the dividend cannot injure either the stock-

³³ *Johnson v. Bridgewater Mfg. Co.*, 14 Gray (Mass.) 274.

³⁴ *Ex parte Rutledge*, Harp. Eq. (S. C.) 65, 14 Am. Dec. 696.

³⁵ *Wallace v. Wallace*, 90 S. C. 61, 72 S. E. 553.

³⁶ *Kingston v. Home Life Ins. Co.*, — Del. Ch. —, 101 Atl. 898; *Coquard v. National Linseed-Oil Co.*, 171 Ill. 480, 49 N. E. 563, aff'g 67 Ill. App. 20; *Carpenter v. New York & N. H. R. Co.*, 5 Abb. Pr. (N. Y.) 277; *Coates v. Nottingham Waterworks Co.*, 30 Beav. 86; *Browne v. Monmouthshire Railway & Canal Co.*, 13 Beav. 32; *Bloxam v. Metropolitan Ry. Co.*, 3 Ch. App. 337; *Davison v. Gillies*, 16 Ch. Div. 347, note; *Macdougall v. Jersey Imperial Hotel Co.*, 2 Hem. & M. 528.

But a bill for an injunction is insufficient where it does not allege that the corporation is insolvent or that a dividend would impair its capital, except by way of argument based on the alleged illegal character of the corporation, and the consequent invalidity of its credits and bills receivable and its inability to collect them by law. *Coquard v. National Linseed-Oil Co.*, 171 Ill. 480, 49 N. E. 563, aff'g 67 Ill. App. 20.

³⁷ *Reid v. Eatonton Mfg. Co.*, 40 Ga. 58, 2 Am. Rep. 563.

³⁸ *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. Ed. 793, quoted with approval in *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N. E. 329.

holders or creditors,³⁹ or where there is an adequate remedy at law.⁴⁰ Nor will a preliminary injunction be granted when the application therefor is delayed to a time when, if granted, it would be an unreasonable hardship to the defendant.⁴¹

§ 3731. — Appointment of receiver. The declaration of a dividend payable out of capital may be such a gross mismanagement of the affairs of the corporation and such a misapplication of its property and funds as will justify the appointment of a receiver at the instance of a minority stockholder.⁴² A stockholder is not estopped to complain of the action of the directors in declaring and paying such a dividend by retaining a certified check sent him in payment thereof, where he uses it, in his action to procure the appointment of a receiver, as evidence of what had been done.⁴³

§ 3732. — Bond or note given for illegal dividend. If a corporation, instead of paying an unlawful dividend out of capital stock in cash, gives its bonds or notes therefor, they cannot be enforced except by bona fide holders for value, and the stockholders receiving the same do not occupy such a position.⁴⁴

§ 3733. — Recovery of dividends unlawfully paid—In general. If the directors of a corporation declare and pay a dividend to its stockholders, when there are no profits out of which a dividend may lawfully be declared, the stockholders have no right to retain the money received by them, and as a rule, it may be recovered from them by the corporation.⁴⁵ And especially is this true as against a

³⁹ *Chaffee v. Rutland R. Co.*, 55 Vt. 110.

⁴⁰ An injunction will be denied where the statute provides that directors shall be liable to the corporation and its creditors for the payment of dividends not actually earned, and there is no showing that the directors are insolvent. *Schoenfeld v. American Can Co.* (N. J. Eq.), 55 Atl. 1044.

⁴¹ As where notice was given on September 1st that on September 30th dividends would be paid on preferred stock, and the bill seeking to bar the payment of dividends under the notice was not filed until September 25th. *Schoenfeld v. American Can Co.* (N. J. Eq.), 55 Atl. 1044.

⁴² A receiver was appointed under the Louisiana statute where a dividend was declared out of capital for the purpose of liquidating the affairs of the corporation in a manner not authorized by law. *Van Vleet v. Evangeline Oil Co.*, 129 La. 406, 56 So. 343.

⁴³ *Van Vleet v. Evangeline Oil Co.*, 129 La. 406, 56 So. 343.

⁴⁴ *Alabama Marble & Stone Co. v. Chattanooga Marble & Stone Co.* (Tenn.), 37 S. W. 1004.

⁴⁵ *Bingham v. Marion Trust Co.*, 27 Ind. App. 247, 61 N. E. 29; *Grant v. Ross*, 100 Ky. 44, 37 S. W. 263; *Lexington Life, Fire & Marine Ins. Co. v. Page & Richardson*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; *Gratz v.*

stockholder who has induced the declaration of such a dividend by fraud. So if the directors intend to distribute only the accrued profits, but a stockholder, by wilfully deceiving them as to the surplus on hand, induces them to declare and pay a dividend the effect of which is to reduce the amount of the invested capital, he thereby obtains from the company the sum by which his own share in the distribution has been increased by such misrepresentation, and is liable to it in at least that amount. And if several stockholders unite in the perpetration of such a fraud, they are liable jointly to the extent of the total excess received by all.⁴⁶

If a corporation refuses to sue to recover dividends paid out of the capital stock, a stockholder may file a bill to compel repayment.⁴⁷ And it has been said that "if the capital of a corporation is depleted by the payment of unearned dividends to one class of stockholders to the injury of another class, any one of the latter class could by appro-

Redd, 4 B. Mon. (Ky.) 178, 189; Gager v. Paul, 111 Wis. 638, 87 N. W. 875. See also Salina Mercantile Co. v. Stiefel, 82 Kan. 7, 107 Pac. 774.

In Hayden v. Thompson, 71 Fed. 60, it is said that the liability to repay is an asset of the corporation which passes to the receiver.

In Detroit Trust Co. v. Goodrich, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882, it is said, "As between the corporation and its stockholders, where all the stockholders are upon the same footing, the doctrine of estoppel might be invoked, though even then, under the authorities, we think the action could be maintained by the corporation upon the theory of mistake."

In Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310, it is held that the corporation itself, in its own right, cannot maintain an action to recover such dividends, at least where it is not alleged that their payment was the unauthorized act of some agent, nor that they were paid under a mistake of fact, nor by reason of any fraud on the part of the defendant against the corporation.

Where a corporation has disposed

of all its property and ceased to do any business, thereby necessitating the employment of another corporation to perform the essential clerical work required in the management of its affairs, it is in such a comatose state, preceding final dissolution, that without some act of revivification whereby its animation is restored, it cannot institute or maintain a suit to recover part of a dividend paid out in liquidation for the purpose of paying a claim in favor of such other corporation for its services, but such action must be brought by such other corporation. Garetson Lumber Co. v. Hinson, 69 Ore. 605, 140 Pac. 633.

⁴⁶ Salina Mercantile Co. v. Stiefel, 82 Kan. 7, 107 Pac. 774.

⁴⁷ Gager v. Paul, 111 Wis. 638, 87 N. W. 875; Holmes v. Newcastle-upon-Tyne Freehold Abattoir Co., 1 Ch. Div. 682. See also Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310.

In so doing "he merely enforces the right of the corporation, and the relief granted must be measured by that right." Gager v. Paul, 111 Wis. 638, 87 N. W. 875.

appropriate proceedings compel the corporation itself to recover the funds so unlawfully withdrawn.”⁴⁸

Restitution may also be enforced by creditors of the corporation,⁴⁹ or by a receiver⁵⁰ or it may be compelled by a trustee in bankrupt-

⁴⁸ *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882.

⁴⁹ *United States*. *Wood v. Dummer*, 3 Mason 308, Fed. Cas. No. 17,944. See also *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705.

Alabama. *Ft. Payne Bank v. Alabama Sanitarium*, 103 Ala. 358, 15 So. 618. See also *Bank of St. Marys v. St. John, Powers & Co.*, 25 Ala. 566.

Indiana. *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N. E. 329.

Kentucky. *Grant v. Southern Contract Co.*, 104 Ky. 781, 47 S. W. 1091; *Gratz v. Redd*, 4 B. Mon. 178, 189.

New York. *Bartlett v. Drew*, 57 N. Y. 587; *Cottrell v. Albany Card & Paper Mfg. Co.*, 142 App. Div. 148, 126 N. Y. Supp. 1070. See also *Hastings v. Drew*, 76 N. Y. 9.

West Virginia. Code, § 2873. *Bennett v. Clay County Bank*, 93 S. E. 353; *Benedum v. First Citizens' Bank*, 72 W. Va. 124, 78 S. E. 656.

A creditor may “invoke the aid of a court of equity to compel restitution of such unlawful dividends when the corporation will not reclaim them, but when he does so, he merely enforces the right which the corporation has, and the relief granted must be measured by that right.” *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875.

Such dividends can be reached by creditors where there is no statute as being a fraudulent disposition of assets. *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882; *American Steel & Wire Co. v. Eddy*, 138 Mich. 403, 101 N. W. 578, 130 Mich. 266, 89 N. W. 952.

The Maine statute formerly gave a right of action to judgment creditors. Rev. St. 1857, c. 46, § 34. *Bowker v.*

Hill, 115 Fed. 528. The present statute of that state gives a right of action to “any creditor.” Rev. St. 1903, c. 47, § 32.

In Michigan it is provided by statute that “If the capital stock of any such corporation shall be withdrawn and refunded to the stockholders before the payment of all the debts of the corporation for which such stock would have been liable, the stockholders of such corporation shall be jointly and severally liable to any creditor of such corporation, in an action founded on this statute, to the amount of the sum refunded to him or them respectively.” This provision permits a recovery by creditors where a portion of the capital stock is refunded to stockholders by way of dividends. *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882; *American Steel & Wire Co. v. Eddy*, 138 Mich. 403, 101 N. W. 578, 130 Mich. 266, 89 N. W. 952.

“Whenever it is satisfactorily proved that the assets of a corporation are so reduced as to impair the capital, the creditors have a right to follow them into the hands of the stockholders to whom they have been paid as dividends, and who must be held to hold such assets as a trust fund for the benefit of creditors.” *American Steel & Wire Co. v. Eddy*, 138 Mich. 403.

The statute applies equally to preferred stockholders who have received dividends from the capital stock. *American Steel & Wire Co. v. Eddy*, 138 Mich. 403, 101 N. W. 578, 130 Mich. 266, 89 N. W. 952.

⁵⁰ *United States*. *Hayden v. Williams*, 96 Fed. 279; *Hayden v. Brown*, 94 Fed. 15; *Hayden v. Thompson*, 71

cy,⁵¹ or by an assignee for the benefit of creditors, where the language of the assignment is comprehensive enough to include the right.⁵²

Usually a creditor cannot sue pending receivership proceedings, but the right of action is in the receiver.⁵³ It has been held, however, that a creditor, rather than trustees appointed to wind up the affairs of a corporation whose charter has been surrendered, is a proper party to bring a suit for his own benefit, although a suit for the benefit of the corporation would probably have to be brought by the trustees.⁵⁴

The right of recovery for the benefit of creditors is often held to be based on the equitable doctrine that the capital is a fund held by the corporation in trust for the payment of its debts, and that the money

Fed. 60. See also *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936.

Arkansas. *Corn v. Skillern*, 75 Ark. 148, 87 S. W. 142.

Indiana. *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N. E. 329; *Bingham v. Marion Trust Co.*, 27 Ind. App. 247, 61 N. E. 29.

Michigan. *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882.

Minnesota. *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310.

New Jersey. *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542; *Williams v. Boice*, 38 N. J. Eq. 364.

The receiver of a national bank may bring such a suit. The right of recovery in such cases is not based on the National Banking Act, and the remedies provided by it for the collection of assets are not exclusive. *Hayden v. Thompson*, 71 Fed. 60.

A receiver may sue when authorized by the court appointing him. *Kretschmar v. Stone*, 90 Miss. 375, 43 So. 177.

The receiver of a national bank may sue without an order of the comptroller of the currency directing him to do so. *Hayden v. Thompson*, 71 Fed. 60.

An order of court directing a receiver to take proper steps to recover dividends which the court finds were illegally paid is not an adjudication as against particular stockholders that

they received the dividends in question, or that the same were illegal, but such questions can only be adjudged as against them, in a proper proceeding to which they are parties. Nor is such an order, nor an order refusing to vacate it, appealable in Indiana, there being no statute authorizing an appeal therefrom. *Stewart v. Marion Trust Co.*, 155 Ind. 174, 57 N. E. 911.

⁵¹ *Cottrell v. Albany Card & Paper Mfg. Co.*, 142 N. Y. App. Div. 148, 126 N. Y. Supp. 1070; *Bennett v. Clay County Bank*, — W. Va. —, 93 S. E. 353. See also *Ratcliff v. Clendenin*, 232 Fed. 61; *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N. E. 329.

⁵² *Grant v. Ross*, 100 Ky. 44, 37 S. W. 263; *Lexington Life, Fire & Marine Ins. Co. v. Page & Richardson*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165. See also *Main v. Mills*, 6 Biss. 98, Fed. Cas. No. 8,974.

⁵³ *McTamany v. Day*, 23 Idaho 95, 128 Pac. 563.

A right of action given to individual creditors by statute, if not absolutely taken away by the institution of insolvency proceedings and the appointment of a receiver, is at least suspended during the pendency of the proceedings. *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310.

⁵⁴ *Bowker v. Hill*, 115 Fed. 528.

received for dividends, being in fact capital, is impressed with this trust,⁵⁵ and that "he who has received moneys impressed with a trust, without consideration, ought to and must restore them."⁵⁶ But some courts have held that since so long as a corporation is solvent, and remains in control of its property and assets, it may deal therewith and dispose of the same like an individual, subject only to such limitations upon its powers as may be imposed by its charter,⁵⁷ it may distribute its earnings among its stockholders by way of dividends without first paying its general creditors, unless an intent to defraud them is shown,⁵⁸ and hence that general creditors cannot recover dividends so paid where it is not shown that the corporation was insolvent when they were paid and there is no proof of fraud.⁵⁹

The right of the receiver to sue has been variously placed on the ground that the liability of the stockholder to repay is an asset of the corporation which passes to the receiver;⁶⁰ that he represents the stockholders and must adjust the affairs of the association equally among them;⁶¹ and that he represents the creditors.⁶²

It has been doubted whether the receiver's right of action is assignable and whether the court in which the receivership proceedings

⁵⁵ *United States. Hayden v. Thompson*, 71 Fed. 60; *Wood v. Dummer*, 3 Mason 308, Fed. Cas. No. 17,944.

Alabama. Ft. Payne Bank v. Alabama Sanitarium, 103 Ala. 358, 15 So. 618. See also *Bank of St. Marys v. St. John, Powers & Co.*, 25 Ala. 566.

Minnesota. Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310.

New Jersey. Mills v. Hendershot, 70 N. J. Eq. 258, 62 Atl. 542.

New York. Bartlett v. Drew, 57 N. Y. 587. See also *Hastings v. Drew*, 76 N. Y. 9.

The rule is based "upon the equitable ground that the stock is regarded as a trust fund for all the debts of the corporation, and no stockholder can entitle himself to any dividend or share of it until all the debts are paid." *Williams v. Boice*, 38 N. J. Eq. 364.

⁵⁶ *Hayden v. Thompson*, 71 Fed. 60.

⁵⁷ See Chap. 32, *supra*.

⁵⁸ See § 3663, *supra*.

⁵⁹ *Great Western Min. & Mfg. Co.*

v. Harris, 128 Fed. 321, *rev'g* 111 Fed. 38, judgment affirmed on other grounds, 198 U. S. 561, 49 L. Ed. 1163; *New Hampshire Sav. Bank v. Richey*, 121 Fed. 956.

⁶⁰ *Hayden v. Thompson*, 71 Fed. 60.

The receiver may recover the dividends because the corporation could do so. *Bingham v. Marion Trust Co.*, 27 Ind. App. 247, 61 N. E. 29.

⁶¹ *Bingham v. Marion Trust Co.*, 27 Ind. App. 247, 61 N. E. 29.

⁶² A receiver may recover such dividends in the right of the creditors, but not in the right of the corporation. *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310.

"While primarily the receiver represents the insolvent so far as the collection and conservation of its assets is concerned, in his hands all those claims become assets which were assets as to creditors as well as those which were assets as to the insolvent corporation." *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882.

are pending has power to order it sold. And it has been held that, in any event, an order of sale will not be construed as authorizing such a thing unless such a construction is compelled by the clearest and plainest language, and that such a right will not pass to the purchaser at a receiver's sale held pursuant to an order directing all the assets of the corporation to be sold as one property, and not in parcels.⁶³

To sustain such a recovery, there need not have been any bad faith or negligence in declaring the dividend, and the right exists where the dividend was made under a misconception on the part of the directors as to what constituted profits, and under a belief that there were profits to divide when, in fact there were none.⁶⁴

The right of the corporation or its assignee to recover is not affected by the fact that the stockholders authorized and directed the payment to be made, where the right to declare dividends is vested in the directors alone.⁶⁵ Nor is the obligation of the stockholder to refund affected by the fact that the amount of the dividend was credited on his stock subscription, at least where he is also a director.⁶⁶ But a stockholder who participates in a vote by which the whole cash assets of the corporation are withdrawn and paid to the stockholders in proportion to the amount of stock held by each cannot thereafter, in his capacity as a creditor, compel restitution by the other stockholders.⁶⁷

§ 3734. — — Effect of stockholder's good faith. There are numerous holdings to the effect that stockholders are liable for dividends paid to them out of capital even though they acted in good faith and

⁶³ *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310.

⁶⁴ *Grant v. Ross*, 100 Ky. 44, 37 S. W. 263; *Lexington Life, Fire & Marine Ins. Co. v. Page & Richardson*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; *Gratz v. Redd*, 4 B. Mon. (Ky.) 178, 189.

"The good faith of the corporation in paying dividends in impairment of capital * * * is no defense to an action for their recovery." *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882. To same effect, see *American Steel & Wire Co. v. Eddy*, 138 Mich. 403, 101 N. W. 578.

"The stockholders do not act in

a corporate capacity in receiving a dividend. They do not, therefore, ratify the illegal act of the directors by receiving it." And especially is this true where they do not know that the dividends are illegal. *Lexington Life, Fire & Marine Ins. Co. v. Page & Richardson*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165.

⁶⁵ *Grant v. Ross*, 100 Ky. 44, 37 S. W. 263.

⁶⁶ *Lexington Life, Fire & Marine Ins. Co. v. Page & Richardson*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; *Gratz v. Redd*, 4 B. Mon. (Ky.) 178.

⁶⁷ *Potter v. Stevens Mach. Co.*, 127 Mass. 592, 34 Am. Rep. 428.

without knowledge that the dividend was declared and paid illegally.⁶⁸ But the Supreme Court of the United States has held that the receiver of a national bank cannot recover back a dividend declared and paid out of capital at a time when the bank was not insolvent, where the stockholder received the same in good faith, believing that it was paid out of profits.⁶⁹ And this holding has been followed by the other federal courts and the rule there adopted applied with respect to other corporations.⁷⁰ If, however, the corporation was insolvent when the payment was made, a recovery may be had regardless of the good faith of the stockholder.⁷¹

It has also been held that where the only objection is that the dividend was not declared by the proper authority, the payment must be regarded as a voluntary one, and cannot be recovered back by the corporation from a stockholder who has received it in good faith, without notice of any infirmity in the manner of its declaration.⁷²

If stock is transferred merely for the purpose of enabling the transferee to act more conveniently and completely as the agent of the transferor, who retains the beneficial ownership, the transferor is chargeable with the knowledge of the agent as to the condition of

⁶⁸ *Alabama*. *Ft. Payne Bank v. Alabama Sanitarium*, 103 Ala. 358, 15 So. 618. See also *Bank of St. Marys v. St. John, Powers & Co.*, 25 Ala. 566.

Kentucky. *Lexington Life, Fire & Marine Ins. Co. v. Page & Richardson*, 17 B. Mon. 412, 66 Am. Dec. 165.

Michigan. *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882; *American Steel & Wire Co. v. Eddy*, 138 Mich. 403, 101 N. W. 578.

New Jersey. *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542.

England. *In re Denham*, 25 Ch. Div. 752. Compare *In re Peruvian Guano Co.*, [1894] 3 Ch. 690.

In Bartlett v. Drew, 57 N. Y. 587, it is said that if the stockholder has any of the assets or property of the corporation which ought to be applied to the payment of its debts, it is "immaterial whether he got it by fair agreement with his associates, or by any wrongful act."

In Grant v. Ross, 100 Ky. 44, 37 S. W. 263, a recovery was had by an assignee although the stockholders investigated the affairs of the corporation, and found and declared that it was solvent and that it had a large surplus over its liabilities.

⁶⁹ *McDonald v. Williams*, 174 U. S. 397, 43 L. Ed. 1022.

⁷⁰ *Rateliff v. Clendenin*, 232 Fed. 61; *E. L. Moore & Co. v. Murchison*, 226 Fed. 679; *Great Western Min. & Mfg. Co. v. Harris*, 128 Fed. 321, rev'g 111 Fed. 38, judgment aff'd on other grounds, 198 U. S. 561, 49 L. Ed. 1163; *Lawrence v. Greenup*, 97 Fed. 906; *Hayden v. Williams*, 96 Fed. 279. See also *Cottrell v. Albany Card & Paper Mfg. Co.*, 142 N. Y. App. Div. 148, 126 N. Y. Supp. 1070.

⁷¹ *Hayden v. Williams*, 96 Fed. 279.

⁷² *Berryman v. Bankers' Life Ins. Co.*, 117 N. Y. App. Div. 730, 102 N. Y. Supp. 695.

the company.⁷³ Acquiescence by the corporation in the unauthorized payment, under such circumstances, constitutes a ratification.⁷⁴

§ 3735. — Right of creditors as affected by time when they became such. According to some courts a recovery may be had for the benefit of creditors regardless of whether they became such before or after the dividends were declared,⁷⁵ at least unless those whose claims accrue subsequently know that the dividend has been paid out of capital.⁷⁶ Other courts, however, have held that a corporation, if solvent, has a right to declare a dividend as against subsequent creditors, and therefore creditors who become such after the payment of a dividend cannot recover the same from the stockholders on the subsequent insolvency of the company,⁷⁷ but that its assets must first be appropriated to the payment of its existing debts before any portion of them can be distributed to the stockholders, and creditors who become such before the payment of dividends may recover the same from the stockholders where such payment renders the corporation insolvent.⁷⁸ The burden of proving that the creditors for whose benefit a recovery is sought became such before the payment was made is on the plaintiff, where his allegation that such was the case is denied.⁷⁹

Dividends paid when the corporation was insolvent may be recovered by creditors who became such before or after they were paid, or by a receiver or trustee in bankruptcy in their behalf.⁸⁰ The test of

⁷³ If the agent was an officer or director and knew or should have known the facts, the principal cannot escape liability on the ground that he was an innocent holder who received the dividends in good faith and under the belief that they were properly paid. *E. L. Moore & Co. v. Murchison*, 226 Fed. 679.

⁷⁴ *Berryman v. Bankers' Life Ins. Co.*, 117 N. Y. App. Div. 730, 102 N. Y. Supp. 695.

⁷⁵ *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N. E. 329; *Gratz v. Redd*, 4 B. Mon. (Ky.) 178, 196; *Williams v. Boice*, 38 N. J. Eq. 364; *Cottrell v. Albany Card & Paper Mfg. Co.*, 142 N. Y. App. Div. 148, 126 N. Y. Supp. 1070.

⁷⁶ *Williams v. Boice*, 38 N. J. Eq. 364.

⁷⁷ *Ratcliff v. Clendenin*, 232 Fed. 61; *Montgomery v. Whitehead*, 40 Colo. 320, 11 L. R. A. (N. S.) 230, 90 Pac. 509.

⁷⁸ *Montgomery v. Whitehead*, 40 Colo. 320, 11 L. R. A. (N. S.) 230, 90 Pac. 509. See also *Ratcliff v. Clendenin*, 232 Fed. 61.

A creditor of a corporate creditor who garnishes the corporation and obtains a judgment against it in the garnishment proceedings stands in the shoes of his debtor in this respect, and may recover dividends paid after his debtor's claim against the corporation accrued. *Montgomery v. Whitehead*, 40 Colo. 320, 11 L. R. A. (N. S.) 230, 90 Pac. 509.

⁷⁹ *Ratcliff v. Clendenin*, 232 Fed. 61.

⁸⁰ *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936, aff'g 34 Fed. 124; *Ratcliff*

the solvency of the corporation under such circumstances is the sufficiency of its assets and its ability to pay its debts, and the sufficiency of its assets and its ability to pay its stockholders the par value of their stock in addition thereto are irrelevant to the issue of insolvency. If the corporation was a going concern when the payment was made, the presumption is that it was solvent, and the burden is on the plaintiff to show that it was insolvent if his allegation to that effect is denied.⁸¹

§ 3736. — Liability where stockholder is officer. A director or other officer of a corporation is bound to know the condition of the corporation's affairs, and if he receives a dividend which has not been earned, it may be recovered from him by the corporation or its assignee, or receiver,⁸² or by a creditor.⁸³

If a majority of the board of directors, by deceiving the minority as to the surplus on hand, induce them to concur in the declaration of a dividend which reduces the amount of the invested capital, the conspiring directors are jointly liable to the corporation in at least the amount by which their shares in the distribution have been increased by their misrepresentation.⁸⁴

An officer who receives a dividend which was fraudulently or unlawfully declared is liable to the corporation therefor, although he may have repudiated the transaction after his receipt of the dividend, and repaid it to another officer, for he should repay it to the corporation.⁸⁵

v. Clendenin, 232 Fed. 61; Fricke v. Angemeier, 53 Ind. App. 140, 101 N. E. 329.

⁸¹ Ratchiff v. Clendenin, 232 Fed. 61.

⁸² Finn v. Brown, 142 U. S. 56, 35 L. Ed. 936, aff'g 34 Fed. 124; E. L. Moore & Co. v. Murchison, 226 Fed. 679; Hayden v. Thompson, 71 Fed. 60; Main v. Mills, 6 Biss. 98, Fed. Cas. No. 8,974; Ebelhar v. German-American Security Co.'s Assignee (Ky. L. Rep.), 119 S. W. 220, 28 Ky. L. Rep. 1144, 91 S. W. 262; Mills v. Hendershot, 70 N. J. Eq. 258, 62 Atl. 542. And see Gratz v. Redd, 4 B. Mon. (Ky.) 178. See also Rance's Case, 6 Ch. App. 104. Compare In re Denham, 25 Ch. Div. 752.

⁸³ Gratz v. Redd, 4 B. Mon. (Ky.)

178; Bartlett v. Drew, 57 N. Y. 587. See also Bank of St. Marys v. St. John, Powers & Co., 25 Ala. 566.

⁸⁴ Salina Mercantile Co. v. Stiefel, 32 Kan. 7, 107 Pac. 774.

⁸⁵ In Finn v. Brown, 142 U. S. 56, 35 L. Ed. 936, aff'g Brown v. Finn, 34 Fed. 124, stock in a national bank was transferred on the books of the bank from the president to the vice president before the latter's election, and after his election a false and fraudulent dividend was declared without his knowledge, and he first learned that the shares had been transferred to him upon being informed that the dividend thereon had been credited to him on the books of the bank. He immediately repudiated the transac-

Statutes making directors individually liable to the corporation or its creditors for paying dividends when there are no profits available for that purpose,⁸⁶ do not affect the liability of directors as stockholders to the extent of the dividends which they have actually received.⁸⁷

§ 3737. — Effect of statutory liability of directors. The fact that a statute makes directors individually liable to the corporation or its creditors for wrongfully paying dividends when there are no profits available for the purpose does not affect the liability of stockholders to repay dividends wrongfully received by them, and, notwithstanding such a statute, the liability of the stockholders may be enforced in equity by a receiver of the corporation,⁸⁸ although, of course, a recovery of the money from the directors would exonerate the stockholders.⁸⁹ Nor does such a statute affect the liability of the directors as stockholders to the extent of the dividends which they have actually received.⁹⁰

§ 3738. — Extent of liability. The liability of the stockholders to refund is, of course, limited to the amounts respectively received by them.⁹¹ But the liability is not merely for a proportionate share of the indebtedness and therefore the solvent stockholders must make up, so far as they are chargeable with dividends, any deficiency due to the inability of insolvent stockholders to contribute their share.⁹² It has been held, however, that where all the stockholders are not made parties, and the bill does not show the total amount of indebtedness or that the stockholders not joined are insolvent or out of the jurisdiction, the defendants will be required to restore only so much of the dividends received by them as the stock held by them bears to the total number of shares.⁹³

tion, directed the president to re-transfer the shares to his own name, and then gave the president his check for the amount of the dividend. It was held that he should have repaid the dividend to the bank, and that his payment to the president did not relieve him from liability to the bank.

⁸⁶ See § 3742, *infra*.

⁸⁷ *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542.

⁸⁸ *Hayden v. Thompson*, 71 Fed. 60; *Williams v. Boice*, 38 N. J. Eq. 364.

As to such statutory liability, see § 3742, *infra*.

⁸⁹ "The directors are their agents, and if redress has been obtained by recourse to the agent, it would of course exonerate the principal." *Williams v. Boice*, 38 N. J. Eq. 364.

⁹⁰ A six years' limitation fixed by such a statute does not affect their liability. *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542.

⁹¹ *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542.

⁹² *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542.

⁹³ *Wood v. Dummer*, 3 Mason 308, Fed. Cas. No. 17,944.

"If one stockholder is compelled to pay more than his fair share of any unpaid debt, he may resort to his associates for equitable contributions."⁹⁴

A corporation cannot recover from a transferee of shares dividends improperly paid to the transferrer, for the transferee only succeeds to such of the transferrer's liabilities as are incidental to the ownership of the shares.⁹⁵

§ 3739. — Jurisdiction and procedure. Equity has jurisdiction of suits by creditors, assignees, receivers or trustees in bankruptcy of corporations to recover dividends illegally paid,⁹⁶ and, as a rule, such dividends may also be recovered in an action at law,⁹⁷ although there are holdings to the effect that the remedy in equity is exclusive, and that an action at law will not lie.⁹⁸ It has been held

⁹⁴ *Bartlett v. Drew*, 57 N. Y. 587.

⁹⁵ *Hurlbut v. Tayler*, 62 Wis. 607, 22 N. W. 855.

⁹⁶ *United States*. *Wood v. Dummer*, 3 Mason 308, Fed. Cas. No. 17,944. See also *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705.

Kentucky. *Grant v. Southern Contract Co.*, 104 Ky. 781, 47 S. W. 1091.

New Jersey. *Williams v. Boice*, 38 N. J. Eq. 364. See also *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542.

Oregon. *Garetson Lumber Co. v. Hinson*, 69 Ore. 605, 140 Pac. 633.

West Virginia. Code, § 2873. *Bennett v. Clay County Bank*, 93 S. E. 353.

Wisconsin. *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875.

Equity has jurisdiction of a suit by a receiver against all of the stockholders to recover dividends paid to them out of capital, since it is a suit to execute a trust and to undo a fraud, and because it will avoid a multiplicity of suits. *Hayden v. Thompson*, 71 Fed. 60.

The statutes of Maine (Rev. St. 1857, c. 46, § 34) formerly provided that judgment creditors might recover dividends unlawfully paid in a suit in equity in the Supreme Judicial Court of that state.

In *Bowker v. Hill*, 115 Fed. 528, it

was held that this provision was not intended to deprive a federal court of equity of jurisdiction of such a suit in a case where the necessary diversity of citizenship existed.

The present Maine statute provides that a recovery may be had in an action on the case. Rev. St. 1903, c. 47, § 32, p. 439.

⁹⁷ *Lexington Life, Fire & Marine Ins. Co. v. Page & Richardson*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; *Kretschmar v. Stone*, 90 Miss. 375, 43 So. 177.

The Michigan statute making stockholders jointly and severally liable to creditors to the amount of the capital withdrawn and refunded to them "provides a new procedure, permitting one who has exhausted his remedy against the corporation (if not others) to sue the stockholder in an action at law." *American Steel & Wire Co. v. Eddy*, 130 Mich. 266, 89 N. W. 952.

See also *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936, which was an action at law by a receiver of a national bank; and *Main v. Mills*, 6 Biss. 98, Fed. Cas. No. 8,974, which was an action at law by a trustee in bankruptcy.

⁹⁸ *Paschall v. Whitsett*, 11 Ala. 472; *Spéar v. Grant*, 16 Mass. 9; *Vose v. Grant*, 15 Mass. 505.

A receiver of a national bank can-

that dividends paid on void stock may be recovered by the other stockholders for the benefit of the corporation in an action at law for money had and received.⁹⁹

In the federal courts general creditors cannot maintain a suit in equity to compel stockholders to account for dividends received by them on the theory that the distribution of the same was fraudulent until they have exhausted their remedy at law by reducing their claims to judgment.¹

It has been held that a creditor may sue a single stockholder, and that he is not obliged to sue on behalf of himself and all other creditors who may choose to come in.² "If one stockholder is compelled to pay more than his fair share of any unpaid debt he may resort to his associates for equitable contribution;³ but with that proceeding the creditor has nothing to do, unless he chooses to intervene to settle equities that exist between his debtors."⁴ The liability for the benefit of the creditors under the West Virginia statute may be enforced in a proceeding instituted by all of the creditors, or by one of them for the benefit of all.⁵ In New York the corporation is a necessary party defendant to a suit by a judgment creditor.⁶

The bill in a suit by a receiver is not multifarious because all of the stockholders are joined as defendants.⁷ Nor is such a bill against several stockholders to recover dividends declared during a number of years multifarious merely because some of the defendants participated in but one or two of such dividends, while others participated in more of them and still others in all.⁸ But a bill is multifarious

not maintain an action at law in a federal court against a stockholder to recover a dividend paid him out of the assets of the bank during its voluntary liquidation, and at a time when it was solvent, and where such payment did not render it insolvent, but the remedy, if any, is in equity. *Lawrence v. Greenup*, 97 Fed. 906.

In *Williams v. Boice*, 38 N. J. Eq. 364, which was a suit by a receiver, it is said that "the remedy is in equity and not at law."

"The proper remedy of a creditor of an insolvent corporation to reach the fund alleged to have been paid to a stockholder as a dividend in liquidation is by a suit in equity and not by an action at law." *Garetson Lumber*

Co. v. Hinson, 69 Ore. 605, 140 Pac. 633.

⁹⁹ *Tooker v. National Sugar Refining Co. of New Jersey*, 80 N. J. Eq. 305, 84 Atl. 10.

¹ *New Hampshire Sav. Bank v. Richey*, 121 Fed. 956.

² *Bartlett v. Drew*, 57 N. Y. 587.

³ See § 4265, *infra*.

⁴ *Bartlett v. Drew*, 57 N. Y. 587.

⁵ *Bennett v. Clay County Bank*, — W. Va. —, 93 S. E. 353; *Benedum v. First Citizens' Bank*, 72 W. Va. 124, 78 S. E. 656.

⁶ *Lathrop, Shea & Henwood Co. v. Byrne*, 115 N. Y. App. Div. 846, 100 N. Y. Supp. 1041.

⁷ *Williams v. Boice*, 38 N. J. Eq. 364.

⁸ *Hayden v. Thompson*, 71 Fed. 60.

where it joins, in the same court, a cause of action to foreclose a mortgage and a cause of action against individual stockholders to compel them to account for dividends claimed to have been fraudulently paid by them and which it is claimed, therefore, they hold as trustees for the benefit of corporate creditors.⁹ And the same is true of a bill by a trustee in bankruptcy to recover dividends illegally and fraudulently paid, for the benefit of corporate creditors, and to impeach a decree entered against the corporation as a garnishee predicated upon a judicially admitted and unauthorized declaration of dividends in favor of the same stockholder.¹⁰

§ 3740. — Statute of limitations. When dividends are unlawfully paid, an action against the stockholders to recover them back is governed by the statute of limitations applicable to actions on implied contract, unless there is some other statute expressly applying to it.¹¹ And, by analogy, a suit in equity will be barred after the lapse of the time fixed by the statute governing actions at law.¹²

⁹ *New Hampshire Sav. Bank v. Richey*, 121 Fed. 956.

¹⁰ *Bennett v. Clay County Bank*, — W. Va. —, 93 S. E. 353.

¹¹ *Main v. Mills*, 6 Biss. 98, Fed. Cas. No. 8,974; *Lexington Life, Fire & Marine Ins. Co. v. Page & Richardson*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882; *Tooker v. National Sugar Refining Co. of New Jersey*, 80 N. J. Eq. 305, 84 Atl. 10.

¹² *Hayden v. Williams*, 96 Fed. 279; *Hayden v. Thompson*, 71 Fed. 60; *Tooker v. National Sugar Refining Co. of New Jersey*, 80 N. J. Eq. 305, 84 Atl. 10.

A court of equity will interpose the bar of the statute as against creditors in favor of a stockholder who had no notice that the dividend was paid out of capital. *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882; *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542.

While the liability of the stockholders is based on the theory that they hold the dividends so paid in

trust, the trust is a constructive or implied one, and the statute applies to such trusts in the absence of fraud. *Hayden v. Thompson*, 71 Fed. 60; *Lexington Life, Fire & Marine Ins. Co. v. Page & Richardson*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882; *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542.

A federal court of equity will act or refuse to act in analogy to the statute of limitations of the state in which it is sitting. *Hayden v. Thompson*, 71 Fed. 60.

In *Williams v. Boice*, 38 N. J. Eq. 364, it is held that lapse of time in analogy to the statute of limitations will not bar a suit in equity by a receiver to recover dividends paid out of capital.

But in *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542, it was pointed out that the question in that case arose on general demurrer, and that, as the bill was filed to recover all dividends paid after a certain date, including some paid within six years, its deci-

As a rule, where the claim has become barred as against the corporation it is also barred as against creditors or an assignee for their benefit,¹³ or a receiver.¹⁴ But a court of equity will not interpose the bar of the statute as against creditors in behalf of directors who knew that the dividends were paid from capital and hence received them in fraud of the corporation and its creditors.¹⁵

In the absence of fraud the statute generally commences to run from the time when the dividend is paid.¹⁶ Under a statute giving a right of action to judgment creditors, it has been held that a creditor's cause of action does not accrue, and therefore limitations do not commence to run, until an execution against the corporation has been returned *nulla bona*.¹⁷ Where there has been fraud, the statute does not commence to run against those guilty of it until its discovery.¹⁸

That the directors were ignorant of the right of the corporation to reclaim the dividends will not prevent the running of the statute, where they knew the facts and by the exercise of reasonable diligence could have ascertained whether or not the dividends were authorized by the charter.¹⁹ Nor is the running of the statute postponed because the misappropriation of the corporate assets is concealed by third persons, where the defendant received his dividend in entire good faith, in the honest belief that he was justly entitled to it, and knew nothing of such misappropriation or its concealment.²⁰ Nor will the fact that some creditor may not have become such within the statutory period after the unlawful diversion affect the question in a suit

sion was not necessary. It is also pointed out that the decision was based on the holding in a case involving a distribution of assets on liquidation.

¹³ *Lexington Life, Fire & Marine Ins. Co. v. Page & Richardson*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165.

¹⁴ *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882.

¹⁵ *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542.

¹⁶ *Lexington Life, Fire & Marine Ins. Co. v. Page & Richardson*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882.

The cause of action arises when the payment is made rather than when it

is discovered, after the appointment of a receiver, that the corporate assets are insufficient to pay its debts. *Hayden v. Thompson*, 71 Fed. 60.

¹⁷ *Bowker v. Hill*, 115 Fed. 528.

¹⁸ Where the sole stockholders and managers of a bank divide among themselves as profits money belonging to the capital or to the depositors, they are guilty of a fraud on the depositors, and if they conceal this fraud from the depositors the statute does not begin to run until it is discovered. *Main v. Mills*, 6 Biss. 98, Fed. Cas. No. 8,974.

¹⁹ *Lexington Life, Fire & Marine Ins. Co. v. Page & Richardson*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165.

²⁰ *Hayden v. Thompson*, 71 Fed. 60.

by a receiver, since the right to enforce repayment exists in some one at all times after such diversion until the statute has run.²¹

§ 3741. — Liability of directors—At common law. The directors of a corporation charged with the management of its affairs occupy a relation analogous to that of trustees, and they are certainly liable to the corporation for any breach of trust.²² This principle applies if they unlawfully pay dividends when there are no surplus profits available for their payment, and thereby reduce the capital stock, provided they act in bad faith, or are guilty of gross negligence or inattention. In such a case they incur liability, not only to the corporation, but also, in equity, to creditors.²³ There is no liability, however, either to the corporation or to creditors, if they act in good faith and with due care, unless liability is imposed by some statute. In other words, they are not liable for mere errors of judgment.²⁴

²¹ *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, Ann. Cas. 1915 A 821, 141 N. W. 882.

²² See § 2261 et seq., supra.

²³ *United States*. *Boyd v. Schneider*, 131 Fed. 223, rev'g 124 Fed. 239.

Kentucky. *Gratz v. Redd*, 4 B. Mon. 178.

New York. *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422; *Gaffney v. Colvill*, 6 Hill 567; *Scott v. Eagle Fire Co.*, 7 Paige 198.

Pennsylvania. *Loan Soc. of Philadelphia v. Eavenson*, 248 Pa. 407, 94 Atl. 121, 241 Pa. 65, 88 Atl. 295; *Cornell v. Seddinger*, 237 Pa. 389, 85 Atl. 446.

England. *In re National Funds Assurance Co.*, 10 Ch. Div. 118. Compare *In re National Bank of Wales*, [1899] 2 Ch. 629.

The corporation may sue although the stockholders could not, since it represents the interests of creditors as well as those of the stockholders. *Loan Soc. of Philadelphia v. Eavenson*, 248 Pa. 407, 94 Atl. 121.

A foreign corporation doing business in Pennsylvania may maintain a suit in that state against directors residing there. *Loan Soc. of Philadelphia v. Eavenson*, 241 Pa. 65, 88 Atl. 295;

Id., 248 Pa. 407, 94 Atl. 121.

A creditor's case is different from that of the stockholders "since the assets are a fund to which he may look for the satisfaction of his claim, and the liability of directors for the wilful and fraudulent impairment of that fund by the distribution of dividends not earned may be asserted by him in a proper form of action, irrespective of any statutory declaration of his right." *Johnson v. Nevins*, 87 N. Y. Misc. 430, 150 N. Y. Supp. 828.

A director of an insolvent corporation who knowingly participates in declaring dividends out of capital, cannot recover from an assignee for creditor's money loaned by him to the corporation to pay such a fraudulent dividend until the stockholders have been fully paid. *Kisterbock's Appeal*, 51 Pa. St. 483.

Directors may be held liable even though they have no personal knowledge of the real condition of the company, and act in reliance on the reports of the treasurer where, by the exercise of common prudence, they might readily have ascertained the truth. *Cornell v. Seddinger*, 237 Pa. 389, 85 Atl. 446.

²⁴ *E. L. Moore & Co. v. Murchison*,

And it has been held that at common law a mere distribution of a portion of the capital of the corporation to the stockholders in proportion to their respective interests, and which does not impair the power of the corporation to discharge its indebtedness, is not such a waste or misappropriation of its funds as will give the corporation a cause of action against the directors for the amount so distributed.²⁵

§ 3742. — Statutory liability. In many jurisdictions statutes have been enacted making the directors or trustees of corporations liable to the corporation, or to its stockholders, or its creditors, for paying dividends unlawfully and thereby diminishing the capital stock. So it is variously provided that they shall be jointly and severally liable to the corporation, and its creditors to the amount of the capital so divided, or to the extent of any loss sustained by them by reason of the violation of the statute.²⁶ Under some statutes they are

226 Fed. 679; *Davenport v. Lines*, 77 Conn. 473, 59 Atl. 603; *Lexington & O. R. Co. v. Bridges*, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528; *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422. See also *Cornell v. Seddinger*, 237 Pa. 389, 85 Atl. 446.

²⁵ *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424, 83 N. Y. Supp. 509, followed in *De Raimes v. United States Lithograph Co.*, 161 N. Y. App. Div. 761, 146 N. Y. Supp. 813. See also *Johnson v. Nevins*, 87 N. Y. Misc. 430, 150 N. Y. Supp. 828.

²⁶ The California statute makes the directors liable to the corporation and to its creditors to the extent of the capital stock unlawfully divided, withdrawn or paid out. *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030; *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44; *In re Brown*, 164 Fed. 673.

The New York statute makes the directors liable to the corporation and to its creditors to the full amount of the loss sustained by them by reason of the unlawful dividend. *Stock Corp. Law*, § 28; *Wesp v. Muckle*, 136 N. Y. App. Div. 241, 120 N. Y. Supp. 976, aff'd 201 N. Y. 527, 94 N. E. 1100 (mem. dec.).

Under Laws 1892, c. 688, § 23, they were liable to the corporation and its creditors to the full amount of the capital divided. *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424, 83 N. Y. Supp. 509; *Hutchinson v. Curtiss*, 45 N. Y. Misc. 484, 92 N. Y. Supp. 70.

The Corporation Act of 1848 made the directors liable for the debts of the company if they declared and paid any dividend the payment of which would render the corporation insolvent or would diminish the amount of its capital stock. *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422; *Rorke v. Thomas*, 56 N. Y. 559; *Merchants' Bank v. Bliss*, 35 N. Y. 412.

As to the provisions of Laws 1875, c. 371, § 33, relative to savings banks, see *Van Dyck v. McQuade*, 86 N. Y. 38.

The corporation's cause of action is not impaired by the fact that the enforcement of the liability will result in advantage to the stockholder greater than he would have received had the corporation complied with the law. *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424, 83 N. Y. Supp. 509.

The Virginia Code makes the directors liable for the amount of capital divided. *Ann. Code* 1904, § 1105e (60).

made liable to the corporation, and to its creditors in the event of its dissolution.²⁷ The corporation is dissolved, within the meaning of such a provision, when it ceases to do business because of insolvency and goes into the hands of a receiver, and there need not have been a voluntary dissolution, declared by a court of competent jurisdiction, in order to render the statute applicable.²⁸ A director is not relieved from liability because he ceases to be such before the dissolution takes place.²⁹ It has also been held that under such a statute it is not necessary to show that the corporation was insolvent when the dividend was paid.³⁰

Some statutes make the corporation liable to the stockholders, severally and respectively, to the full amount of any loss sustained by them, or in case of insolvency to the corporation or its receiver to the full amount of any loss sustained by the corporation.³¹

Under Code 1873, c. 57, § 33, if a dividend was declared out of net profits when the corporation was insolvent, the directors were jointly and severally liable to creditors for the amount of the capital so divided.

Under this provision in order to hold the directors personally liable it was necessary to show that the corporation was insolvent when the dividend was declared. *Slaymaker's Adm'r v. Jaffray & Co.*, 82 Va. 346, 4 S. E. 606.

²⁷ The Idaho statute so provides. *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340; *Brenaman v. Whitehouse*, 85 Wash. 355, 148 Pac. 24.

And there is such a provision in Washington. *Brenaman v. Whitehouse*, 85 Wash. 355, 148 Pac. 24. In this case it is held that trustees are liable under the statute where they direct the sale of shares of the stock of the corporation and the distribution of the proceeds as a dividend.

²⁸ *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340.

²⁹ *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340.

³⁰ *Brenaman v. Whitehouse*, 85 Wash. 355, 148 Pac. 24.

In an action by a receiver it need not be alleged that the corporation

was insolvent when the dividend was paid, where it appears from the allegations that the rights of creditors were injuriously affected by the payment. *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340.

³¹ New Jersey P. L. 1896, p. 286, as amended by P. L. 1904, p. 275; 2 Comp. Stat. p. 1617, § 30. *Fleisher v. West Jersey Securities Co.*, 84 N. J. Eq. 55, 92 Atl. 575. In the case last cited it is doubted whether a court of equity has jurisdiction of the several action given by the statute to a stockholder, but the question is not decided.

Prior to the amendment of 1904 the statute made the directors liable "to the corporation and to its creditors in the event of its dissolution or insolvency, to the full amount of the dividend made," etc. *Siegmán v. Electric Vehicle Co.*, 72 N. J. Eq. 403, 65 Atl. 910, aff'g 71 N. J. Eq. 123, 62 Atl. 941; *Schoenfeld v. American Can Co.* (N. J. Eq.), 55 Atl. 1044; *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 54 Atl. 454, rev'g 63 N. J. Eq. 422, 51 Atl. 1003; *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400, 29 Atl. 203; *Siegmán v. Electric Vehicle Co.*, 140 Fed. 117; *Hutchinson v. Curtiss*, 45 N. Y. Misc. 484, 92 N. Y.

It is sometimes provided that if the directors pay a dividend when the corporation is insolvent, or is in danger of insolvency, or a dividend which will make it insolvent, they shall be liable for all the debts of the corporation,³² or that they shall be liable to the extent of

Supp. 70; *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424, 88 N. Y. Supp. 509, construing the New Jersey statute.

³² The Iowa statute provides that if the directors or other officers declare and pay any dividend when the corporation is known by them to be insolvent, or any dividend which would render it insolvent or diminish the amount of its capital stock, all directors, officers or agents knowingly consenting thereto shall be jointly and severally liable for all the debts of the corporation then existing. *Swartley v. Oak Leaf Creamery Co.*, 135 Iowa 573, 113 N. W. 496; *Killen v. Barnes*, 106 Wis. 546, 82 N. W. 536, construing the Iowa statute.

The Illinois statute (Ill. St. Ann. ¶ 2436) provides that if the directors or other officers declare and pay any dividend when the corporation is insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, all directors, officers or agents assenting thereto shall be jointly and severally liable for all the debts of the corporation then existing or which shall thereafter be contracted while they shall respectively continue in office.

The Kentucky statute makes the directors liable for all the debts of the corporation if they pay any dividends while it is insolvent or that will make it insolvent. *Taylor v. Com.*, 119 Ky. 731, 75 S. W. 244.

This provision has been so construed as to limit the liability to the amount of the dividend declared, rather than to hold the directors liable for the full amount of the corporate indebtedness, where the facts show that in declar-

ing it they have acted in good faith and have used ordinary care and diligence in conducting the affairs of the corporation. *Franklin v. Caldwell*, 123 Ky. 528, 29 Ky. L. Rep. 935, 96 S. W. 605.

The statute applies to directors of banks. *Franklin v. Caldwell*, 123 Ky. 528, 29 Ky. L. Rep. 935, 96 S. W. 605.

The Maryland statute is similar to that of Oregon, *infra*. *Boston & M. R. R. v. Graves*, 80 Fed. 588.

The Missouri statute provides that if the directors knowingly declare and pay any dividend when the corporation is insolvent, or any dividend the payment of which would make it insolvent, or which would diminish the amount of its capital stock, they shall be jointly and severally liable for all the debts of the corporation then existing and for all that shall be thereafter contracted while they shall respectively remain in office. *Shields v. Hobart*, 172 Mo. 491, 95 Am. St. Rep. 529, 72 S. W. 669.

The Oregon statute provides that if the directors declare and pay dividends when the corporation is insolvent, or which renders it insolvent, or diminishes the amount of its capital stock, such directors shall be jointly and severally liable for the debts of the corporation then existing or incurred while they remain in office. *Patterson v. Wade*, 115 Fed. 770; *Patterson v. Thompson*, 86 Fed. 85; *Patterson v. Thompson*, 90 Fed. 647.

The Wisconsin statute provides that if the directors pay a dividend when the corporation is insolvent or in danger of insolvency, not having reason to believe that there were sufficient net profits properly applicable thereto

the dividend so declared.³³ Under such a statute it has been held that the directors are not liable unless the corporation is insolvent when the dividend is made, "or is actually rendered insolvent thereby, even though the dividend may be one of several causes of insolvency which results a considerable time afterwards."³⁴

It is also sometimes provided that directors who pay a dividend before the capital stock is fully paid in shall be jointly and severally liable to creditors of the corporation at the time of declaring such dividend to the amount of their debts.³⁵ The liability of the directors under such a provision is fixed by their act in paying the dividend and

to pay the same without impairing or diminishing the same, they shall be jointly and severally liable to the creditors of the corporation at the time of declaring such dividend, to the amount of their debts. *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479.

The statute of Wyoming is similar to that of Illinois, *supra*. *Collins v. Penn-Wyoming Copper Co.*, 203 Fed. 726.

³³ The Massachusetts statute provides that the president and directors shall be jointly and severally liable for making and consenting to a dividend if the corporation is, or is thereby rendered, insolvent, to the extent of such dividend. *Rev. Laws, c. 110, § 58, cl. 1. Pennsylvania Iron Works Co. v. Mackenzie*, 190 Mass. 61, 76 N. E. 228; *Ellis v. French-Canadian Co-operative Ass'n*, 189 Mass. 566, 76 N. E. 207.

Directors cannot escape liability under the defense that the corporate president failed to retain enough property, upon a distribution of assets, to maintain the solvency of the corporation, though directed to do so by the directors, since the distribution of assets is a part of the duty of the directors and they cannot delegate this authority. *Pennsylvania Iron Works Co. v. Mackenzie*, 190 Mass. 61, 76 N. E. 228.

A distribution of the proceeds of the sale of all the property of the cor-

poration is a dividend within the meaning of this provision. The object of the statute "is to secure to creditors their right to be paid out of the funds of the corporation, and its provisions apply even more to a final distribution of the proceeds of sale of the whole property than to a division of supposed earnings." *Pennsylvania Iron Works Co. v. Mackenzie*, 190 Mass. 61, 76 N. E. 228.

The Pennsylvania statute relative to manufacturing companies provides that if the directors declare any dividend when the company is insolvent, or the payment of which would render it insolvent, they shall be jointly and severally liable for all debts of the company then existing and for all thereafter contracted, so long as they respectively remain in office, provided that the amount for which they shall be liable shall not exceed the amount of such dividend. *Childs v. Adams*, 43 Pa. Super. Ct. 239. See also *Hill v. Frazier*, 22 Pa. St. 320, construing an earlier similar statute.

³⁴ *Ellis v. French-Canadian Co-op. Ass'n*, 189 Mass. 566, 76 N. E. 207. See also *Slaymaker's Adm'r v. Jaffray & Co.*, 82 Va. 346, 4 S. E. 606, construing an early Virginia statute which is no longer in force.

³⁵ *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479.

As to what constitutes payment, see § 3675 *et seq.*, *supra*.

the status of the creditors and the condition of the corporation's capital at that time, and cannot be extinguished by a subsequent payment or collection of the unpaid capital. Nor are creditors estopped from enforcing such liability by reason of the fact that the assignee for the benefit of creditors has recovered a judgment against the subscribers for stock for the unpaid portions of their subscriptions, especially where such judgment has not been paid.³⁶

Directors of a national bank may be held liable under the provision of the National Banking Act making directors who participate in or consent to any violation of the act personally liable for any damages sustained by the association, its shareholders, or any other person in consequence of such violation.³⁷

A liability imposed upon directors by the law of the state where the corporation is formed will not be enforced by the courts of another state where the corporation is doing business,³⁸ except where the statutes of the latter state provide to the contrary.³⁹

³⁶ *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479.

³⁷ *Boyd v. Schneider*, 131 Fed. 223, rev'g 124 Fed. 239; *Cockrill v. Cooper*, 86 Fed. 7, rev'g 73 Fed. 679; *Emerson v. Gaither*, 103 Md. 564, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, 64 Atl. 26.

As to the liability of directors generally under this provision, see § 2647, *supra*.

³⁸ This for the reason that such liability does not have for its foundation the principles of the common law and is not contractual in its nature. *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424, 83 N. Y. Supp. 509.

³⁹ In New York the statute provides that directors of a foreign corporation transacting business in that state shall be liable in the same manner and to the same extent as directors of a domestic corporation for the making of unauthorized dividends, and that such liability may be enforced in the courts of New York in the same manner as similar liabilities imposed by law upon the directors of domestic corporations. This statute gives a remedy by which a liability imposed by the statutes of

another state may be enforced in New York in precisely the same way and to the same extent, and no other, that it could be in the state in which the foreign corporation obtained its charter. *De Raimes v. United States Lithograph Co.*, 161 N. Y. App. Div. 781, 146 N. Y. Supp. 813.

The common-law right of creditors to sue directors may be enforced under this statute, but the action must be in the form prescribed by section 28 of the New York Stock Corporation Law. The recovery must be had in a representative action in equity, and a receiver in supplementary proceedings, who represents but a single creditor, cannot sue. *Johnson v. Nevins*, 87 N. Y. Misc. 430, 150 N. Y. Supp. 828.

Under this statute and the statutes of New Jersey and New York imposing personal liability on directors making dividends out of capital, a New Jersey corporation doing business in New York may maintain an action in the latter state to recover from directors amounts unlawfully distributed by them as dividends. *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424, 83 N. Y. Supp. 509, followed in *Hutchin-*

Generally the liability under such statutes is held not to survive.⁴⁰ And in any event persons cannot be held liable as distributees under the will of a deceased director where it is not alleged that he left any estate, or that, if he did, the alleged distributees received anything from it.⁴¹

Neither the directors nor a majority of the stockholders can waive a statutory right of the corporation to recover from the directors the amount of dividends made out of capital, where the corporation itself is expressly prohibited from so making them.⁴²

§ 3743. — Nature and extent of liability. The statutory liability of the directors to make restitution is not contractual in its nature.⁴³ Some courts hold that such statutes are penal in character,⁴⁴ while

son v. Curtiss, 45 N. Y. Misc. 484, 92 N. Y. Supp. 70, holding that under such circumstances it is the New Jersey statute which makes the dividend unauthorized, but that the recovery is to be had according to the New York statute.

The New Jersey statute was subsequently amended so as to make the directors liable, not to the corporation, but to the stockholders severally and respectively for any loss sustained by them, or in case of insolvency, to the creditors of the corporation or its receiver, and it was then held that a stockholder of a New Jersey corporation could not maintain such an action in New York in the right and for the benefit of the New Jersey corporation, since he could not have maintained such an action in New Jersey. *De Raimes v. United States Lithograph Co.*, 161 N. Y. App. Div. 781, 146 N. Y. Supp. 813.

⁴⁰ *Boston & M. R. R. v. Graves*, 80 Fed. 588; *Killen v. Barnes*, 106 Wis. 546, 82 N. W. 536.

But see *Stephens v. Overstolz*, 43 Fed. 465, where it is held that a right or action against directors under the National Banking Act survives.

⁴¹ *Emerson v. Gaither*, 103 Md. 564, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, 64 Atl. 26.

⁴² *Siegmán v. Electric Vehicle Co.*, 140 Fed. 117; *Siegmán v. Electric Vehicle Co.*, 72 N. J. Eq. 403, 65 Atl. 910, aff'g 71 N. J. Eq. 123, 62 Atl. 941.

"To say that any final discretion is imposed in the directors, or in the majority of stockholders, with respect to waiving such a cause of action, is to say, in effect, that the same body may by indirection confirm the dividends from capital which the law has distinctly prohibited." *Siegmán v. Electric Vehicle Co.*, 72 N. J. Eq. 403, 65 Atl. 910, aff'g 71 N. J. Eq. 123, 62 Atl. 941. In this case it was held that the fact that the directors refuse to bring such a suit and that this action on their part is ratified by a majority of the stockholders, does not prevent the bringing of such a suit by a dissenting stockholder.

⁴³ *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424, 88 N. Y. Supp. 509.

⁴⁴ *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422; *Rorke v. Thomas*, 56 N. Y. 559; *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Killen v. Barnes*, 106 Wis. 546, 82 N. W. 536.

An action under the Oregon statute is one to recover a statutory penalty. *Patterson v. Wade*, 115 Fed. 770; *Patterson v. Thompson*, 90 Fed. 647; *Patterson v. Thompson*, 86 Fed. 85.

others take the view that they are not penal, and that their "sole purpose is, not to punish, but to provide for the making of compensation by wrong-doers for the injury sustained by their wrongful act."⁴⁵

The liability is a civil one, and does not affect the responsibility of the directors for their criminal acts. So it will not preclude the prosecution of a director for embezzlement committed under the guise of declaring a dividend.⁴⁶ Such statutes will be strictly construed,⁴⁷ and "the liability cannot be extended beyond the strict terms of the statute."⁴⁸ But while a clear case must be established, "yet the substance of the act and not the mere form must be the test of liability."⁴⁹

Where the statute merely makes the directors liable to "creditors," they are liable to all the creditors of the corporation, including both those who became such before and after the dividend was declared.⁵⁰ It is not necessary to a recovery by creditors or a receiver representing them that the assets of the corporation be first exhausted.⁵¹ Nor according to the weight of authority is it necessary that a judgment be recovered against the corporation,⁵² nor the directors bound by

⁴⁵ *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 54 Atl. 454, rev'g 63 N. J. Eq. 422, 51 Atl. 1003, quoted in *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424, 83 N. Y. Supp. 509; *Hutchinson v. Curtiss*, 45 N. Y. Misc. 484, 92 N. Y. Supp. 70, holding that the New Jersey statute was not penal and hence not within the rule that the courts of one state will decline to enforce the penal laws of another. See also *Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450, 59 Atl. 577.

In *Stephens v. Overstolz*, 43 Fed. 465, it was held that the provisions of the National Banking Act imposing liability on the directors of national banks under certain circumstances are remedial and not penal.

⁴⁶ *Taylor v. Com.*, 119 Ky. 731, 75 S. W. 244.

⁴⁷ *Collins v. Penn-Wyoming Copper Co.*, 203 Fed. 726.

⁴⁸ *Rorke v. Thomas*, 56 N. Y. 559.

The Massachusetts statute in terms excludes liability to creditors in all cases other than those therein specially

mentioned. *Ellis v. French-Canadian Co-op. Ass'n*, 189 Mass. 566, 76 N. E. 207.

⁴⁹ *Rorke v. Thomas*, 56 N. Y. 559.

⁵⁰ *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340; *Brenaman v. Whitehouse*, 85 Wash. 355, 148 Pac. 24.

Hence in a suit by a receiver it is not necessary to allege that the creditors for whose benefit it is brought were creditors when the unlawful dividend was declared. *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340.

⁵¹ *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340; *Swartley v. Oak Leaf Creamery Co.*, 135 Iowa 573, 113 N. W. 496.

⁵² *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340; *Swartley v. Oak Leaf Creamery Co.*, 135 Iowa 573, 113 N. W. 496.

If the directors are made liable for all of the debts of the company, the recovery of a judgment against it by the creditor is not necessary to their liability. *Rorke v. Thomas*, 56 N. Y. 559.

such a judgment if one is recovered. And it follows that they cannot be held liable for the costs of such a judgment.⁵³ Some courts hold, however, that the creditor must first proceed to have the amount of his indebtedness adjudicated in an action against the corporation.⁵⁴

The directors are not liable for loss of commissions and discounts on an issue of bonds made necessary by the declaration of the dividend.⁵⁵

Profits made by the corporation under new management cannot be applied in reduction of the liability.⁵⁶

§ 3744. — Effect of good faith. Under some statutes the liability of the directors is absolute, and exists even though they declared the dividends in good faith,⁵⁷ while under others they are

⁵³ Rorke v. Thomas, 56 N. Y. 559.

⁵⁴ Childs v. Adams, 43 Pa. Super. Ct. 239.

⁵⁵ Hutchinson v. Curtiss, 45 N. Y. Misc. 484, 92 N. Y. Supp. 70.

⁵⁶ Hutchinson v. Curtiss, 45 N. Y. Misc. 484, 92 N. Y. Supp. 70.

⁵⁷ In *Siegman v. Electric Vehicle Co.*, 140 Fed. 117, which was a suit under the New Jersey statute, it was held that the defense of good faith is one of fact, and that, assuming that good faith would be a valid defense, the plea did not present it in the proper manner. In the course of the opinion the court said that statute "certainly imposes upon a board of directors the duty of making a fair and honest effort to ascertain whether a proposed dividend can be paid without impairment of the capital. They must make an examination of the corporation's assets and its liabilities. They must value its assets at no higher figures than reasonably prudent men would do. If the proofs show such a loose and unbusiness-like examination of the affairs of the company, or such inflated valuations of its assets as to overcome the proofs of the good faith and honest purposes of the directors, their payment of a dividend which impairs the capital puts them in the position of lia-

bility to make the impaired capital good." The court further said: "If upon a fair and just ascertainment of the financial condition of a corporation it appears that a proposed dividend may be paid without impairment of capital, the sudden decline of the value of the assets of the corporation, or the diminution of its assets from other causes, even below the point of solvency, after the declaration of the dividend, will not render the directors liable either to the corporation or its creditors." See also *Siegman v. Electric Vehicle Co.*, 72 N. J. Eq. 403, 65 Atl. 910, aff'g 71 N. J. Eq. 123, 62 Atl. 941, and *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 54 Atl. 454, rev'g 63 N. J. Eq. 422, 51 Atl. 1003.

In *Rorke v. Thomas*, 56 N. Y. 559, it was held that trustees who distributed the proceeds of a sale of corporate property as dividends were liable to a creditor for the amount of his debt, though they acted in good faith and in the belief that his claim was not a valid liability of the company.

"Whether the director knows the exact condition of the corporation is unimportant. It is his duty to ascertain whether the earnings authorize the withdrawal of the corporate as-

not liable unless they act in bad faith or are guilty of negligence,⁵⁸

sets to pay a dividend." *Wesp v. Muckle*, 136 N. Y. App. Div. 241, 120 N. Y. Supp. 976, aff'd 201 N. Y. 527, 94 N. E. 1100 (mem. dec.).

In *Patterson v. Thompson*, 86 Fed. 85, it is said with respect to the Oregon statute: "The law clearly presumes that the director is bound to know the condition of his corporation and to know whether or not dividends are payable; and it makes no excuse or release of liability on account of his failure to acquire such knowledge."

⁵⁸ The directors of a national bank are not liable for dividends declared when there were not sufficient net profits, after deducting losses and bad debts, with which to pay them, where they acted in good faith, and merely misjudged the value of the assets, as where there were debts which, while not within the statutory definition of bad debts, were subsequently found to be bad in fact to such an extent as to wipe out the profits. *Witters v. Sowles*, 31 Fed. 1.

The Connecticut statute in terms imposes liability upon directors who vote in favor of the dividend, "knowing or having the means of knowing," that the capital is impaired. The statute is quoted in *Davenport v. Lines*, 77 Conn. 473, 59 Atl. 603.

Under the Illinois statute directors cannot be held liable for declaring a dividend when the corporation was insolvent where they did not know that it was insolvent and were not guilty of negligence in failing to discover that fact. *Chick v. Fuller*, 114 Fed. 22.

The Iowa statute provides that dividends made in good faith before knowledge of the occurring losses shall not come within its provisions. *Swartley v. Oak Leaf Creamery Co.*, 135 Iowa 573, 113 N. W. 496.

Although the Kentucky statute in

terms makes the directors liable for all the debts of the corporation if they declare any dividend when the corporation is insolvent, or which would render it insolvent, it has been held that it should be so construed as to limit their liability to the amount of the dividend declared when the facts show that in declaring it they acted in good faith, and used ordinary care and diligence in the conduct of the affairs of the institution. *Franklin v. Caldwell*, 123 Ky. 528, 29 Ky. L. Rep. 935, 96 S. W. 605.

"Where the directors act in good faith and under a mere mistake in judgment, they are each responsible for what he receives, but they are not jointly liable for the whole sum. In other words, in order to create the latter liability the conduct of the directors must amount to a tort, either actually or constructively." *Ebelhar v. German-American Security Co.'s Assignee* (Ky. L. Rep.), 119 S. W. 220, 28 Ky. L. Rep. 1144, 91 S. W. 262.

But it is the duty of bank directors to use ordinary care to acquaint themselves with the condition of the business of the bank, and to exercise reasonable control and supervision of its officers, and they will not be permitted to shield themselves from liability under the statute to the amount of the dividend declared on the ground that they did not knowingly violate its provisions. *Franklin v. Caldwell*, 123 Ky. 528, 29 Ky. L. Rep. 935, 96 S. W. 605.

The Missouri statute uses the word "knowingly" in imposing the liability, but further provides that objecting directors may relieve themselves from liability by filing written objections. The statute is quoted in *Shields v. Hobart*, 172 Mo. 491, 95 Am. St. Rep. 529, 72 S. W. 669.

or are only liable when they declare a dividend without having reason to believe that there are sufficient net profits properly applicable thereto to pay the same without impairing or diminishing the capital.⁵⁹

§ 3745. — Dissenting or nonparticipating directors. Under some statutes the personal liability is imposed only on those directors who vote in favor of the unlawful dividend.⁶⁰ Under others it is imposed upon all of the directors under whose administration the dividend is declared except those who are not present when it is declared,⁶¹ or those who expressly dissent to its declaration and express their dissent in a prescribed manner.⁶²

It has been held that a director cannot escape personal liability

⁵⁹ This is true under the express terms of the Wisconsin statute. *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479.

⁶⁰ *Van Dyck v. McQuade*, 86 N. Y. 38.

⁶¹ *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030; *Hutchinson v. Curtiss*, 45 N. Y. Misc. 484, 92 N. Y. Supp. 70; *Brenaman v. Whitehouse*, 85 Wash. 355, 148 Pac. 24.

⁶² Those who cause their dissent to be entered at large on the minutes of the directors at the time are exempted in California. *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030.

In Idaho the statute imposes personal liability upon all the directors during whose administration the dividend was declared, "except those who may have caused their dissent therefrom to be entered at large in the minutes of the directors at the time, or, when not present, when the same did occur." *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340.

In Missouri the statute provides that if any of the directors shall object to the declaration or payment of the same, and shall, at any time before the time fixed for such payment, file a written certificate of their objections with the clerk of the corporation and with the circuit clerk of the

county, they shall be exempt from the statutory liability. Cited in *Shields v. Hobart*, 172 Mo. 491, 95 Am. St. Rep. 529, 72 S. W. 669.

In New Jersey all of the directors are personally liable except such as expressly dissent and cause their dissent to be entered upon the minutes of the directors and to be published in a newspaper in the county where the corporation has its principal office. *Siegmán v. Electric Vehicle Co.*, 72 N. J. Eq. 403, 65 Atl. 910, aff'g 71 N. J. Eq. 123, 62 Atl. 941; *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 54 Atl. 454, rev'g 63 N. J. Eq. 422, 51 Atl. 1003; *Siegmán v. Electric Vehicle Co.*, 140 Fed. 117.

The New York statute expressly excepts those directors who cause their dissent to be entered on the minutes of the directors at the time. *Wesp v. Muckle*, 136 N. Y. App. Div. 241, 120 N. Y. Supp. 976, aff'd 201 N. Y. 527, 94 N. E. 1100 (mem. dec.); *Hutchinson v. Curtiss*, 45 N. Y. Misc. 484, 92 N. Y. Supp. 70. See *Van Dyck v. McQuade*, 86 N. Y. 38.

The provisions of the Washington statute are similar to those of the California statute above referred to. *Brenaman v. Whitehouse*, 85 Wash. 355, 148 Pac. 24.

because he did not actually participate in the proceedings declaring the dividend, where he participates in the benefit thereof and thereby sanctions its payment.⁶³

§ 3746. — By whom liability may be enforced. Only the class or classes of persons for whose benefit the liability is imposed by the statute may maintain an action to enforce it.⁶⁴ As we have seen, many of the statutes in terms make the offending directors liable to the corporation, and of course when such is the case it may sue.⁶⁵ But if the statute merely provides that the offending directors shall be liable to creditors,⁶⁶ or to the stockholders severally and respectively,⁶⁷ the corporation cannot sue.

As in other cases,⁶⁸ if the liability is to the corporation, a stockholder may sue in its behalf where the directors refuse to do so,⁶⁹ or where the interest or bias of the directors makes it certain that an application to them to sue would be denied if made, or, if granted, that the litigation following would necessarily be under the direction of persons opposed to its success,⁷⁰ but not otherwise.⁷¹ If the direc-

⁶³ *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479.

⁶⁴ *Fleisher v. West Jersey Securities Co.*, 84 N. J. Eq. 55, 92 Atl. 575; *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422.

⁶⁵ See § 3737, *supra*.

⁶⁶ *Collins v. Penn-Wyoming Copper Co.*, 203 Fed. 726; *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422; *Childs v. Adams*, 43 Pa. Super. Ct. 239.

⁶⁷ The present New Jersey statute (P. L. 1896, p. 286, as amended by P. L. 1904, p. 275; Comp. Stat. p. 1617, § 30), makes the directors liable to the stockholders, severally and respectively, or in case of insolvency to the corporation or its receiver. A solvent corporation has no right of action under this statute, and it has been held that the statute supersedes any equitable remedy which may have previously existed in favor of the corporation independently of statute. *Fleisher v. West Jersey Securities Co.*, 84 N. J. Eq. 55, 92 Atl. 575.

Prior to the amendment of 1904 the statute in terms made the directors

liable to the corporation. *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 54 Atl. 454, rev'g 63 N. J. Eq. 422, 51 Atl. 1003; *Siegman v. Electric Vehicle Co.*, 140 Fed. 117.

And it was then held to be the duty of the board of directors to enforce such liability against former directors. *Siegman v. Electric Vehicle Co.*, 140 Fed. 117, construing the New Jersey statute.

⁶⁸ As to the right of stockholders to sue in behalf of the corporation generally, see § 4051 et seq., *infra*.

⁶⁹ *Siegman v. Electric Vehicle Co.*, 140 Fed. 117; *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 54 Atl. 454, rev'g 63 N. J. Eq. 422, 51 Atl. 1003; *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424, 83 N. Y. Supp. 509.

⁷⁰ *Schoenfeld v. American Can Co.* (N. J. Eq.), 55 Atl. 1044; *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 54 Atl. 454, rev'g 63 N. J. Eq. 422, 51 Atl. 1003.

⁷¹ *Siegman v. Maloney*, 65 N. J. Eq. 372, 54 Atl. 405, aff'g 63 N. J. Eq. 422, 51 Atl. 1003.

tors are made liable to the stockholders severally and respectively for the amount of any loss sustained by them, and not to the corporation, a stockholder cannot sue in the right and for the benefit of the corporation.⁷²

The right of a stockholder to sue in behalf of the corporation is not affected by the fact that he participated in the illegal dividends and has not returned to the corporation the amount which he has so received, since the suit is brought solely for the benefit of the corporation and the relief obtained belongs to it and not to the complainant.⁷³ But it has been held that if the creditors have been paid in full, a receiver should not be permitted to recover for the benefit of the stockholders.⁷⁴

Many of the statutes make the offending directors liable to creditors, in which case they, of course, may sue.⁷⁵ And it is generally held that under such circumstances the action may be maintained by a receiver of the corporation as the representative of the creditors,⁷⁶ although there is authority to the contrary.⁷⁷

In those states where such statutes are held to be penal in character,⁷⁸ a liability under them is not assignable.⁷⁹

Where there has been no actual refusal on the part of the directors, the burden is on the stockholder to show the existence of a state of facts justifying the conclusion that an application to them to sue would be futile. *Siegman v. Maloney*, 65 N. J. Eq. 372, 54 Atl. 405, aff'g 63 N. J. Eq. 422, 51 Atl. 1003.

⁷² *Fleisher v. West Jersey Securities Co.*, 84 N. J. Eq. 55, 92 Atl. 575. *De Raismes v. United States Lithographic Co.*, 161 N. Y. App. Div. 781, 146 N. Y. Supp. 813, construing the New Jersey statute.

⁷³ *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 54 Atl. 454, rev'g on other grounds 63 N. J. Eq. 422, 51 Atl. 1003; *Siegman v. Maloney*, 63 N. J. Eq. 422, 51 Atl. 1003, aff'd on other grounds, 65 N. J. Eq. 372, 54 Atl. 405.

⁷⁴ Inasmuch as the stockholders themselves received the dividends, they should not be permitted to hold the directors responsible for them.

Emerson v. Gaither, 103 Md. 564, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, 64 Atl. 26.

⁷⁵ See § 3743, supra.

Depositors may maintain a suit in equity under the National Banking Act against the directors of an insolvent national bank notwithstanding the appointment of a receiver. *Boyd v. Schneider*, 131 Fed. 223, rev'g 124 Fed. 239.

⁷⁶ *Brenaman v. Whitehouse*, 85 Wash. 355, 148 Pac. 24.

The liability is based on the illegal payment of dividends in fraud of the creditors, and the action to enforce it may be maintained by the receiver as the representative of the creditors. *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340.

⁷⁷ *Childs v. Adams*, 43 Pa. Super. Ct. 239.

⁷⁸ See § 3743, supra.

⁷⁹ *Killen v. Barnes*, 106 Wis. 546, 82 N. W. 536.

§ 3747. — Parties and pleading. Of course the liability of directors for unlawfully declaring dividends cannot be enforced in a suit to which they are not parties.⁸⁰

A receiver is not bound to proceed against all of the directors in the same suit.⁸¹

In jurisdictions where all liabilities of officers, stockholders and directors to creditors may be enforced in a single action for their benefit,⁸² causes of action against directors to hold them liable for corporate debts on the ground that they declared dividends before the full amount of stock was paid in, or when the corporation was insolvent or in danger of insolvency without having reason to believe that there were sufficient net profits to pay the same without impairing or diminishing the capital, may be joined with causes of action to enforce the statutory double liability of stockholders and to recover from stockholders dividends unlawfully paid.⁸³

A bill in equity against several persons who had been directors of a corporation at different times to hold them liable for wrongfully paying dividends and for other acts of mismanagement is multifarious as to those defendants who are not alleged to have been directors at the times when all the acts complained of were done, but not as to those alleged to have been directors at all such times.⁸⁴

A bill is multifarious which joins a suit against the directors in behalf of the corporation for the recovery of secret profits with one brought by a stockholder in his own behalf to recover from directors damages sustained by him by reason of injury to his stock through the payment of unlawful dividends.⁸⁵

§ 3748. — Statute of limitations. It is generally held that the statute of limitations may be interposed as a defense to an action based on such a statute.⁸⁶

⁸⁰ *Kingston v. Home Life. Ins. Co.*, — Del. Ch. —, 101 Atl. 898.

⁸¹ *Gaither v. Bauernschmidt*, 108 Md. 1, 69 Atl. 425.

⁸² See § 3026, *supra*.

⁸³ *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479.

⁸⁴ *Gaither v. Bauernschmidt*, 108 Md. 1, 69 Atl. 425; *Emerson v. Gaither*, 103 Md. 564, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, 64 Atl. 26.

The dismissal of the bill as to some of the defendants under such circumstances, in order to obviate the ob-

jection of multifariousness does not affect any right of the remaining defendants to enforce any right of contribution against the dismissed defendants which they may have. *Gaither v. Bauernschmidt*, 108 Md. 1, 69 Atl. 425.

⁸⁵ *Fleisher v. West Jersey Securities Co.*, 84 N. J. Eq. 55, 92 Atl. 575.

⁸⁶ A director may rely upon the statute of limitations if he is not sued within the statutory period from the time when he ceases to be a director. Directors are at most implied trustees,

It has been held that a creditor's cause of action under such a statute accrues upon the maturity of his debt rather than at the time when the unlawful dividend is declared.⁸⁷ And it has also been held that limitations do not begin to run as against the creditors until they have notice of the illegality of the dividend, in the absence of a showing of negligence on their part,⁸⁸ although there seems to be authority to the contrary.⁸⁹

A receiver in bringing such an action represents the creditors, and the action is not barred unless it would have been barred if brought by them.⁹⁰

§ 3749. — Liability of treasurer. The treasurer of a corporation is personally liable to it if he distributes corporate funds to himself and other stockholders without authority from the directors and without any dividend having been declared.⁹¹

§ 3750. — Criminal liability of directors and officers. Under the statutes of some states officers or directors of a corporation are made criminally liable if they assist in declaring and paying a dividend otherwise than out of net profits.⁹² As a rule it is a good

and hence the statute will run in their favor. After they have ceased to be directors, at least, they are not precluded from relying on it either at law or in equity by reason of their former relation to the corporation. *Emerson v. Gaither*, 103 Md. 564, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, 64 Atl. 26.

In New York the statute governing actions to recover statutory penalties applies. *Merchants' Bank v. Bliss*, 35 N. Y. 412.

And the same is true in Oregon. *Patterson v. Wade*, 115 Fed. 770; *Patterson v. Thompson*, 90 Fed. 647; *Patterson v. Thompson*, 86 Fed. 85.

See also *Cockrell v. Cooper*, 86 Fed. 7, rev'g 78 Fed. 679, where a suit against the directors of a national bank was held not to be barred.

⁸⁷ *Patterson v. Wade*, 115 Fed. 770. See also *Patterson v. Thompson*, 86 Fed. 85, where it was held that the action was barred even if the cause of action did not accrue until the debt became due,

⁸⁸ *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340.

Where it is alleged that the creditors did not discover that illegal dividends had been paid until shortly before the bringing of the action, that they were negligent in failing to discover it sooner is a matter of defense. *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340.

⁸⁹ In *Patterson v. Wade*, 115 Fed. 770, it was held that an allegation that the plaintiff had no knowledge of the facts constituting his cause of action until a certain date was immaterial.

⁹⁰ *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340.

⁹¹ *Cheat Valley R. Co. v. Humes*, 211 Pa. 287, 60 Atl. 908.

⁹² The Georgia statute provides in effect that no corporation "shall declare any dividend or distribute any money among its members as profits, when such dividend or money is not declared or distributed from the actual legitimate net earnings of its

defense to a prosecution under such a statute that the defendant acted in good faith in declaring the dividend, and in the honest belief that there were surplus funds legally applicable to its payment, even though the statute does not expressly so provide.⁹³ But before he can claim the benefit of any such exception it must further appear that he did not act recklessly, or wilfully or in gross negligence shut his eyes to the facts.⁹⁴ If he was present and participated in the declaration of the dividend, the law presumes that he did so with knowledge of the financial condition of the company, and the burden of showing the contrary is on him.⁹⁵ If he knew or should have known the facts, his motives in assenting to the dividend are immaterial.⁹⁶ Directors who object to and protest against the declaration of a dividend cannot be held criminally liable.⁹⁷ If the offense is several, an indictment against a director for violating such a statute need not name the other directors who participated with him in declaring the unlawful dividend.⁹⁸ In such a prosecution the usual rules of criminal evidence apply.⁹⁹

Directors who vote in favor of and receive a dividend when they know that there are no funds of the corporation out of which it may lawfully be paid, and with the fraudulent purpose of converting the money of the corporation to their own use, are guilty of embezzle-

investments, and does in any manner increase its debts," and that any officer, director or agent of a corporation violating this provision shall be guilty of a misdemeanor. Pen. Code 1910, § 740. *Mangham v. State*, 11 Ga. App. 440, 75 S. E. 508; *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849.

The declaration and payment of a dividend when the corporation is insolvent "necessarily increases its debts, in that it takes away from its creditors the assets which lawfully belong to them and gives them to the stockholders." *Mangham v. State*, 11 Ga. App. 440, 75 S. E. 508.

If the corporation is a bank, it need not be alleged that it is a bank of issue. *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849.

See *Davenport v. Lines*, 77 Conn. 473, 59 Atl. 603, which quotes the Connecticut statute providing that directors who vote for a dividend

when the capital is impaired, and when they know or have means of knowing that fact, shall be guilty of a misdemeanor.

⁹³ *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849.

⁹⁴ *Mangham v. State*, 11 Ga. App. 440, 75 S. E. 508; *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849.

⁹⁵ *Mangham v. State*, 11 Ga. App. 440, 75 S. E. 508.

⁹⁶ *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849.

⁹⁷ Whether the defendant did so is a question for the jury where the evidence is conflicting. *Mangham v. State*, 11 Ga. App. 440, 75 S. E. 508.

⁹⁸ *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849.

⁹⁹ See *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849, as to the admissibility of particular evidence to show the financial condition of the bank, knowledge of the defendant, etc,

ment.¹ Knowledge of the financial condition of the company and a fraudulent intent on the part of the accused are essential elements of this offense. And hence "if the directors believed they had the right to pay the dividend, or if they paid it in utter ignorance of their legal right, but without any fraudulent motive against others interested in the assets of the corporation," they cannot be convicted. A single director cannot be convicted unless it appears that all of the directors, or at least a majority of them voting in the affirmative, including the accused, acted in voting and paying the dividend, and the accused also in receiving it, with the knowledge that their act was illegal, that there were no funds belonging to the corporation applicable to their payment, and that they each acted with the fraudulent purpose of converting to their own use, and to the use of each other respectively, the money of the corporation. This follows from the fact that the accused could not alone have voted and declared the dividend, and therefore could not by such vote or act have taken or converted the money charged. If the other directors voted the dividend in the honest belief that they had a right to do so, the act is not criminal, but is merely maladministration; and since the act of voting the dividend was the one by which the money was set apart to the stockholders, the knowledge or purpose of the accused in receiving it cannot alone make him guilty. On the other hand, if the accused actually believed that he had the right to receive the dividend and appropriate it, and acted without fraud, he would not be guilty although the other directors voting the dividend did so with the guilty knowledge and purpose of committing a fraud upon the corporation and converting to themselves its assets.² It is no defense that all of the directors and stockholders concurred in the act of declaring the dividends and in the wrongful appropriation of the money.³ Evidence bearing on the solvency of the company when the dividend was declared, and on the motive of the directors in declaring it is admissible.⁴

The act of the directors of a national bank in declaring a dividend when there are no net profits to pay it is not a criminal misapplication of its funds within the meaning of the National Banking Act. In declaring dividends the directors act in their official and not in

¹ Taylor v. Com., 119 Ky. 731, 75 S. W. 244. See this case for the sufficiency of an indictment for embezzlement.

² Taylor v. Com., 119 Ky. 731, 75 S. W. 244.

³ The corporation is a separate legal entity. Taylor v. Com., 119 Ky. 731, 75 S. W. 244.

⁴ As to the admissibility of particular evidence on these issues, see Taylor v. Com., 119 Ky. 731, 75 S. W. 244.

their individual capacities, and hence declaring a dividend under such circumstances "is an act of maladministration and nothing more, which while it may subject the association to a forfeiture of its charter, and the directors to a personal liability for damages suffered in consequence thereof by the association or its shareholders, does not render them liable to a criminal prosecution." It follows that an indictment charging a conspiracy on the part of certain directors to misapply the funds of the bank by procuring to be declared by the association a dividend when there were no net profits to pay it does not charge a conspiracy to commit a crime, and hence does not charge an offense.⁵

XVII. DIVIDENDS ON PREFERRED STOCK

§ 3751. Right to and extent of preference in general. Ordinary preferred stock, as we have seen, is stock upon which the holders are entitled to certain dividends before payment of any dividends to the holders of the common stock.⁶ The relation between the holders of preferred stock and the corporation is a contract relation,⁷ and the extent of their right to share in the corporate profits,⁸ and of their

⁵ *United States v. Britton*, 108 U. S. 199, 27 L. Ed. 698.

⁶ See § 3621, *supra*.

⁷ See § 3632, *supra*.

⁸ *Equitable Life Assur. Soc. of United States v. Union Pac. R. Co.*, 162 N. Y. App. Div. 81, 147 N. Y. Supp. 382, *aff'd* 212 N. Y. 360, L. R. A. 1915 D 1052, 106 N. E. 92; *Wood v. Lary*, 47 Hun (N. Y.) 550, appeal dismissed 124 N. Y. 83, 26 N. E. 338.

"The conditions under which the holder of preferred stock may demand a dividend depend of course upon the precise terms upon which it is issued." *Burk v. Ottawa Gas & Electric Co.*, 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857.

Where a corporation agreed to pay a person all dividends on certain shares on which he held an option during the period of the option, and that it would make good any deficiencies in the dividends below four

per cent. per annum, but did not guarantee payment of dividends annually or at any stated period, and the dividend paid the first year exceeded four per cent. for the whole period of the option, and no further dividends were declared, it was held that the company's liability was discharged by the payment made. *Fontana v. Pacific Can Co.*, 129 Cal. 51, 61 Pac. 580.

Where preferred stock was "to bear interest" at a specified rate, payable semiannually, and new preferred stock, which was to have the same rights as the old, was issued between the dividend days of the latter, it was held that the intention was that the new stock should be entitled to dividends from the date when it was issued only, and not from the last dividend day of the old stock. *Utica Trust & Deposit Co. v. Charles C. Kellogg & Sons Co.*, 126 N. Y. App. Div. 176, 110 N. Y. Supp. 1048.

preference over the common stockholders⁹ depends upon the terms of their contract. They are entitled to such dividends as are therein provided for,¹⁰ so long as the company has funds which may rightfully be devoted to their payment.¹¹ "The preferred dividends may be made cumulative or noncumulative; the dividend may be a fixed amount each year to be paid out of earnings, or it may be a percentage, not exceeding a certain amount to be determined by the directors at their discretion; and the preferred stockholder who has received his preferred dividend may still have a share of the net earnings that may remain."¹²

As in the case of any other agreement, the parties to a contract of this character are bound to carry it out according to its terms.¹³ The

⁹ **Georgia.** *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

Kentucky. *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477.

Maine. *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

Maryland. *Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327.

Massachusetts. *Gardner Sav. Bank v. Taber-Prang Art Co.*, 189 Mass. 363, 75 N. E. 705.

New York. *Utica Trust & Deposit Co. v. Charles C. Kellogg & Sons Co.*, 126 App. Div. 176, 110 N. Y. Supp. 1048.

The stock of a corporation was divided by the by-laws into preferred and common stock, and certain of the preferred stock was declared to be "entitled to annual dividends in preference to the remaining preferred stock for a period of three years from the original issue thereof." The court held it immaterial whether or not the dividends on the special preferred stock were declared during a period of three years next following the issue of the stock—that the preference to special preferred stock over the ordinary preferred stock was three annual dividends whenever declared. *Gardner Sav. Bank v. Taber-Prang Art Co.*, 189 Mass. 363, 75 N. E. 705.

¹⁰ *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

Where the contract provided that the preferred stock was entitled to a semiannual preferential cumulative dividend, payable on certain specified days in each year, it was held that preferred stockholders were entitled to have dividends paid them semiannually if there were net earnings, and that a contention that the corporation made no promise or guaranty of any dividends to be paid at any particular time, and that it would have fully kept and performed the obligations of its contract if, at any time, past or future, it had paid or would pay the preferred dividends before paying common ones, was untenable. *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

¹¹ See § 3752, *infra*.

¹² *Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327.

As to cumulative and noncumulative dividends, see § 3754, *infra*.

As to the right to an additional share in the earnings after the preferred dividends have been paid, see § 3755, *infra*.

¹³ *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, *rev'g* on other grounds 120 Ill. App. 596; *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833.

rights thereby secured to the preferred stockholders are inviolable, and they cannot be deprived of them by any action of the directors or common stockholders to which they do not consent.¹⁴ And the court may enforce such rights as against the corporation and the other stockholders.¹⁵ Like any other contract, it will not "be abrogated or set aside by construction, on the ground that performance of it would be inconvenient or unfavorable to either one of the contracting parties."¹⁶ Nor will the fact that performance of it according to its terms may lead to the insolvency of the corporation be regarded as an excuse for failure to perform it.¹⁷

On the other hand, a preferred stockholder "can require the payment of dividends, when others cannot, only in case and to the extent that dividends were promised or guaranteed in his contract,"¹⁸ and aside from it, he stands on no better footing than any other stockholder.¹⁹

The holder of preferred stock may, by agreement with the company, waive his rights to preference over common stock and thereby put it on a level with stock of the latter character.²⁰

§ 3752. Dividends payable out of profits only. As we have seen, preferred stockholders are not creditors of the corporation, even though the specified dividends may in terms be "guaranteed," so as to be entitled to dividends irrespective of the condition of the corporation and the existence of profits.²¹ On the contrary, they are stockholders, and in the same position substantially as the other

¹⁴ *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13, rev'g 102 N. Y. App. Div. 118, 92 N. Y. Supp. 387.

A corporation cannot reduce the rate of dividend expressed in certificates of preferred stock, where it has not reserved the power to do so either in the certificate of incorporation or the certificate of stock. And the power to do so is not given by a statute authorizing corporations, with the assent of a majority in interest of its stockholders, to amend its certificate of incorporation as of the date of the filing and recording of the original. *Pronick v. Spirits Distributing Co.*, 58 N. J. Eq. 97, 42 Atl. 586.

¹⁵ *West Chester & P. R. R. v. Jackson*, 77 Pa. St. 321.

As to the discretion of the directors in declaring dividends, see § 3753, *infra*.

As to the remedies of preferred stockholders, see § 3757, *infra*.

¹⁶ *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g 120 Ill. App. 596.

¹⁷ *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g on other grounds 120 Ill. App. 596.

¹⁸ *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

¹⁹ See § 3632, *supra*.

²⁰ *Pendleton v. Harris-Emery Co.*, 124 Iowa 361, 100 N. W. 117.

²¹ See § 3628, *supra*.

stockholders, except as to the right to a preference. And it is well settled that they are entitled to dividends only when there are surplus profits or net earnings out of which dividends may lawfully be paid, as in the case of common stockholders,²² and that the directors

22 United States. New York, L. E. & W. R. R. v. Nickals, 119 U. S. 296, 30 L. Ed. 363; Warren v. King, 108 U. S. 389, 27 L. Ed. 769, aff'g 2 Fed. 36; Ellsworth v. Lyons, 181 Fed. 55; Mercantile Trust Co. v. Baltimore & O. R. Co., 82 Fed. 360; St. John v. Erie R. Co., 10 Blatchf. 271, Fed. Cas. No. 12,226, 22 Wall. 136, 22 L. Ed. 743.

Georgia. Jefferson Banking Co. v. Trustees of Martin Institute, 146 Ga. 383, 91 S. E. 463; Coggeshall v. Georgia Land & Investment Co., 14 Ga. App. 637, 82 S. E. 156.

Illinois. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707, rev'g on other grounds 120 Ill. App. 596; Hamblock v. Clipper Lawn Mower Co., 148 Ill. App. 618.

Kansas. Inscho v. Mid-Continent Development Co., 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014; Burk v. Ottawa Gas & Electric Co., 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857; Hogsett v. Aetna Building & Loan Ass'n, 78 Kan. 71, 96 Pac. 52.

Kentucky. Westerfield-Bonte Co. v. Burnett, 176 Ky. 188, 195 S. W. 477; Smith v. Southern Foundry Co., 166 Ky. 208, 179 S. W. 205; Rider v. John G. Delker & Sons Co., 145 Ky. 634, 39 L. R. A. (N. S.) 1007, 140 S. W. 1011; Sumrall v. Commercial Bldg. Trust's Assignee, 106 Ky. 260, 44 L. R. A. 659, 90 Am. St. Rep. 223, 50 S. W. 69.

Maine. Spear v. Rockland-Rockport Lime Co., 113 Me. 285, 93 Atl. 754; Belfast & M. Lake R. Co. v. Belfast, 77 Me. 445, 1 Atl. 362; Bates v. Androscoggin & K. R. Co., 49 Me. 491.

Maryland. Heller v. National Marine Bank, 89 Md. 602, 45 L. R. A.

438, 73 Am. St. Rep. 212, 43 Atl. 800.

Massachusetts. Field v. Lamson & Goodnow Mfg. Co., 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126; Williston v. Michigan Southern & N. I. R. Co., 13 Allen 400.

Michigan. Knight v. Alamo Mfg. Co., 190 Mich. 223, 157 N. W. 24; American Steel & Wire Co. v. Eddy, 138 Mich. 403, 101 N. W. 578, 130 Mich. 266, 89 N. W. 952; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156.

Minnesota. Booth v. Union Fibre Co., 162 N. W. 677.

Missouri. Feld v. Roanoke Inv. Co., 123 Mo. 603, 27 S. W. 635; Kidd v. Puritana Cereal Food Co., 145 Mo. App. 502, 122 S. W. 784.

New York. Roberts v. Roberts-Wicks Co., 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13, rev'g 102 App. Div. 118, 92 N. Y. Supp. 387.

Ohio. Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496.

Pennsylvania. Warren v. Queen & Co., 240 Pa. 154, 87 Atl. 595; Fidelity Trust Co. v. Lehigh Valley R. Co., 215 Pa. 610, 7 Ann. Cas. 613, 64 Atl. 829.

Rhode Island. Taft v. Hartford, P. & F. R. Co., 8 R. I. 310, 5 Am. Rep. 575.

Texas. Reagan Bale Co. v. Huermann, — Tex. Civ. App. —, 149 S. W. 228.

Vermont. Chaffee v. Rutland R. Co., 55 Vt. 110.

Virginia. Drewry, Hughes Co. v. Throckmorton, 92 S. E. 818.

England. Birch v. Cropper, 14 App. Cas. 525.

"It is now well established that dividends on preferred stock are payable only out of net earnings which

have no right to decrease the capital of the corporation in order to pay them.²³ Their rights are subordinate to those of creditors,²⁴ and they "cannot claim dividends out of funds that are needed for, or that properly should be applied to, the payment of debts."²⁵

The fact that the dividends are in terms "guaranteed" does not change this rule so as to render them payable absolutely and unconditionally.²⁶ The guaranty merely means that the holders of the stock are entitled to the specified dividends when there are profits to pay them, and not otherwise.²⁷ "It is not a debt that is guaranteed, but the right to a dividend from the earnings and income of

are applicable to the payment of dividends; * * * and that such dividends are not payable absolutely and unconditionally as interest is, but only out of profits made by the company. The preference is limited to profits whenever earned." *Chaffee v. Rutland R. Co.*, 55 Vt. 110.

That this is the rule in respect to dividends generally, see § 3658, *supra*.

²³ *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, *rev'g* on other grounds 120 Ill. App. 596.

Whatever may be the mutual rights as between preferred and common stockholders, no withdrawal from the capital of the corporation can be effected by a preferred stockholder unless it appears that there are no creditors whose interests might be adversely affected thereby. *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

²⁴ See § 3634, *supra*.

²⁵ *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

²⁶ *United States. Mercantile Trust Co. v. Baltimore & O. R. Co.*, 82 Fed. 360.

Kentucky. *Sumrall v. Commercial Bldg. Trust's Assignee*, 106 Ky. 260, 44 L. R. A. 659, 90 Am. St. Rep. 223, 50 S. W. 69.

Massachusetts. *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126; *Williston v. Michigan Southern & N. I. R. Co.*, 13 Allen 400.

Michigan. *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156.

Missouri. *Feld v. Roanoke Inv. Co.*, 123 Mo. 603, 27 S. W. 635; *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

Ohio. *Miller v. Ratterman*, 47 Ohio St. 141.

Rhode Island. *Taft v. Hartford, P. & F. R. Co.*, 8 R. I. 310.

Vermont. *Chaffee v. Rutland R. Co.*, 55 Vt. 110.

²⁷ *United States. Mercantile Trust Co. v. Baltimore & O. R. Co.*, 82 Fed. 360.

Massachusetts. *Field v. Lamson*, 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126.

Michigan. *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156.

Missouri. *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

Ohio. *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

Rhode Island. *Taft v. Hartford, P. & F. R. Co.*, 8 R. I. 310, 5 Am. Rep. 575.

The guaranty merely means that the company binds itself to pay the dividends "out of such assets as are legally available for that purpose, that is, net earnings, and this is true whether the guaranteed payments are called dividends or interest." *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

the corporation. The right to a dividend is not a debt. There is no debt until the dividend is declared. The obligation and right to declare it does not arise until there is a fund from which it can properly be made."²⁸

As we have seen, a contract to pay a stockholder dividends out of capital stock, or to pay absolutely and unconditionally, whether there are profits or not, is illegal and void as against creditors and as against the corporation.²⁹

An agreement to pay dividends on preferred stock out of net earnings does not mean the net earnings of the corporation as it is when the preferred stock is issued, and the corporation may incur new obligations after the agreement which will diminish the net earnings applicable to such dividends.³⁰

The principles upon which it is to be determined whether there are net earnings or surplus profits for the purpose of paying a dividend are precisely the same in the case of preferred stock as in the case of common stock, and have been considered in former sections.³¹

The legislature, of course, may authorize a corporation to issue preferred stock as a means of raising money, and to stipulate for the payment of dividends out of gross earnings,—thus putting the preferred stockholders in the position of creditors. If this clearly appears to have been the intention, the courts must give it effect.³² And it has been held that the stockholders may agree that, on dissolution of the corporation, and after the creditors have been paid, the preferred stockholders shall be paid any arrears of dividends due them at the time of such dissolution, though not earned, before the common stockholders receive any part of the corporate assets.³³

§ 3753. Discretion in declaring dividends. As a rule, what has been said in a former section as to the discretion of the directors in declaring or refusing to declare dividends³⁴ applies to preferred stock, as well as common stock. Even when the dividends for a particular year are made dependent upon the profits of that year, as declared by the board of directors, it is primarily for the board of

²⁸ *Chaffee v. Rutland R. Co.*, 55 Vt. 110. And see to the same effect, *Hamblock v. Clipper Lawn Mower Co.*, 148 Ill. App. 618.

²⁹ See § 3659, *supra*.

³⁰ *St. John v. Erie Ry. Co.*, 22 Wall. (U. S.) 136, 22 L. Ed. 743, *aff'g* 10 Blatchf. 271, Fed. Cas. No. 12,226.

See also *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769.

³¹ See §§ 3630-3671, *supra*.

³² See § 3628, *supra*.

³³ *Drewry, Hughes Co. v. Throckmorton*, — Va. —, 92 S. E. 818.

³⁴ See § 3656, *supra*.

directors to determine whether the condition of the company in any particular year is such as to warrant the declaration of a dividend, and the courts will not interfere unless an abuse of discretion is shown.³⁵ If the directors abuse their discretion, however, and refuse to declare a dividend when it is clear that there are surplus profits available for the purpose, a court of equity may compel them to declare and pay a dividend, in a suit instituted by the preferred stockholders for that purpose,³⁶ or may treat the dividend as having been declared at the time when it should have been declared,³⁷ and may regard the preferred stockholders as creditors from that time.³⁸

It has been held that, with respect to dividends, common and preferred stockholders occupy a different status with respect to securing the aid of a court of equity in the enforcement of a declaration of dividends, and that the court of equity may aid a holder of preferred stock where it would not aid a holder of common.³⁹ As is the case

35 United States. *New York, L. E. & W. R. R. v. Nickals*, 119 U. S. 296, 30 L. Ed. 363, rev'g 15 Fed. 575; *Union Pac. R. Co. v. Frank*, 226 Fed. 906; *Wilson v. American Ice Co.*, 206 Fed. 736.

Kentucky. *Smith v. Southern Foundry Co.*, 166 Ky. 208, 179 S. W. 205.

Maine. *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362.

Massachusetts. *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833; *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126.

New York. *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13, rev'g 102 App. Div. 118, 92 N. Y. Supp. 387; *Boardman v. Lake Shore & M. S. R. Co.*, 84 N. Y. 157.

Pennsylvania. *McLean v. Pittsburgh Plate Glass Co.*, 159 Pa. St. 112, 28 Atl. 211.

And see generally § 3656, *supra*.

36 United States. *Storow v. Texas Consol. Compress & Manufacturing Ass'n*, 87 Fed. 612; *Id.* 92 Fed. 5.

Kentucky. *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477.

Maine. *Hazeltine v. Belfast & M. L. R. Co.*, 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328.

Massachusetts. *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833.

Missouri. *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

New York. *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13, rev'g 102 App. Div. 118, 92 N. Y. Supp. 387; *Boardman v. Lake Shore & M. S. R. Co.*, 84 N. Y. 157.

See also § 3757, *infra*. And see generally § 3688, *supra*.

37 Kidd v. Puritana Cereal Food Co., 145 Mo. App. 502, 122 S. W. 784.

38 Burk v. Ottawa Gas & Electric Co., 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857.

See also *Storow v. Texas Consol. Compress & Manufacturing Ass'n*, 87 Fed. 612; *Id.* 92 Fed. 5, where it is said that the interest on preferred stock "becomes a debt as soon as it can be shown that there were profits wherewith to pay it."

39 Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707, rev'g 120 Ill. App. 596.

in respect to common stock,⁴⁰ the mere fact that there are profits for a particular year does not necessarily entitle the preferred stockholders to a dividend for that year.⁴¹ "Even as to a preferred stockholder, unless his contract otherwise provides or requires, the profits or net earnings may be allowed to accumulate, and remain invested in the business."⁴² And the directors are clearly justified in using earnings for the purpose of making necessary repairs, paying debts, laying by for the creation of a reserve fund to repair, or to pay obligations not yet due, and the like, and the circumstances may be such as to justify improvements.⁴³ But they will not be permitted to add to the corporate property so as to increase the value of the capital at the expense of the holders of preferred stock in violation of the terms of the contract with them.⁴⁴ And of course they have no right to discriminate in the distribution of the surplus to the impairment of any prior right of the preferred stockholders thereto.⁴⁵

Whether the dividends are cumulative or noncumulative may be taken into account in determining whether or not there ought to be

⁴⁰ See § 3656, *supra*.

⁴¹ *New York, L. E. & W. R. R. v. Nickals*, 119 U. S. 296, 30 L. Ed. 363; *Union Pac. R. Co. v. Frank*, 226 Fed. 906, 921.

⁴² *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

⁴³ *New York, L. E. & W. R. R. v. Nickals*, 119 U. S. 296, 30 L. Ed. 363, *rev'g* 15 Fed. 575; *Union Pac. R. Co. v. Frank*, 226 Fed. 906; *Wilson v. American Ice Co.*, 206 Fed. 736; *Storrow v. Texas Consol. Compress & Manufacturing Ass'n*, 87 Fed. 612; *Id.* 92 Fed. 5; *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126; *McLean v. Pittsburgh Plate Glass Co.*, 159 Pa. St. 112, 28 Atl. 211.

See generally § 3656, *supra*.

⁴⁴ *Craty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, *rev'g* 120 Ill. App. 596. In this case the contract with the stockholders of a law library association, as contained in the corporate by-laws, provided for the payment of dividends of eight per cent. per annum, and that the

board of directors should fix the annual dues at such amounts as might be necessary to raise a sum sufficient to pay, first, the dividends; second, the necessary expenses; third, to keep up the continuation of all reports and periodicals; fourth, to purchase new books and legal publications; and it was held that the directors had no right to deprive the stockholders of their dividends by expending the net earnings in purchasing new books before such dividends were paid though otherwise the full development of the library would be interfered with.

⁴⁵ "Directors have a wide discretion in the management of the corporate affairs and their declaration of a dividend from surplus assets, when honestly exercised, will not be interfered with by the courts; but that does not mean that they have the power to discriminate in the division of the surplus to the impairment of any prior right thereto." *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E.

money available with which to pay them and in estimating the duties of the corporation to stockholders, and to others, such as creditors.⁴⁶ So if a corporation wrongfully pays dividends to its ordinary stockholders when there are no surplus profits out of which dividends may lawfully be declared, as where a railroad company pays dividends without setting aside anything to create a reserve fund for the purpose of repairs and renewals, it cannot, in a subsequent year, set apart such a fund, not only for the current year, but also for preceding years, to the prejudice of preferred stockholders whose right to a dividend in each year is dependent upon the profits of the particular year only. As was said in an English case: "The company either have a right to recover back from the ordinary shareholders any sums overpaid or not. If they have a right, they must recover them; if they have no right to recover them, a fortiori they have no right to recover them from the preference shareholders, and, of course, still less right to take away the dividends from the preference shareholders."⁴⁷

The language of the contract may be such as to impose an imperative duty upon the directors to pay a dividend to the preferred stockholders whenever in any year there are net profits available for that purpose.⁴⁸ And when such is the case, and the dividends are non-cumulative, funds available for that purpose in any year cannot rightfully be withheld to meet the expenses of the next year, nor can they rightfully be expended for extensions merely for the benefit of

13, rev'g 102 N. Y. App. Div. 118, 92 N. Y. Supp. 387.

⁴⁶ If they are noncumulative, "inasmuch as the only possible source of profit to the preferred stockholder from his investment is the distribution of earnings in the year in which they accrue, he has a right to insist that an accounting shall be taken annually, and that the surplus of one year, available for a dividend, shall not be carried over to meet a possible deficiency of the next." *Burk v. Ottawa Gas & Electric Co.*, 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857.

But if they are cumulative, and hence are not lost by failure to declare them each year, that fact may also be considered. *Incho v. Mid-Continent Development Co.*, 94 Kan.

370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

⁴⁷ *Dent v. London Tramways Co.*, 16 Ch. Div. 344.

⁴⁸ *Wood v. Lary*, 47 Hun (N. Y.) 550, appeal dismissed 124 N. Y. 83, 26 N. E. 338.

This was held to be true where the by-laws provided "the preferred stock shall carry a six per cent. per annum preferred noncumulative dividend, payable" at certain specified times "out of the net profits of the preceding fiscal year, and a pro tanto dividend if such dividend fall short of 6 per cent." *Burk v. Ottawa Gas & Electric Co.*, 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857.

Such a construction does not make the contract contrary to public policy.

the business.⁴⁹ But even under such circumstances the obligations to pay dividends on the preferred stock is subordinate to whatever obligation the corporation owes the public, and hence if it is necessary for a public service corporation to use the surplus accruing in any year to make extensions to which its patrons are entitled and which it is obligated to make under its franchises, it may do so, and the declaration of a dividend for that year will be excused.⁵⁰

§ 3754. Cumulative dividends. Dividends on preferred stock may be either cumulative or noncumulative.⁵¹ Sometimes the dividends are in express terms made to depend upon the profits of each particular year, so that the holders of the stock will not be entitled to any dividends in a particular year if there are not enough profits in that year to pay the same, or will be entitled only in so far as there are profits. In such a case, the dividends are not cumulative, and are not to be made up out of the profits, although sufficient, of subsequent years.⁵² In declaring dividends on preferred stock, the arrearages of one year cannot be paid out of the earnings of a subsequent year, when the charter or by-laws require the entire net earnings of each year to be paid out in dividends. In such a case, the preferred stock is noncumulative.⁵³ And of course preferred

Burk v. Ottawa Gas & Electric Co., 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857.

⁴⁹ *Burk v. Ottawa Gas & Electric Co.*, 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857.

⁵⁰ *Burk v. Ottawa Gas & Electric Co.*, 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857.

⁵¹ *Coggeshall v. Georgia Land & Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

⁵² See *New York, L. E. & W. R. R. v. Nickals*, 119 U. S. 296, 30 L. Ed. 363; *Hazeltine v. Belfast & M. L. R. Co.*, 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328; *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 233; *Dent v. London Tramways Co.*, 16 Ch. Div. 344.

Preferred stockholders are not entitled to cumulative dividends under articles providing that "the holders of preference shares shall be entitled, out of the net profits of each year,

to a preference dividend at the rate of £10 per cent. per annum on the amount for the time being paid or deemed to be paid up thereon. After payment of such preferential dividend the holders of ordinary shares shall be entitled to a like dividend at the rate of £10 per cent. per annum. * * * Subject as aforesaid, the preference and ordinary shares shall rank equally for dividend." *Staples v. Eastman Photographic Materials Co.*, [1896] 2 Ch. 303.

⁵³ *Hazeltine v. Belfast & M. L. R. Co.*, 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328. See also *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 233; *Staples v. Eastman Photographic Materials Co.*, [1896] 2 Ch. 303.

This is true where the by-laws imply that all net earnings are to be wholly distributed each year. *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362.

stock is noncumulative when the contract expressly so declares.⁵⁴

Where the dividends are noncumulative, "the corporation has no right to accumulate a reserve fund from earnings which would otherwise be paid out as dividends to the holders of common stock, and afterwards use it to pay dividends to the preferred stockholders, when the net profits of the year for which the dividend is declared are not sufficient for that purpose. On the other hand, when the reserve fund is accumulated, in whole or in part, by the cutting down of dividends which would otherwise have been paid to preferred stockholders, that fund, so far as it represents moneys so retained, is available for the subsequent payment of dividends upon the preferred stock."⁵⁵ And if the holders of noncumulative preferred stock have an absolute right to dividends whenever in any year the net earnings are sufficient to pay them, the directors having no discretion in the matter, the right to them is not lost because the directors fail to declare them in any year, and the fact that the directors thereafter declare a lump dividend covering the years during which no dividends were paid is not a violation of the provision making the dividends noncumulative.⁵⁶

If the contract with the preferred stockholders guarantees or entitles them in general terms to a certain annual dividend, not making the dividend payable in each year dependent upon the profits of that year, the dividends are cumulative, and, if the profits in any year are not sufficient to pay the dividend, it must be paid, in addition to subsequent dividends, out of the profits of subsequent years, before any dividends can be paid to the holders of common stock.⁵⁷

⁵⁴ *New York*, *L. E. & W. R. R. v. Nickals*, 119 U. S. 296, 30 L. Ed. 363; *Burk v. Ottawa Gas & Electric Co.*, 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857; *Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327.

⁵⁵ *Bassett v. United States Cast Iron Pipe & Foundry Co.*, 75 N. J. Eq. 539, 73 Atl. 514, aff'g 74 N. J. Eq. 668, 70 Atl. 929.

⁵⁶ *Wood v. Lary*, 47 Hun (N. Y.) 550, appeal dismissed 124 N. Y. 83, 26 N. E. 338.

⁵⁷ *Connecticut*, *Cotting v. New York & N. E. R. Co.*, 54 Conn. 156, 5 Atl. 851.

Maine, *Hazeltine v. Belfast & M. L. R. Co.*, 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328.

Michigan, *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156.

New Jersey, *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 233.

New York, *Jermain v. Lake Shore & M. S. R. Co.*, 91 N. Y. 483; *Boardman v. Lake Shore & M. S. R. Co.*, 84 N. Y. 157.

Pennsylvania, *Fidelity Trust Co. v. Lehigh Valley R. Co.*, 215 Pa. 610, 7 Ann. Cas. 613, 64 Atl. 829; *West Chester & P. R. R. v. Jackson*, 77 Pa. St. 321.

England, *Corry v. Londonderry & E. Ry. Co.*, 29 Beav. 263; *Smith v. Cork & B. Ry. Co.*, 5 Ir. Eq. 65; *Henry v. Great Northern Ry. Co.*, 27 L. J. Ch. 1, 3 Jur. (N. S.) 1133; *Webb v. Earle*, L. R. 20 Eq. 556.

And of course the same is true where the contract expressly provides that the dividends shall be cumulative.⁵⁸ In either case, all arrears of dividends become a charge upon all surplus profits subsequently gained by the company,⁵⁹ and "if net earnings at any dividend period are insufficient to pay the contract dividend it is to be made up out of subsequent net earnings."⁶⁰

The right of preferred stockholders to cumulative dividends, when it exists, is inviolable, and cannot be taken away or impaired by the directors or the common stockholders without their consent.⁶¹ And it survives a reduction of the capital stock as to previous arrears of dividends. So if the preferred stock is legally reduced when payment of dividends thereon is in arrears, payment of the arrearage accruing prior to the reduction must be made on the basis of the number of shares held by each stockholder prior to such reduction, rather than upon the number of shares as reduced.⁶²

Where preferred stockholders are entitled to share equally in any further dividend declared after the payment of the preferred dividend and of a specified dividend on the common stock,⁶³ amounts

Where the dividend is payable yearly from the time of issuance at a stated rate the dividends are cumulative. *Inscho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014.

The fact that the dividends are made payable on certain specified days in each year does not change the rule. *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157.

⁵⁸ *Connecticut*. *Cotting v. New York & N. E. R. Co.*, 54 Conn. 156, 5 Atl. 851.

Kentucky. *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477.

Maine. *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

Massachusetts. *Boston Safe Deposit & Trust Co. v. Adams*, 219 Mass. 175, 106 N. E. 590; *Gardner Sav. Bank v. Taber-Prang Art Co.*, 189 Mass. 363, 75 N. E. 705; *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126.

Michigan. *Knight v. Alamo Mfg. Co.*, 190 Mich. 223, 157 N. W. 24.

New York. *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13, rev'g 102 App. Div. 118, 92 N. Y. Supp. 387.

Virginia. *Drewry, Hughes Co. v. Throckmorton*, 92 S. E. 818.

⁵⁹ *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13, rev'g 102 N. Y. App. Div. 118, 92 N. Y. Supp. 387; *Henry v. Great Northern Ry. Co.*, 1 De G. & J. 606; 637, 3 Jur. (N. S.) 1133.

⁶⁰ *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

⁶¹ *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13, rev'g 102 N. Y. App. Div. 118, 92 N. Y. Supp. 387.

⁶² *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13, rev'g 102 N. Y. App. Div. 118, 92 N. Y. Supp. 387.

⁶³ See § 3755, *infra*.

so paid preferred stockholders by way of extra dividends in years when there is no default cannot be deducted from arrears due them for subsequent years in which there was a default in the payment of preferred dividends.⁶⁴ And, under such circumstances, it has also been held that dividends on preferred stock, being payable out of net earnings at stated periods, must necessarily be understood as being payable in cash at the dividend periods, and that the declaration and payment of a stock dividend on both the preferred and common stock in no way affects the preference in the payment of the preferred dividends to which the stock is entitled, and cannot be considered in determining the amount in which such payments are in arrears.⁶⁵

An excess or surplus of capital resulting from the reduction of the capital stock does not represent surplus profits, and preferred stockholders cannot have it applied to the payment of arrears of dividends on their stock. If distributed at all, it must be divided among all the stockholders, both common and preferred, ratably and without preference.⁶⁶

Provision is sometimes made for the payment of interest on arrearages.⁶⁷

§ 3755. Right to share in surplus after payment of preferred dividends. Preferred stockholders may, by the terms of their contract, be entitled, after payment of the preferred dividend, to share equally with the common stockholders in any further dividends that may be declared,⁶⁸ or to share in any surplus after payment of a specified dividend on the common stock.⁶⁹ And where they are entitled to share in any further dividend, they are entitled to share in a stock

⁶⁴ *Fidelity Trust Co. v. Lehigh Valley R. Co.*, 215 Pa. 610, 7 Ann. Cas. 613, 64 Atl. 829.

The contrary would be true, however, where any balance remaining after the payment of the preferred dividends belongs exclusively to the common stockholders. *Fidelity Trust Co. v. Lehigh Valley R. Co.*, 215 Pa. 610, 7 Ann. Cas. 613, 64 Atl. 829.

⁶⁵ *Sterling v. H. F. Watson Co.*, 241 Pa. 105, 88 Atl. 297.

⁶⁶ *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213,

77 N. E. 13, rev'g 102 N. Y. App. Div. 118, 92 N. Y. Supp. 387.

⁶⁷ *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13, rev'g 102 N. Y. App. Div. 118, 92 N. Y. Supp. 387; *Drewry, Hughes Co. v. Throckmorton*, — Va. —, 92 S. E. 818.

⁶⁸ *Gordon's Ex'rs v. Richmond, F. & P. R. Co.*, 78 Va. 501.

⁶⁹ *Fidelity Trust Co. v. Lehigh Valley R. Co.*, 215 Pa. 610, 7 Ann. Cas. 613, 64 Atl. 829; *Ashbury v. Watson*, 30 Ch. Div. 376.

or scrip dividend declared out of surplus profits used in improvements, or retained by the corporation.⁷⁰

Some courts have held that, unless the contract expressly provides otherwise, preferred stockholders participate in the surplus profits after the preferred dividend has been declared on the preferred stock and an equal dividend on the common stock.⁷¹ Under this rule the holders of the common stock are entitled to receive dividends based on the par value of their stock equal to those paid to the preferred stockholders before the latter are entitled to any additional share of the profits, and this is true although the holders of the common stock have not paid their subscriptions in full.⁷² And it follows that the fact that for a long series of years the preferred stockholders have been paid only their guaranteed dividends of five per cent. and that without objection on their part the entire balance of the profits has been paid to the common stockholders, is not to be considered in determining the rights of the parties to share in subsequent profits where the dividends so paid on the common stock yielded less than two per cent. on its par value, though more than five per cent. on the amount which the holders thereof had actually paid in.⁷³

Other courts have held that there is no such right in the absence of a provision to that effect in the contract.⁷⁴ And it has been held that

⁷⁰Gordon's Ex'rs v. Richmond, F. & P. R. Co., 78 Va. 501.

⁷¹Sternbergh v. Brock, 225 Pa. 279, 24 L. R. A. (N. S.) 1078, 133 Am. St. Rep. 877, 74 Atl. 166. In this case the preferred stockholders were entitled "to receive a cumulative yearly dividend of five per cent. * * * before any dividends shall be set apart or paid on the common stock."

This holding was followed in Sterling v. H. F. Watson Co., 241 Pa. 105, 88 Atl. 297, where the stock in question was "entitled to cumulative semi-annual dividends * * * payable out of the net earnings."

See dictum to this effect in Coggeshall v. Georgia Land & Investment Co., 14 Ga. App. 637, 82 S. E. 156. And see Fidelity Trust Co. v. Lehigh Valley R. Co., 215 Pa. 610, 7 Ann. Cas. 613, 64 Atl. 829.

⁷²Sternbergh v. Brock, 225 Pa. 279, 24 L. R. A. (N. S.) 1078, 133 Am. St. Rep. 877, 74 Atl. 166.

⁷³Sternbergh v. Brock, 225 Pa. 279, 24 L. R. A. (N. S.) 1078, 133 Am. St. Rep. 877, 74 Atl. 166.

⁷⁴In Niles v. Ludlow Valve Mfg. Co., 202 Fed. 141, aff'g 196 Fed. 994, the certificate of incorporation provided that the preferred stock should receive interest or dividends of 8 per cent. per annum, and be preferred as to capital as well as to dividends. Dividends at the prescribed rate were paid on the preferred stock for 20 years, larger dividends being generally paid on the common. It was held that the preferred stockholders had no interest in surplus profits accumulated during that period, and no right to share in dividends declared out of it either in cash or stock. It was further held that while the fact that the preferred stockholders had never objected to the payment of larger dividends on the common stock than on the preferred might not operate as an estoppel, it was persuasive

there is no such right where the contract provides that the stockholders are to receive a dividend "up to, but not exceeding" a specified per cent. before any dividends are paid on the common stock.⁷⁵ And where it is specifically provided that preferred stockholders are to receive noncumulative preferred dividends at a certain rate, and are to be "entitled to no other or further share of the profits," they are entitled to no further share in any distribution of what may properly be denominated profits, no matter how acquired.⁷⁶

Preferred stockholders are entitled to share in distributions of capital although they have received their preferred dividends.⁷⁷

§ 3756. Rights of transferees. In the absence of an agreement to the contrary, a transfer of preferred stock, like a transfer of com-

evidence of their understanding of the reciprocal rights of the two classes of stockholders.

In *Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327, the court says that it has been unable to find any case holding that such right exists, and then goes on to say, "It is true that some of the text writers do intimate that such may be the law, but the cases cited are those where there are express provisions for the participation in the surplus."

⁷⁵ Where the certificates of preferred stock provide that the holders thereof shall receive noncumulative dividends as they may be declared by the board of directors up to but not exceeding a specified per cent. before dividends shall be paid on the common stock, the holders of the common stock are entitled to all dividends above such per cent. *Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327.

⁷⁶ Under such circumstances they are not entitled to share in the distribution of profits arising on the sale of stock in other corporations, on the theory that the corporation was not organized to deal in stocks and hence the preferred stockholders could not have had such profits in mind when they agreed to take the specified dividends in full of their share of the

profits. *Equitable Life Assur. Society v. Union Pac. R. Co.*, 212 N. Y. 360, L. R. A. 1915 D 1052, 106 N. E. 92, aff'g 162 N. Y. App. Div. 81, 147 N. Y. Supp. 382.

Where the preferred stock is entitled to cumulative dividends at a specified rate, and to preference in the distribution of assets until the par value and accumulated dividends have been paid, and "to no further dividend or distribution," so long as the dividends upon the preferred stock are paid, and the corporation has property equal in value to the amount of its outstanding capital stock, after the payment of its debts, the corporation, if it sees fit to do so, may distribute all the rest of its assets among the holders of its common stock without giving the preferred stockholders any right to complain. *Russell v. American Gas & Elec. Co.*, 152 N. Y. App. Div. 136, 136 N. Y. Supp. 602.

⁷⁷ See *Equitable Life Assur. Soc. of United States v. Union Pac. R. Co.*, 212 N. Y. 360, L. R. A. 1915 D 1052, 106 N. E. 92, aff'g 162 N. Y. App. Div. 81, 147 N. Y. Supp. 382.

That the right of preferred stockholders to share in distributions of capital is the same as that of common stockholders, see § 3640, *supra*.

mon stock, whether absolute or as a pledge, carries with it the right to all dividends declared after the transfer, but not dividends declared before the transfer. And it carries, in the absence of agreement to the contrary, the right to receive arrears of dividends when a dividend shall be declared.⁷⁸

§ 3757. Remedies in respect to dividends. As in the case of common stockholders,⁷⁹ preferred stockholders have no legal right to any part of the profits of the corporation until a dividend has been declared, and before then they cannot maintain an action at law against the corporation.⁸⁰ But, as in the case of common stockholders,⁸¹ they may maintain an action at law against the corporation after a dividend has been declared.⁸² And it has been held that

⁷⁸ *Bates v. Androseoggin & K. R. Co.*, 49 Me. 491; *Jermain v. Lake Shore & M. S. Ry. Co.*, 91 N. Y. 483; *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157; *Manning v. Quick-silver Min. Co.*, 24 Hun (N. Y.) 360. See § 3700, *supra*.

⁷⁹ See § 3652, *supra*.

⁸⁰ *United States*. *New York*, L. E. & W. R. R. v. Nickals, 119 U. S. 296, 30 L. Ed. 363; *Union Pac. R. Co. v. Frank*, 226 Fed. 906; *American Steel Foundries v. Lazear*, 204 Fed. 204.

Illinois. *Hamblock v. Clipper Lawn Mower Co.*, 148 Ill. App. 618.

Kansas. *Burk v. Ottawa Gas & Electric Co.*, 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857.

Kentucky. *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477.

Massachusetts. *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833; *Boston Safe Deposit & Trust Co. v. Adams*, 219 Mass. 175, 106 N. E. 590; *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126; *Williston v. Michigan Southern & N. I. R. Co.*, 13 Allen 400.

Michigan. *Knight v. Alamo Mfg. Co.*, 190 Mich. 223, 157 N. W. 24.

Missouri. *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784.

New York. *Boardman v. Lake*

Shore & M. S. Ry. Co., 84 N. Y. 157.

Vermont. *Chaffee v. Rutland R. Co.*, 55 Vt. 110.

Virginia. *Kain v. Angle*, 111 Va. 415, 69 S. E. 355.

Preferred stockholders "are not entitled, of right, to dividends payable out of the net profits accruing in any particular year, unless the directors of the company formally declare, or ought to declare, a dividend payable out of such profits." *New York*, L. E. & W. R. R. v. Nickals, 119 U. S. 296, 30 L. Ed. 363, quoted in *Union Pac. R. Co. v. Frank*, 226 Fed. 906.

It is the declaration of the dividend which creates both the dividend itself and the right of the stockholder to demand and receive it. *Boston Safe Deposit & Trust Co. v. Adams*, 219 Mass. 175, 106 N. E. 590.

"The company's contract with the preferred stockholder is not to pay him at all events the amount of the net profits of each year up to six per cent., but to declare a dividend on that basis." *Burk v. Ottawa Gas & Electric Co.*, 87 Kan. 6, Ann. Cas. 1913 D 772, 123 Pac. 857.

⁸¹ See § 3687, *supra*.

⁸² *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833.

they may maintain assumpsit if a dividend has been declared, and has been paid to the common stockholders in violation of their rights.⁸³

The rights of preferred stockholders are enforceable in equity against the corporation in accordance with the terms of the contract securing the preference.⁸⁴ And all unfair discrimination between preferred stockholders and common stockholders will be prevented.⁸⁵ So preferred stockholders may maintain a suit in equity for relief if the corporation attempts to pay a dividend to the common stockholders before payment of the stipulated dividend on the preferred stock,⁸⁶ or to compel the directors to declare and pay a dividend on the preferred stock where they abuse their discretion in refusing to do so.⁸⁷

The right to relief in equity may be barred by laches;⁸⁸ but the doctrine of laches cannot apply to violations of duty on the part of corporate officers which have occurred within a few years prior to the filing of the bill, especially where the complainant has never acquiesced in their acts, and the delay has resulted in no injury to them or to the corporation.⁸⁹

⁸³ *West Chester & P. R. Co. v. Jackson*, 77 Pa. St. 321; *Coey v. Belfast & Co. Down Ry. Co.*, 2 Ir. C. L. 112.

⁸⁴ *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

⁸⁵ *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754.

⁸⁶ The corporation may be enjoined from declaring or paying dividends upon the common stock until the arrears of cumulative dividends upon the preferred stock have been paid. *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157.

⁸⁷ *United States. American Steel Foundries v. Lazear*, 204 Fed. 204; *Storrow v. Texas Consol. Compress & Manufacturing Ass'n*, 87 Fed. 612; *Id.* 92 Fed. 5.

Kentucky. Westerfield-Bonte Co. v. Burnett, 176 Ky. 188, 195 S. W. 477.

Maine. Hazeltine v. Belfast & M. L. R. Co., 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328.

Michigan. Knight v. Alamo Mfg. Co., 190 Mich. 223, 157 N. W. 24.

New York. Boardman v. Lake Shore & M. S. Ry. Co., 84 N. Y. 157; *Thompson v. New York & E. R. Co.*, 45 N. Y. 468.

Virginia. Gordon's Ex'rs v. Richmond, F. & P. R. Co., 81 Va. 621, 78 Va. 501.

The right to a declaration of dividend is one of exclusive equitable cognizance. *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833.

"A proceeding to compel directors to declare and pay a dividend is of an equitable nature, and a court of equity is the proper tribunal in which to institute the action." *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g on other grounds 120 Ill. App. 596.

See also § 3753, *supra*. And see generally § 3688, *supra*.

⁸⁸ *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g on other grounds 120 Ill. App. 596; *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157.

⁸⁹ *Cratty v. Peoria Law Library*

Even if a preferred stockholder has a right of action in tort for damages against the treasurer of the corporation for maliciously inducing it not to declare a dividend on the preferred stock, the right is a personal one which is not assignable and which will not survive the death of the treasurer. Nor can the preferred stockholder maintain a bill in equity against the administrator of the treasurer under such circumstances, unless it appears that the administrator has profited by the intestate's wrong. The treasurer of the corporation does not occupy a fiduciary relation towards the individual stockholders.⁹⁰

XVIII. THE RIGHT TO TRANSFER SHARES

§ 3758. In general. Shares of stock in a corporation are personal property, and it is well settled that the owner, as in the case of other personal property, has an absolute and inherent right, as an incident of his ownership, to sell and transfer the same at will, except in so far as the right may be restricted by the charter of the corporation or the general law, or by a valid by-law, or by a valid agreement between him and the corporation, provided the transfer is in good faith, and to a person capable of assuming the obligations of a stockholder. In the absence of such restrictions, a bona fide transfer does not require the consent of the corporation, and cannot be prevented by it or by its officers.⁹¹ The right of transfer is also fre-

Ass'n, 219 Ill. 516, 76 N. E. 707, rev'g on other grounds 120 Ill. App. 596.

The doctrine of estoppel or acquiescence has no application and cannot be invoked by the corporation, where it has acted without regard to the rights of the preferred stockholders, and has diverted funds to which they were entitled, with full knowledge of the facts, and without having been misled or deceived by any misconduct or want of action on their part. *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157.

⁹⁰ *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833.

⁹¹ *United States. Farmers' Loan & Trust Co. v. Chicago, P. & S. R. Co.*, 163 U. S. 31, 41 L. Ed. 60; *Morgan v. Struthers*, 131 U. S. 246, 33 L. Ed. 132; *In re W. W. Mills Co.*, 162 Fed. 42, 54; *Stratton's Independence, Ltd. v. Dines*, 135 Fed. 449, aff'g 126 Fed.

968; *Joseph Bancroft & Sons Co. v. Bloede*, 106 Fed. 396, 52 L. R. A. 734, certiorari denied 181 U. S. 620, 45 L. Ed. 1031 (mem. dec.); *Johnson v. Laffin*, 5 Dill. 65, Fed. Cas. No. 7,393, aff'd 103 U. S. 800, 26 L. Ed. 532.

Alabama. *Hall & Farley v. Alabama Terminal & Improvement Co.*, 173 Ala. 398, 421, 56 So. 235; *Commercial Fire Ins. Co. v. Board Revenue Montgomery Co.*, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

California. *McGue v. Rommel*, 148 Cal. 539, 83 Pac. 1000; *People v. California Safe Deposit & Trust Co.*, 18 Cal. App. 732, 124 Pac. 558.

Colorado. *Central Sav. Bank v. Smith*, 43 Colo. 90, 95 Pac. 307; *Weber v. Bullock*, 19 Colo. 214, 35 Pac. 183.

Connecticut. *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161.

Illinois. *McNulta v. Corn Belt*

quently conferred in express terms by the corporate charter or the

Bank, 164 Ill. 427, 447, 56 Am. St. Rep. 203, 45 N. E. 954, aff'g 63 Ill. App. 593.

Indiana. Board Com'rs Tippecanoe Co. v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245.

Iowa. Farmers' & Merchants' Bank of Lineville v. Wasson, 48 Iowa 336, 30 Am. Rep. 398.

Kansas. Steele v. Farmers' & Merchants' Mut. Tel. Ass'n, 95 Kan. 580, 148 Pac. 661.

Kentucky. American Wire-Nail Co. v. Bayless, 91 Ky. 94, 15 S. W. 10; Thurber v. Crump, 86 Ky. 408, 6 S. W. 145.

Louisiana. Trisconi v. Winship, 43 La. Ahn. 45, 26 Am. St. Rep. 175, 9 So. 29; State v. American Cotton Oil Trust, 40 La. Ann. 8, 3 So. 409.

Maryland. Kerr v. Urie, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493, 37 Atl. 789; Victor G. Bloede Co. v. Bloede, 84 Md. 129, 33 L. R. A. 107, 57 Am. St. Rep. 373, 34 Atl. 1127; Gemmell v. Davis, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032.

Massachusetts. Bond v. Mt. Hope Iron Co., 99 Mass. 505, 97 Am. Dec. 49; Sargent v. Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306.

Michigan. Foster v. Row, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

Mississippi. Bank of Holly Springs v. Pinson, 58 Miss. 421, 38 Am. Rep. 330.

Missouri. Addis v. Swofford, 180 S. W. 548; Bank of Atchison County v. Durfee, 118 Mo. 431, 40 Am. St. Rep. 396, 24 S. W. 133; Moore v. Bank of Commerce, 52 Mo. 377; Miller v. Great Republic Ins. Co., 50 Mo. 55; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388; Chouteau Spring Co. v. Harris, 20 Mo. 382; Kretzer v. Cole Bros. Lightning Rod Co., 193 Mo. App. 99, 181 S. W. 1066; Chandler v. Blanke Tea & Coffee Co., 183 Mo. App. 91, 165 S. W.

819; Banta v. Hubbell, 167 Mo. App. 38, 150 S. W. 1089; Senn v. Union Premium & Mercantile Co., 115 Mo. App. 685, 92 S. W. 507; Crenshaw v. Columbian Min. Co., 110 Mo. App. 355, 86 S. W. 260.

Nebraska. Miller v. Farmers' Milling & Elevator Co., 78 Neb. 441, 126 Am. St. Rep. 606, 110 N. W. 995.

New Jersey. Morris v. Hussong Dyeing Mach. Co., 81 N. J. Eq. 256, 86 Atl. 1026.

New York. Rice v. Rockefeller, 134 N. Y. 174, 17 L. R. A. 237, 30 Am. St. Rep. 658, 31 N. E. 907; Driscoll v. West Bradley & Cary Mfg. Co., 59 N. Y. 96; Bank of Attica v. Manufacturers' & Traders' Bank, 20 N. Y. 501; Lane v. Albertson, 78 App. Div. 607, 79 N. Y. Supp. 947; Ingraham v. National Salt Co., 36 Misc. 646, 74 N. Y. Supp. 388, aff'd 72 App. Div. 582, 76 N. Y. Supp. 1016, appeal dismissed 172 N. Y. 644, 65 N. E. 1117; Commercial Bank of Buffalo v. Kortright, 22 Wend. 348, 34 Am. Dec. 317.

Pennsylvania. Insurance Bank of Columbus v. Bank of United States, 4 Clark 125.

Tennessee. Brightwell v. Mallory, 10 Yerg. 196; Herring v. Ruskin Coop. Ass'n (Tenn. Ch. App.), 52 S. W. 327.

Texas. Anderson v. First Nat. Bank of La Grange, — Tex. Civ. App. —, 191 S. W. 836.

Utah. Mundt v. Commercial Nat. Bank of Ogden, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

Vermont. In re Heaton's Estate, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21.

Virginia. Feckheimer v. National Exch. Bank, 79 Va. 80.

West Virginia. Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

general law under which the corporation is formed, or by provisions in the corporate by-laws or the certificates of stock.⁹²

In the absence of restrictions in the charter or general law,⁹³ or an agreement,⁹⁴ a subscriber for stock in a corporation is entitled to transfer the same before he has made any payment therefor, where the subscription has been accepted by the corporation, and certificates of stock issued to him,⁹⁵ and even though no such certificates have been issued.⁹⁶ Nor is the right of transfer impaired because a part only of the subscription has been paid, until a legal call has been made for the payment of the whole or a part of the balance.⁹⁷

Wisconsin. In re Klaus, 67 Wis. 401, 29 N. W. 582.

England. Poole v. Middleton, 29 Beav. 646; Gilbert's Case, 5 Ch. App. 559; Weston's Case, 4 Ch. App. 20; Moffatt v. Farquhar, 7 Ch. Div. 591.

The power of a stockholder to dispose of his stock is not derived from the corporation, but is inherent in him as part of his proprietorship. Bank of Holly Springs v. Pinson, 58 Miss. 421, 38 Am. Rep. 330.

It is not the duty or within the power of a corporation to prevent a stockholder from selling his stock for any price he can obtain. Stratton's Independence, Ltd. v. Dines, 135 Fed. 449, aff'g 126 Fed. 968.

Shares are vendible at will, and the corporation has no right to restrict their transfer except as authorized by the statute. Steele v. Farmers' & Merchants' Mut. Tel. Ass'n, 95 Kan. 580, 148 Pac. 661.

"The owner of corporate stock may convey the beneficial interest therein for a time to one and the whole ownership in remainder to another, unhampered by any power lodged in the corporation to disturb the purpose of the conveyance." In re Heaton's Estate, 89 Vt. 550, L. R. A. 1916 D 201, 96 Atl. 21.

No injunction can lie against a corporation to prevent a sale of its shares by its stockholders since it has no power to stop them from selling. Ingraham v. National Salt Co., 36 N.

Y. Misc. 646, 74 N. Y. Supp. 388, aff'd 72 N. Y. App. Div. 582, 76 N. Y. Supp. 1016, appeal dismissed 172 N. Y. 644, 65 N. E. 1117.

The holder of stock in a railroad company is under no duty to the company or its other stockholders to continue in the ownership of the stock for the purpose of facilitating pending negotiations for the transfer of control of the company to another railroad company, but may sell the same to a rival company, also seeking control, or to whomsoever he sees fit, and at any price he can obtain. Farmers' Loan & Trust Co. v. Chicago, P. & S. R. Co., 163 U. S. 31, 41 L. Ed. 60.

⁹² See People v. California Safe Deposit & Trust Co., 18 Cal. App. 732, 124 Pac. 558; Chouteau Spring Co. v. Harris, 20 Mo. 382, and other cases cited in last preceding note.

The National Banking Act makes stock in national banks transferable like any other personal property. Earle v. Carson, 188 U. S. 42, 47 L. Ed. 373, aff'g 107 Fed. 639, 60 L. R. A. 266; First Nat. Bank of South Bend v. Lanier, 11 Wall. (U. S.) 369, 20 L. Ed. 172.

⁹³ See § 3759, *infra*.

⁹⁴ See § 3761 et seq., *infra*.

⁹⁵ Downing v. Potts, 23 N. J. L. 66.

⁹⁶ Roosevelt v. Hamblin, 199 Mass. 127, 18 L. R. A. (N. S.) 748, 85 N. E. 98.

⁹⁷ Banta v. Hubbell, 167 Mo. App. 38, 150 S. W. 1089.

Where stock is transferred by the owners to a committee or a trust company, and assignable trust certificates are issued to them, entitling them to a transfer of the stock on termination of the trust, the trust certificates are transferable by the holders to the same extent as the stock would be, and the transfer thereof is governed by the same principles.⁹⁸

A corporation cannot refuse to recognize and register a transfer of shares on the ground that the transferrer is indebted to it, unless it has a lien on the shares,⁹⁹ nor because of the motive inducing the transfer.¹

Even when there are no restrictions upon the power to transfer shares, a stockholder cannot escape liability to the corporation or to its creditors by a merely colorable or fictitious transfer, or by a transfer to a person who is irresponsible by reason of infancy or other legal disability, or, according to the weight of authority, by reason of known insolvency.²

The mode of transferring shares and the necessity for the registration of transfers on the books of the corporation will be considered in subsequent sections.³

§ 3759. Restrictions in the charter or general law. Restrictions upon the power to transfer shares of stock are sometimes imposed by provisions in the charter of a corporation or the general law. Such provisions, of course, are binding upon all persons who become stockholders after enactment of the statute. And they are binding upon purchasers of stock, for they are chargeable with notice.⁴ But a statute which impairs or restricts an existing right of transfer by stockholders who became such before its enactment is invalid as impairing contract obligations.⁵

⁹⁸ *Bostwick v. Chapman* (Shepaug Voting Trust Cases), 60 Conn. 553, 24 Atl. 32; *Rice v. Rockefeller*, 134 N. Y. 174, 17 L. R. A. 237, 30 Am. St. Rep. 658, 31 N. E. 907.

⁹⁹ See § 3599 et seq., *supra*.

¹ See § 3826, *infra*.

² See § 4111, *infra*, and § 4196 et seq., *infra*.

³ See § 3784 et seq., *infra*.

⁴ *Merrill v. Call*, 15 Me. 428; *Fisher v. Essex Bank*, 5 Gray (Mass.) 373; *Sweetland v. Quidnick Co.*, 11 R. I. 328.

Where the charter of a corporation subjected subscribers for stock to for-

feiture of all right acquired by their subscriptions on failure to pay the first instalment at a time specified by the directors, and there was no provision authorizing a transfer of the right acquired by subscriptions, but it was provided that stock could only be transferred on the books of the corporation, it was held that no right to stock could be assigned by a subscriber before payment of the first instalment. *Coleman v. Spencer*, 5 Blackf. (Ind.) 197.

⁵ *In re W. W. Mills Co.*, 162 Fed. 42, 54.

Corporate charters or general laws sometimes provide that no stock shall be sold or transferred for a specified length of time,⁶ or until the whole amount of the capital shall have been paid in.⁷ And statutes sometimes prohibit transfers on the corporate books when the corporation is in a failing condition or when its capital is impaired.⁸

A provision in a general enumeration of the powers of corporations that, among other things, they shall have power "to render the interest of the stockholders transferable," has been held not to make the transferability of the stock dependent on some affirmative act of the corporation, but merely to impress the stock with that quality as a consequence of the act of incorporation.⁹

St. 1903, c. 437, § 8 (e), requiring the agreement of association to state the number of shares into which the capital stock is to be divided, "and the restrictions, if any, imposed upon their transfer," shows that the statute contemplates the imposition of restrictions upon the transfer of stock as being within the power of the incorporators. "In general, therefore, restrictions upon such transfer cannot be regarded as contrary to public policy, but must be treated as within the contemplation of the legislature. The absence of any definite limitation upon the power of the incorporators to impose restrictions must be taken to be a legislative determination that considerable latitude was intended. No such restrictions can be stricken down as unlawful under these circumstances unless palpably unreasonable." *Longyear v. Hardman*, 219 Mass. 405, Ann. Cas. 1916 D 1200, 106 N. E. 1012.

⁶ Where the charter of a bank provided that the capital stock should not be sold or transferred, but should be held by the original subscribers for one year from the date of the charter, and a subscriber assigned his shares within the year, and the assignee notified the corporation and paid the last instalment due on the shares, it was held that, although the assignee was not at the time entitled

to a certificate in his own name, the assignment was valid in equity. *Nesmith v. Washington Bank*, 6 Pick. (Mass.) 324.

⁷ Where a charter provided that "no part of the capital stock shall be sold or transferred, except by execution or distress, or by administrators or executors, until the whole amount thereof shall have been paid in," it was held that a contract to transfer shares, not within the exceptions, made and to be carried into execution when only 50 per cent. was paid in, was not enforceable. *Merrill v. Call*, 15 Me. 428.

But where an act incorporating an insurance company provided that no transfer of any share of stock should be permitted until payment of the whole capital stock, it was held that a bona fide sale of his shares by a stockholder to his creditor, before the whole capital stock was paid, in satisfaction of his debt, transferred the equitable interest of the debtor, so as to justify the corporation in issuing certificates to the assignee. *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476.

⁸ *Madison Bank v. Price*, 79 Kan. 289, 100 Pac. 280.

⁹ *Miller v. Farmers' Milling & Elevator Co.*, 78 Neb. 441, 126 Am. St. Rep. 606, 110 N. W. 995.

Provisions in charters, articles of incorporation, or general laws requiring stockholders desiring to sell their stock to offer it to the corporation or the other stockholders before disposing of it to others are valid.¹⁰ But it has been held that they do not apply to a sheriff's

¹⁰ *Lane v. Albertson*, 78 N. Y. App. Div. 607, 79 N. Y. Supp. 947; *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 150 N. W. 1101, 149 N. W. 754. See also *Moses v. Soule*, 63 N. Y. Misc. 203, 118 N. Y. Supp. 410, aff'd on other grounds 136 N. Y. App. Div. 904, 120 N. Y. Supp. 1136; *Garrett v. Philadelphia Lawn Mower Co.*, 39 Pa. Super. Ct. 78.

Such a provision contained in the contract of subscription for shares, the articles of incorporation, and the by-laws, and which also appears on the face of the stock certificates, is valid. *Farmers' Mercantile & Supply Co. v. Lawn*, 146 Wis. 252, 131 N. W. 366.

"The personal element is as important in the make-up and management of a corporation as it is in almost every other undertaking. Restrictions, therefore, reasonably protecting incorporators or stockholders in their interests by permitting them first to purchase stock offered for sale, should be held lawful as promotive of good management and sound business enterprise." *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 150 N. W. 1101, 149 N. W. 754.

Assuming that a charter provision, which is printed on each stock certificate, to the effect that no stock shall be sold by any stockholder until he has given the company ten days' notice of his intention to sell, during which time the other stockholders shall have the privilege of purchasing the same, is valid and binding on a bona fide purchaser, its only effect is to preserve to the other stockholders the privilege of purchasing the stock at any time during a period of ten days. It does not and can not have

the effect of rendering the stock inalienable, or of rendering a sale of it, without the prior notice of the intention to sell, absolutely null. Hence where stock is sold without giving such notice, but the purchaser delivers the certificate, indorsed by the person in whose name it was issued, to the secretary with the request that it be transferred on the books, and at the same time notifies him of his intention to sell the stock, and requests that such notice as may be required be given to the other stockholders, and the purchaser receives no offer or proposal from the corporation or any stockholder for the purchase of the stock within ten days after the service of the notice, he is entitled to have the stock transferred to him on the books and a new certificate issued to him. *State v. Caddo Rock Drill Bit Co.*, 141 La. 353, 75 So. 78.

An offer by a stockholder of a certain number of shares to the corporation at a gross price is not a compliance with a charter provision that no stockholder shall have the right to transfer his shares without giving ten days' written notice of his intention, and ten days' refusal to the corporation at the lowest price at which he will sell to any other person, and that the corporation shall have the first right to elect to purchase the shares at such lowest price, and the corporation cannot be compelled to transfer on its books a smaller number of shares afterwards sold by him to a third person at a given price per share. *Sweetland v. Quidnick Co.*, 11 R. I. 328.

The validity and effect of similar provisions in the corporate by-laws (see § 513, *supra*), or in contracts be-

sale on execution against a stockholder,¹¹ nor to a bequest of stock by a stockholder.¹² It has also been held that a provision giving such an option to the corporation is for its benefit, and not for the benefit of individual stockholders.¹³ And the corporation waives any option it may have to purchase the stock by consenting to its transfer to others.¹⁴

A provision in a statutory written agreement of association that no stock shall be sold, hypothecated, or transferred without the consent of three-fourths of the capital stock of the corporation has been upheld under a statute permitting such an agreement to impose restrictions upon the transfer of shares.¹⁵

In England, the deeds of settlement or articles of association of joint stock companies have frequently required stockholders wishing to transfer their shares to first offer them to the company, or to submit the name of the transferee to the directors for their approval, and such provisions have been enforced.¹⁶ But these provisions do not give the company the right to arbitrarily refuse to allow a transfer of shares, if they do not act in good faith, and for what they deem to be the best interests of the company.¹⁷ If they act in good faith, however, and for what they consider the interest of the company, their refusal to allow a transfer is final.¹⁸ They are not bound to

tween stockholders and the corporation (see § 3762, *infra*), are considered in other sections.

¹¹ A provision in a charter that no stockholder shall sell his shares without first giving the corporation the refusal of the same for ten days at the lowest price at which he is willing to sell does not apply to a sheriff's sale on execution against a stockholder. *Barrows v. National Rubber Co.*, 12 R. I. 173.

¹² A stockholder may bequeath his shares by will without giving the corporation or its members an opportunity to buy them. *Lane v. Albertson*, 78 N. Y. App. Div. 607, 79 N. Y. Supp. 947.

¹³ *Bartlett v. Fourton*, 115 La. 26, 38 So. 882.

¹⁴ *Bartlett v. Fourton*, 115 La. 26, 38 So. 882.

Where stockholders are required to offer shares to the corporation or the other stockholders before selling and

transferring the same to third persons, and the corporation permits a transfer to be made to a third person, the inference is that the stock was offered to it or the stockholders, and declined, or that the requirement has been waived. *American Nat. Bank v. Oriental Mills*, 17 R. I. 551, 23 Atl. 795.

¹⁵ *Longyear v. Hardman*, 219 Mass. 405, Ann. Cas. 1916 D 1200, 106 N. E. 1012.

¹⁶ *Poole v. Middleton*, 29 Beav. 646; *Ex parte Penney*, 8 Ch. App. 446; *Chappell's Case*, 6 Ch. App. 902; *Moffatt v. Farquhar*, 7 Ch. Div. 591; *Bargate v. Shortridge*, 5 H. L. Cas. 297.

¹⁷ *Moffatt v. Farquhar*, 7 Ch. Div. 591; *Taft v. Harrison*, 10 Hare 489; *Robinson v. Chartered Bank*, L. R. 1 Eq. 32; *Smith v. Canada Car Co.*, 6 P. R. (U. C.) 107.

¹⁸ *Ex parte Penney*, 8 Ch. App. 446; *Shepherd's Case*, L. R. 2 Eq. 564.

disclose their reasons for refusing to allow a transfer.¹⁹

The validity and effect of so-called "Blue Sky Laws" regulating the sale of stocks, bonds and other securities by domestic and foreign corporations and dealers will be considered in a subsequent chapter.²⁰

§ 3760. By-laws restricting transfers. As we have seen in previous sections, a corporation may undoubtedly enact such by-laws regulating the transfer of its shares as may be reasonably necessary to protect itself against colorable or fraudulent transfers, or to enable it to know who are its stockholders, and, as such, entitled to receive dividends, vote at corporate meetings, and otherwise participate in its management, or to enable it to take advantage of charter or statutory provisions giving it a lien on its stock.²¹ But in the absence of charter or statutory authority, it has no power to adopt by-laws prohibiting or restricting transfers.²²

§ 3761. Agreements in restraint of the right to transfer—In general. An agreement between stockholders of a corporation not to sell or transfer their shares without the consent of all the parties thereto is in restraint of trade, and contrary to public policy, and is therefore void, if there is no other consideration than the mutual promises of the stockholders.²³ It was so held, for example, of an agreement between stockholders of a railroad company which provided that they would not "assign, set over, pledge or give power of attorney to vote, or agree to sell, assign, transfer, set over, pledge, or give power of attorney to vote, in any way, shape or manner, the stock which we respectively and individually own, hold or possess in said company without the concurrent consent of all signers to this instrument"; and which recited that the agreement was "made for mutual protection and to prevent the sale of the company's franchise by a majority of the members of the present board of directors, who are, and who represent, a minority of the shares of the capital of this company."²⁴ It has also been held that an agreement requiring election of the transferee to membership in the corporation, or his acceptance as a member, by the board of directors is void.²⁵

¹⁹ Ex parte Penney, 8 Ch. App. 446.

²⁰ See chapter on Governmental Regulations.

²¹ See § 514, supra.

²² See § 513, supra.

²³ Williams v. Montgomery, 68 Hun (N. Y.) 416, 22 N. Y. Supp. 1033, 148

N. Y. 519, 43 N. E. 57; Fisher v. Bush, 35 Hun (N. Y.) 641.

²⁴ Fisher v. Bush, 35 Hun (N. Y.) 641.

²⁵ A provision to this effect in the so-called "constitution and by-laws" of a corporation is void whether re-

This principle, however, does not prevent reasonable agreements between stockholders and the corporation, based upon a valid consideration, restricting the right to transfer shares.²⁶ Thus, an agreement that shares shall not be transferred until all debts due from the holder to the corporation are paid is valid, and binding upon the stockholders and purchasers with notice.²⁷ And the same is true of an agreement between all of the stockholders and the corporation on the one hand and its fiscal agent on the other that neither the corporation nor the stockholders will sell or transfer any of their shares while a contract between the corporation and such agent for the sale of treasury stock remains in force.²⁸ Nor does an agreement between the owners of property, on transferring the same to a corporation, that certificates of stock issued to them by the corporation in payment shall be deposited with a trust company, "and shall not be withdrawn for the period of six months without the written consent" of all the parties to the agreement impose any restraint upon the disposition of the stock, so as to be objectionable on that ground, but all that it prevents is the actual handing over of the certificates of stock to the purchasers thereof, and transfers on the books of the corporation.²⁹

As we shall see, a corporation has no right to refuse to recognize a transferee as a stockholder merely because the transfer is a violation of a pooling agreement between the transferrer and other stockholders, since such a contract is a matter between the parties thereto with which it has no concern.³⁰

garded as a contract or a by-law. *Steele v. Farmers' & Merchants' Mut. Tel. Ass'n*, 95 Kan. 580, 148 Pac. 661.

²⁶ *Cook Ry. Signal Co. v. Buck*, 59 Colo. 368, 149 Pac. 95; *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432; *Blue Mountain Forest Ass'n v. Borrowe*, 71 N. H. 69, 51 Atl. 670; *Farmers' Mercantile & Supply Co. v. Laun*, 146 Wis. 252, 131 N. W. 366.

"A distinction must be observed between an agreement absolutely restrictive of sale or transfer, and one merely imposing conditions." *Farmers' Mercantile & Supply Co. v. Laun*, 146 Wis. 252, 131 N. W. 366.

A distinction must also be observed between such conditions "when created by contract and authorized by

the articles, and when attempted to be imposed by a by-law upon an unwilling minority or upon those who may assert that the by-law is beyond the charter power." *Farmers' Mercantile & Supply Co. v. Laun*, 146 Wis. 252, 131 N. W. 366.

²⁷ See § 3602, *supra*.

²⁸ An assignee with notice of the agreement and who does not pay a valuable consideration takes subject to the agreement and cannot compel the corporation to transfer the stock to him on the books. *Cook Ry. Signal Co. v. Buck*, 59 Colo. 368, 149 Pac. 95.

²⁹ *Williams v. Montgomery*, 68 Hun (N. Y.) 416, 22 N. Y. Supp. 1033, 148 N. Y. 519, 43 N. E. 57.

³⁰ See § 3825, *infra*.

§ 3762. — **Agreements giving corporation or other stockholders prior right to purchase.** According to the weight of authority, an agreement between a stockholder and the corporation giving the latter an option to purchase his shares before offering them to others is valid as between the parties and as against transferees with notice.³¹ And the same is true of an agreement requiring a stockholder wishing to sell his stock to offer it first to the other stockholders,³² or to offer it first to the corporation and then to the other

³¹ *Barrett v. King*, 181 Mass. 476, 63 N. E. 934; *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432. See also *Rosenfeld v. Einstein*, 46 N. J. L. 479.

A provision in a certificate issued to an employee as a gratuity to the effect that if his employment shall cease the president of the company shall be privileged to purchase the shares at a specified price is valid, and since this condition appears on the face of the certificate a transferee has notice of and is bound by it. *Douglas v. Aurora Daily News Co.*, 160 Ill. App. 506.

Where the contract provides for an appraisal of the stock by the directors and a sale to the corporation at the appraised value, their decision as to its value cannot be impeached for mere errors of judgment, nor will specific performance be refused merely because they value it at too low a figure. *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432. In this case it was further held that a requirement that the stock be offered to the corporation was for the purpose of fixing the running of the time after the expiration of which the stockholder was at liberty to sell elsewhere, that the offer was not a condition precedent to an appraisal, and that if the directors appraised the stock and voted to take it at its appraised value, no offer was necessary.

The validity and effect of provisions of this character in the corporate

charter, the articles of incorporation, or the statute governing corporations (see § 3759, *supra*); or in the by-laws (see § 513, *supra*), are considered in other sections.

³² *Garrett v. Philadelphia Lawn Mower Co.*, 39 Pa. Super. Ct. 78.

A provision that the shares shall not be transferable except in pursuance of a vote of two-thirds of all the outstanding shares, that this majority may either consent to the transfer or themselves purchase the shares at par, and that if they do neither the holder is at liberty to sell and transfer the same as usual, contained in the contract of subscription, the articles of incorporation, and the by-laws, and appearing on the face of the stock certificates, is valid. *Farmers' Mercantile & Supply Co. v. Laun*, 146 Wis. 252, 131 N. W. 366.

An agreement between all the stockholders of a corporation that in the event that one or more of them shall die or shall desire to dispose of his interest the others shall have the option to purchase his stock at its book value is valid. *In re Lindsay's Estate*, 210 Pa. 224, 59 Atl. 1074; *Fitzsimmons v. Lindsay*, 205 Pa. 79, 54 Atl. 488.

The fact that each stockholder acquires a preferred right to purchase the shares of the others under the circumstances specified constitutes a mutual and sufficient consideration for such a contract. *In re Lindsay's Estate*, 210 Pa. 224, 59 Atl. 1074; *Fitz-*

stockholders,³³ before selling it elsewhere. It has been held by a number of courts that a void by-law on this subject may become a valid contract.³⁴ But where the by-law is without authority of

simmons v. Lindsay, 205 Pa. 79, 54 Atl. 488.

The value of the good will of the business is to be taken into consideration in determining the book value of the stock. In *re Lindsay's Estate*, 210 Pa. 224, 59 Atl. 1074.

An agreement existed between stockholders that where one wished to sell his holdings offer thereof must first be made to the holders of the remaining stock on terms to be determined as specified in the agreement, the other stockholders having the privilege of buying and making distribution of the stock purchased among the several stockholders in proportion to the amount each held. Each of the several stockholders was held entitled to participate in the stock of a selling member, and it was not competent for a selling stockholder to prefer certain of the remaining stockholders to the prejudice of others. *Boswell v. Buhl*, 213 Pa. 450, 63 Atl. 56.

³³ *Weiland v. Hogan*, 177 Mich. 626, 143 N. W. 599.

Where defendant acquired stock under the provisions of a by-law, referred to in the certificates of stock, that if a member desired to dispose of his stock offer thereof must first be made to the association at a specified price; that if the offer was not accepted by the association a similar offer must then be made to the stockholders; and that if the stockholders should fail to purchase, the stock might be sold to any person at any price, the court said: "Upon this agreement she (the defendant) obtained the stock which she now holds, claiming, in effect, that the contract was sufficient to transfer to her the title, but that it was ineffectual to re-

strict her right of disposing of it. But whatever effect, if any, the restricted right of alienation of the stock might be held to have upon the validity of the contract, the defendant is not in a position to interpose that defense. There is, in fact, no contest in regard to her ownership of the stock. She claims to be the owner and the plaintiff does not dispute her claim. She does not seek to rescind the contract and surrender the stock, for which she paid nothing; nor is the plaintiff seeking to enforce a forfeiture of her title. Under these circumstances common justice forbids that she should be permitted to retain the stock and enjoy the benefits incident to its ownership without incurring the burdens she agreed to assume by such ownership. If the contract is valid so far as it conferred benefits upon her, it is equally valid so far as it imposed obligations upon her." *Blue Mountain Forest Ass'n v. Borrowe*, 71 N. H. 69, 51 Atl. 670.

³⁴ *Massachusetts*. *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432.

Michigan. *Weiland v. Hogan*, 177 Mich. 626, 143 N. W. 599.

New Hampshire. *Blue Mountain Forest Ass'n v. Borrowe*, 71 N. H. 69, 51 Atl. 670.

Ohio. See *Nicholson v. Franklin Brewing Co.*, 82 Ohio St. 94, 137 Am. St. Rep. 764, 19 Ann. Cas. 699, 91 N. E. 991.

Pennsylvania. *Garrett v. Philadelphia Lawn Mower Co.*, 39 Pa. Super. Ct. 78.

Rhode Island. *Ireland v. Globe Milling Co.*, 21 R. I. 9, 79 Am. St. Rep. 769, 41 Atl. 258.

One who was a stockholder at the time of the adoption of such a by-

statute, it has been held that it can only have the effect of a contract by, and enforceable against, the assignor, and that the assignee is not bound by it by virtue of the assignment alone,³⁵ where he has no notice of the restriction.³⁶

Some courts have held that a contract requiring shareholders to offer their stock to the corporation before selling it elsewhere is void as imposing improper restrictions upon the alienation of stock. And it has been held that such a contract is not within a grant of power to the corporation to enter into any contract or obligation essential to the transaction of ordinary affairs.³⁷

Of course such a contract is void where the corporation has no power to purchase shares of its own stock.³⁸

The corporation cannot be a party to such an agreement made before it came into existence or was authorized to do business,³⁹ and is not entitled to enforce an agreement made by its promoters before that time, unless it ratifies the same, by accepting its benefits or otherwise, after it comes into existence. Nor can the corporation take advantage of such a contract made by its incorporators as individuals before it came into existence, but the only remedy for a breach thereof would be a personal one against the offending stockholder.⁴⁰

A valid agreement of this character to which the corporation is a

law is estopped to deny its validity as a contract. *Weiland v. Hogan*, 177 Mich. 626, 143 N. W. 599.

In *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432, it was held that, where a person purchased certificates of stock which provided that they were transferable only to the company, and at an appraisal to be made by the directors, as provided in the by-laws printed on the back of the certificates, and signed a receipt therefor "subject to the conditions and restrictions therein referred to, and to the by-laws of the company to which I agree to conform," he was bound by the provisions of the certificates, although mere by-laws containing such provisions would have been void.

As to the validity and effect of such by-laws, see § 513, *supra*.

As to the effect of void by-laws as contracts generally, see § 498, *supra*.

³⁵ *Ireland v. Globe Milling Co.*, 21

R. I. 9, 79 Am. St. Rep. 769, 41 Atl. 258.

³⁶ *Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S. W. 129.

³⁷ *Steele v. Farmers' & Merchants' Mut. Tel. Ass'n*, 95 Kan. 580, 148 Pac. 661.

³⁸ *Steele v. Farmers' & Merchants' Mut. Tel. Ass'n*, 95 Kan. 580, 148 Pac. 661.

As to the power of a corporation to purchase shares of its own stock, see § 1134 *et seq.*, *supra*.

³⁹ *Ireland v. Globe Milling & Reduction Co.*, 20 R. I. 190, 38 L. R. A. 299, 38 Atl. 116.

And see generally § 404, *supra*.

⁴⁰ *Ireland v. Globe Milling & Reduction Co.*, 20 R. I. 190, 38 L. R. A. 299, 38 Atl. 116.

The mere act of the corporation in issuing certificates of stock to a party to such an agreement after the corporation comes into existence does not

party will be specifically enforced at its instance,⁴¹ since to remit it to an action at law for damages would defeat the very purpose of the contract and would not furnish an adequate remedy.⁴² And similarly such an agreement between stockholders as individuals may be specifically enforced against a defaulting stockholder by the others.⁴³

If the agreement merely gives the corporation an option to take the stock or not as it chooses, the stockholder cannot compel the corporation to take it.⁴⁴

Mandamus will not lie at the instance of one of two stockholders, who together own all the stock of the company, to compel the other to unite with him in determining the value of the stock in order to fix the price to be paid therefor by the corporation under a contract.⁴⁵

§ 3763. Restrictions in stock certificates. Where the right to transfer is given by the statute, it cannot be curtailed by recitals in the stock certificate.⁴⁶

Provisions in a certificate reasonably restricting the right of trans-

amount to a ratification of the agreement. *Ireland v. Globe Milling & Reduction Co.*, 20 R. I. 190, 38 L. R. A. 299, 38 Atl. 116.

As to the right of a corporation to enforce contracts made by its promoters generally, see § 152 et seq., *supra*.

⁴¹ *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432; *Weiland v. Hogan*, 177 Mich. 626, 143 N. W. 599; *Blue Mountain Forest Ass'n v. Borrowe*, 71 N. H. 69, 51 Atl. 670.

⁴² *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432.

⁴³ *In re Lindsay's Estate*, 210 Pa. 224, 59 Atl. 1074; *Fitzsimmons v. Lindsay*, 205 Pa. 79, 54 Atl. 488.

⁴⁴ An agreement existed between the corporation and its members that if a member should desire to sell his stock he should cause it to be appraised by the directors, the appraisal being made a matter of duty on the part of the directors upon request of a stockholder, and that upon

such appraisement the stockholder should offer the stock to the corporation and that it should have the option of accepting or rejecting the offer. The court held that a refusal by the directors to make an appraisal when requested by the stockholders did not render the corporation liable since the directors were simply made referees by the agreement between the corporation and a member wishing to sell, and the corporation could not be deemed bound to see that the referees acted. Furthermore, the corporation was not under obligation to buy the stock unless it chose so to do, and if it did not wish to buy the stock appraisal thereof would have been an idle ceremony. *Whiton v. Batchelder & Lincoln Corporation*, 179 Mass. 169, 60 N. E. 483.

⁴⁵ *Rosenfeld v. Einstein*, 46 N. J. L. 479.

⁴⁶ *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676; *Brown v. Wright*, 48 Utah 633, 161 Pac. 448.

fer may be enforced as a contract between the corporation and the stockholder.⁴⁷ But a provision in a certificate that it is transferable only to some person first approved by the board of directors is void.⁴⁸ And the same has been held to be true of a provision inserted in a part only of the certificates of stock prohibiting a transfer without the consent of the president and board of directors.⁴⁹

§ 3764. Transfers to or by directors or other officers. In the absence of express restrictions, the directors or other officers of a corporation have the same right as any other person to take a transfer of shares, and stockholders have the same right to transfer to them as to other persons. In the absence of fraud or breach of trust, the transfer has the same effect as if made to a stranger.⁵⁰ Nor does the mere fact that a stockholder is also a director of the corporation affect his right to make a bona fide transfer of his shares. His right in this respect, and the effect of the transfer, are precisely the same as in case of any other stockholder, provided the transfer involves no breach of his trust as a director, and is not made fraudulently.⁵¹

§ 3765. Transfers to other corporations. If a corporation has authority to purchase shares in another corporation, and does so, the other corporation cannot refuse to recognize the transfer. In such a case, the rights of the transferee are the same as if it were a natural person.⁵² It is otherwise, however, if the purchase is ultra vires. If a corporation makes an ultra vires purchase of stock in another corporation, it cannot compel the latter to transfer the stock to it on its books, so as to entitle it to vote the same at corporate meetings.⁵³

⁴⁷ See § 3761, supra.

⁴⁸ *Douglas v. Aurora Daily News Co.*, 160 Ill. App. 506.

⁴⁹ "The element of mutuality was wanting and the restriction claimed was an arbitrary one having no force as a contract." *Finch v. Macoupon Telephone & Telegraph Co.*, 146 Ill. App. 158.

⁵⁰ *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445; *Farmers' & Merchants' Bank v. Wasson*, 48 Iowa 336, 30 Am. Rep. 398; *Walsh v. Goulden*, 130 Mich. 531, 90 N. W. 406.

The question of fraud by a corporate officer in buying or selling shares

of the corporate stock will be discussed later. See § 3862 et seq., infra.

⁵¹ *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532; *Johnson v. Laffin*, 5 Dill. 65, Fed. Cas. No. 7,393; *Trisconi v. Winship*, 43 La. Ann. 45, 26 Am. St. Rep. 175; *Ex parte Littledale*, 9 Ch. App. 257; *Gilbert's Case*, 5 Ch. App. 559; *In re Cawley*, 42 Ch. Div. 209.

⁵² See § 3758 et seq., supra.

As to the right of corporations to acquire and hold stock in other corporations, see § 1116 et seq., supra.

⁵³ *Milbank v. New York, L. E. & W. R. Co.*, 64 How. Pr. (N. Y.) 20;

§ 3766. Transfers after dissolution of the corporation or pending liquidation. After a corporation has been dissolved by expiration of its charter, by the judgment or decree of a court or otherwise, the stockholders have not the same power to transfer the legal title to their shares as before the dissolution, for their position is very different. After the dissolution of the corporation, their only right is an equitable right to share in the assets of the corporation after the payment of his debts and after they have paid or been charged with any indebtedness which may have been due from them to the corporation. This equitable right may be assigned, but in such a case the assignee acquires no greater or different rights than the assignor. He does not acquire a legal title to the shares, as in the case of a transfer before dissolution.⁵⁴

The owner of stock in an insolvent corporation in process of liquidation may transfer the same to whomsoever he pleases, for while such stock may possess little, if any, intrinsic value, it is nevertheless still property, and its transfer carries with it whatever rights would accrue to the original owner.⁵⁵ But such transfer does not always relieve the transferor from liability for his proportionate share of the corporate debts.⁵⁶

XIX. EFFECT OF TRANSFER

§ 3767. Scope of subdivision. Some matters involving the effect of a transfer of shares on the rights and liabilities of the transferor and transferee have already been considered; as, for example, the right to dividends as between the transferor and transferee,⁵⁷ the effect of a transfer on the right of the corporation to set off dividends against debts due to it from the transferor,⁵⁸ and that the transferee of stock sold after a vote to increase the capital stock of the corporation acquires the right, incident to the shares, to a preference in subscribing for or purchasing a proportionate amount of the new

Franklin Bank v. Commercial Bank,
36 Ohio St. 350, 38 Am. Rep. 594.

See also § 1573, *supra*.

Though a national bank has no authority to invest its funds in the stock of other corporations, where stock is assigned to it as collateral security for a loan and it acquires title thereto for foreclosure of its lien, it is entitled to have the same transferred to it on the corporate books. *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A.

(N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

⁵⁴ *James v. Woodruff*, 10 Paige (N. Y.) 541, *aff'd* 2 Den. (N. Y.) 574.

See also the chapter on Forfeiture, Dissolution and Winding Up, *infra*.

⁵⁵ *People v. California Safe Deposit & Trust Co.*, 18 Cal. App. 732, 124 Pac. 558.

⁵⁶ See subd. xxxiv, *infra*.

⁵⁷ See § 3700 et seq., *supra*.

⁵⁸ See § 3697 et seq., *supra*.

stock.⁵⁹ The right of a transferee to sue to set aside ultra vires transactions or to obtain redress for the conversion of corporate assets will be considered in connection with the subject of stockholders' suits;⁶⁰ and the right of a transferee to have the transfer registered on the corporate books and a new certificate issued to him in connection with the subject of the registration of transfers.⁶¹

§ 3768. General principles. As a general rule a valid transfer of shares, when completed, substitutes the transferee for the transferor as a stockholder in the corporation with respect both to rights and to liabilities. The transferor ceases to be a stockholder, and neither has any further rights, nor is subject to any further liabilities, as such.⁶² The transferee comes in and takes his place. He is vested by substitution with all the rights of the transferor in the stock,⁶³ and holds it on the same conditions and subject to the same liabilities and obligations,⁶⁴ and to the same equities, as did the transferor

⁵⁹ See § 3461 et seq., supra.

⁶⁰ See § 4060, infra.

⁶¹ See § 3816, infra.

⁶² *Whitney v. Butler*, 118 U. S. 655, 30 L. Ed. 266; *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209; *West Nashville Planing-Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 Am. St. Rep. 835, 6 S. W. 340; *Stewart v. Walla Walla Prtg. & Pub. Co.*, 1 Wash. 521, 20 Pac. 605.

⁶³ *United States. Campbell v. American Alkali Co.*, 125 Fed. 207, aff'g 113 Fed. 398.

California. Perkins v. Cowles, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711; *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 53, 97 Pac. 1.

New York. Johnson v. Underhill, 52 N. Y. 203; *Clark v. Bankers' Trust Co.*, 99 Misc. 300, 163 N. Y. Supp. 748.

Tennessee. Parker v. Bethel Hotel Co., 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209; *West Nashville Planing-Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 Am. St. Rep. 835, 6 S. W. 340.

Washington. Stewart v. Walla Walla Prtg. & Pub. Co., 1 Wash. 521, 20 Pac. 605.

⁶⁴ *United States. Campbell v. American Alkali Co.*, 125 Fed. 207, aff'g 113 Fed. 398.

California. Perkins v. Cowles, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711; *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 53, 97 Pac. 1; *Visalia & T. R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10.

Connecticut. Hartford & N. H. R. Co. v. Boorman, 12 Conn. 530.

Delaware. Trustees of Mut. Loan Ass'n v. Parsons, 3 Boyce 131, 80 Atl. 1062.

Kentucky. Corbin Banking Co. v. Mitchell, 141 Ky. 172, 31 L. R. A. (N. S.) 446, 132 S. W. 426.

Maryland. Bend v. Susquehanna Bridge & Bank Co., 6 Harr. & J. 128, 14 Am. Dec. 261.

New York. Johnson v. Underhill, 52 N. Y. 203; *Richards v. Robin*, 86 Misc. 528, 148 N. Y. Supp. 822.

Tennessee. West Nashville Planing-Mill Co. v. Nashville Sav. Bank, 86 Tenn. 252, 6 Am. St. Rep. 835, 6 S. W. 340.

Vermont. Lafountain & Woolson Co. v. Brown, 101 Atl. 36.

Washington. Stewart v. Walla

prior to the transfer.⁶⁵ "The general rule concerning the effect of the transfer of shares in a corporation is that such transfer operates as a novation of the contract of membership. The transferrer ceases to be a shareholder, and the transferee becomes one. The first is ordinarily relieved from all further liability to contribute capital, and loses all right to participate in the further profit or management; the transferee takes the place of the retiring member, and by implication assumes all the obligations which rested upon the former holder as a member of the company, and ordinarily becomes liable for calls to the same extent as the former owner before the transfer was made. Assuming the burdens, he becomes likewise entitled to all the benefits attaching to ownership of the shares. In the absence of charter provisions or statutory regulations, this general rule is almost universally recognized."⁶⁶ But the obligations incurred by a registered shareholder can only be discharged by a novation, accomplished through the substitution of another in his place occupying the same relation, and that requires the consent of the party to be substituted.⁶⁷

Walla Prtg. & Pub. Co., 1 Wash. 521, 20 Pac. 605.

"The purchaser takes the stock with all its incidents." Lafountain & Woolson Co. v. Brown, — Vt. —, 101 Atl. 36.

"The vendee does, in all cases of sale and transfer to him, take the shares with a right to all the benefits attached to or growing out of them; and this from the mere fact of the sale and transfer. And so, from the same fact, he takes them subject to all the burdens and liabilities growing out of them." Johnson v. Underhill, 52 N. Y. 203.

"After assignment the assignees hold the shares on the same conditions, and are subject to the same rules and orders as the original subscribers, and are to all intents and purposes substituted in the places of the original subscribers." Huddersfield Canal Co. v. Buckley, 7 T. R. 36, quoted with approval in Hartford & N. H. R. Co. v. Boorman, 12 Conn. 530.

⁶⁵ Kent v. Quicksilver Min. Co., 78 N. Y. 159, 188.

An assignee of stock takes it burdened with any equities existing as to it in the hands of his assignor, and hence is bound by an agreement of the latter relative to the issuance of preferred stock. In re Seneca Oil Co., 153 N. Y. App. Div. 594, 138 N. Y. Supp. 78, aff'd 208 N. Y. 545, 101 N. E. 1121.

A purchaser of stock, who has knowledge of an agreement between the seller and the other stockholders looking to the consolidation of the corporation with another one, takes the stock cum onere, and is bound by such agreement. Senn v. Union Premium & Mercantile Co., 115 Mo. App. 685, 92 S. W. 507.

⁶⁶ West Nashville Planing-Mill Co. v. Nashville Sav. Bank, '86 Tenn. 252, 6 Am. St. Rep. 835, 6 S. W. 340.

⁶⁷ Russell v. Easterbrook, 71 Conn. 50, 40 Atl. 905.

§ 3769. Liability for calls—General rules. The liability for calls after a transfer of stock depends upon the law of the state in which the corporation is located, and not upon the law of the state in which the stockholder may reside, and in which an action for a call may be brought.⁶⁸

Since a valid and complete transfer of shares operates as a novation of the contract of membership, and substitutes the transferee for the transferrer as a stockholder, it is well settled in most jurisdictions, in the absence of express provision to the contrary,⁶⁹ and where the transfer has been registered on the books of the company, if such registry is required,⁷⁰ that a transferee of shares not issued as full paid⁷¹ is liable on implied contract for all future calls thereon, both to the corporation and to its creditors, but is not liable on calls made prior to the transfer, although not payable until afterwards; and the transferrer is liable for calls made prior to the transfer, but not for calls made afterwards.⁷² "The transferee is vested, by substi-

⁶⁸ See § 3777, *infra*.

⁶⁹ See § 3770, *infra*.

⁷⁰ See § 3788 et seq., *infra*.

⁷¹ See § 3771, *infra*.

⁷² **United States.** Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Morris v. Dunbar, 177 Fed. 159; Campbell v. American Alkali Co., 125 Fed. 207, aff'g 113 Fed. 398; Glenn v. Porter, 73 Fed. 275; Upton v. Burnham, 3 Biss. 520, Fed. Cas. No. 16,799; Upton v. Burnham, 3 Biss. 431, Fed. Cas. No. 16,798.

Alabama. Allen v. Montgomery R. Co., 11 Ala. 437.

California. Perkins v. Cowles, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711; O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 97 Pac. 1; Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; People's Home Sav. Bank v. Rauer, 2 Cal. App. 445, 84 Pac. 329; People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029. See also People's Home Sav. Bank v. Rickard, 139 Cal. 285, 73 Pac. 858.

Connecticut. Hartford & N. H. R. Co. v. Boorman, 12 Conn. 530.

Illinois. Kellogg v. Stockwell, 75 Ill. 68.

Iowa. Wishard v. Hansen, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691; Calumet Paper Co. v. Stolls Inv. Co., 96 Iowa 147, 59 Am. St. Rep. 362, 64 N. W. 782.

Kansas. Wichita Union Terminal R. Co. v. Kansas City, M. & O. R. Co., 100 Kan. 83, 163 Pac. 1067.

Louisiana. Haynes v. Palmer, 13 La. Ann. 240; Union Bank of Louisiana v. Desban, 2 Rob. 486.

Maryland. Brant v. Ehlen, 59 Md. 1; Hall v. United States Ins. Co. of Baltimore, 5 Gill 484; Bend v. Susquehanna Bridge & Bank Co., 6 Harr. & J. 128, 14 Am. Dec. 261.

Michigan. Merrimac Min. Co. v. Bagley, 14 Mich. 501.

Missouri. Miller v. Great Republic Ins. Co., 50 Mo. 55; Chouteau Spring Co. v. Harris, 20 Mo. 382; Dain Mfg. Co. v. Trumbull Seed Co., 95 Mo. App. 144, 68 S. W. 951.

New York. Sigua Iron Co. v. Brown, 171 N. Y. 488, 64 N. E. 194, aff'g 58 App. Div. 436, 69 N. Y. Supp. 295; Rochester & K. F. Land Co. v. Raymond, 158 N. Y. 576, 47 L. R. A.

tution, with the rights of the transferrer to the stock, but assumes also corresponding obligations. Because the transferrer ceases to have a voice in the management of the company, and has no longer

246, 53 N. E. 507, aff'g 4 App. Div. 600, 39 N. Y. Supp. 145; *Billings v. Robinson*, 94 N. Y. 415; *Isham v. Buckingham*, 49 N. Y. 216; *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Cole v. Ryan*, 52 Barb. 168; *Cowles v. Cromwell*, 25 Barb. 413; *Mann v. Currie*, 2 Barb. 294.

South Carolina. *Efrid v. Piedmont Land Improvement & Investment Co.*, 55 S. C. 78, 32 S. E. 758, 897.

Tennessee. *West Nashville Planning-Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 Am. St. Rep. 835, 6 S. W. 340; *Jackson v. Sligo, M. & M. Co.*, 1 Lea 210.

Texas. *Cole v. Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052.

Washington. *Stewart v. Walla Walla Prtg. & Pub. Co.*, 1 Wash. 521, 20 Pac. 605.

Wisconsin. *Whitewater Tile & Pressed Brick Mfg. Co. v. Baker*, 142 Wis. 420, 125 N. W. 984.

England. *Harrison's Case*, 6 Ch. App. 286; *Gilbert's Case*, 5 Ch. App. 559; *Weston's Case*, 4 Ch. App. 20; *Murray v. Bush*, L. R. 6 H. L. 37; *Huddersfield Canal Co. v. Buckley*, 7 T. R. 36.

"The reasons for subjecting the original subscribers to personal liability apply with equal force to those who become stockholders by purchase. The relation of a stockholder and company exists. A privity between them is created." *Hartford & N. H. R. Co. v. Boorman*, 12 Conn. 530, quoted with approval in *Visalia & T. R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10.

"If the law implies a promise by the original holders or subscribers to pay the full par value when it may be called, it follows that an assignee of

stock, when he has come into privity with the company by having stock transferred to him on the company's books, is equally liable. The same reasons exist for implying a promise by him as exists for raising up a promise by his assignor. And such is the law as laid down by the text-writers generally, and by many decisions of the courts. * * * We think, therefore, the transferee of stock in an incorporated company is liable for calls made after he has been accepted by the company as a stockholder, and his name has been registered on the stock books as a corporator; and, being thus liable, there is an implied promise that he will pay calls made while he continues the owner." *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384, quoted in part with approval in *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194, aff'g 58 N. Y. App. Div. 436, 69 N. Y. Supp. 295; *Stewart v. Walla Walla Prtg. & Pub. Co.*, 1 Wash. 521, 20 Pac. 605.

Where a person takes a transfer of shares, and is registered as owner on the books of the corporation, he cannot avoid liability for the balance due on the shares, in an action by the corporation or its receiver, by showing that another is the equitable owner of the shares, even though the corporation may have had notice thereof. *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905.

A purchaser who has the stock transferred to himself on the corporate books cannot escape liability for an assessment by transferring the shares after such assessment is made. *Visalia & T. R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10.

This rule applies only where there

any interest or ownership in the property, he is freed from further liability, and the transferee is substituted and subjected to future

are no special provisions making the original subscribers liable for the amount of their subscriptions notwithstanding a transfer. Where there are such provisions they must be given effect. *Rochester & K. F. Land Co. v. Raymond*, 158 N. Y. 576, 47 L. R. A. 246, 53 N. E. 507, aff'g 4 N. Y. App. Div. 600, 39 N. Y. Supp. 145.

Formerly this doctrine was not recognized in Pennsylvania, but it was held that, in the absence of express agreement to the contrary, or a release by the corporation, an original subscriber for shares, notwithstanding a bona fide transfer of the same to a responsible party, remained liable for the full amount of his subscription, even though the corporation expressly consented to the transfer; and that the transferee did not assume any liability, even for future calls, unless such liability was expressly imposed by the charter or general law, or assumed by an express agreement with the corporation. Unless liability was thus imposed or assumed, the only remedy of the corporation was held to be by an action against the original subscriber, or by forfeiture or sale of the shares for nonpayment of assessments, when such a remedy was given by the charter or by statute, as hereinbefore explained. *Messersmith v. Sharon Sav. Bank*, 96 Pa. St. 440; *Franks Oil Co. v. McCleary*, 63 Pa. St. 317; *Palmer v. Ridge Min. Co.*, 34 Pa. St. 288; *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. St. 489; *Pittsburgh & C. R. Co. v. Clarke & Thaw*, 29 Pa. St. 146; *Everhart v. Westchester & P. R. Co.*, 28 Pa. St. 339; *Delaware & S. Canal Navigation v. Sansom*, 1 Binn. (Pa.) 70. See also *Morris v. Dunbar*, 177 Fed. 159.

The case of *Merrimac Min. Co. v. Levy*, 54 Pa. St. 227, 93 Am. Dec.

697, is sometimes cited as laying down a different rule; but in this case the court merely followed the decisions of another state, in which the corporation was located. See *Franks Oil Co. v. McCleary*, 63 Pa. St. 317, 319.

In *Bell's Appeal*, 115 Pa. St. 88, 2 Am. St. Rep. 532, 8 Atl. 177, these decisions were distinguished and limited, and a transferee of shares was held liable, as upon implied contract, for calls made upon the shares after the transfer for the purpose of paying the debts of an insolvent corporation. See also *Citizens' & Miners' Sav. Bank & Trust Co. v. Gillespie*, 115 Pa. St. 564, 9 Atl. 73; *In re Lane's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166, to the same effect.

In *Morris v. Dunbar*, 177 Fed. 159, it is said that "while these cases declare that the transferee of stock of an insolvent corporation must pay a pro rata share of the unpaid capital for the benefit of the corporation's creditors, they do not hold that the original subscriber for such stock does not also remain liable on his contract of subscription."

In *Finletter v. Acetylene Light, Heat & Power Co.*, 215 Pa. St. 86, 64 Atl. 429, it was held that the original subscribers could not be held liable for assessments made after the transfer, where all instalments had been paid at the time of the transfer and the transferees had been accepted by the company as shareholders, citing *Lane's Appeal*, supra.

The General Railroad Law of 1849 provided that the assignee of shares in railroad companies should take them subject to all the liabilities, conditions and penalties incident thereto, in the same manner as the original subscriber would have been, and it was held that under this provision the

calls by the corporation for further aid to carry on its business and fulfill its corporate ends.”⁷³

The liability as between the transferrer and the transferee is fixed by the date of the call rather than the date when it becomes payable. So the transferrer is liable for a call made prior to the date of the transfer though by its terms it is not payable until afterwards.⁷⁴ And it has been held that it is sufficient to show that the transferee purchased the stock and that a certificate therefor was issued to him on the day that the assessment sought to be enforced against him was made, since it cannot be presumed that the assessment was made a fraction of a day prior to the purchase.⁷⁵

The transferee cannot escape liability for the amount of a call because it was made to meet obligations incurred before the transfer.⁷⁶

It has been held that where stock is sold to pay a delinquent assessment the purchaser takes merely the title of the delinquent stockholder, and takes it subject to liability for the unpaid subscription; ⁷⁷ but there is authority to the contrary.⁷⁸

An agreement by the seller of stock, in the contract of sale, to pay a call on the stock when made, is not for the benefit of the corporation, and it cannot sue thereon.⁷⁹ Especially is the transferee liable to pay calls where he has expressly agreed with the corporation to pay them,⁸⁰ or where he has paid previous calls made after the trans-

assignee takes subject to all unpaid instalments, whether called at the time of his purchase or not. *Com. v. Lehigh Ave. Ry. Co.*, 129 Pa. St. 405, 5 L. R. A. 367, 18 Atl. 414, 498.

The effect of the Act of June 24, 1895 (P. L. 258), is to change the former rule and to relieve the transferor from liability in all cases, provided the transfer is made in good faith. *Morris v. Dunbar*, 177 Fed. 159.

⁷³ *Campbell v. American Alkali Co.*, 125 Fed. 207, aff'g 113 Fed. 398.

⁷⁴ *Campbell v. American Alkali Co.*, 125 Fed. 207, aff'g 113 Fed. 398.

⁷⁵ *San Gabriel Valley Land & Water Co. v. Dennis*, 99 Cal. xix, 34 Pac. 441.

This is particularly true where the purchaser paid a portion of the assessment and requested time in which to pay the balance. *Id.*

⁷⁶ *Visalia & T. R. Co. v. Hyde*, 110

Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10.

⁷⁷ *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 53, 97 Pac. 1.

⁷⁸ A purchaser of stock and property mortgaged to secure the subscription thereof at a judicial sale to enforce unpaid calls is not liable for a balance remaining due. *Succession of Thomson*, 46 La. Ann. 1074, 15 So. 379.

⁷⁹ *Crown Slate Co. v. Allen*, 199 Pa. 239, 48 Atl. 968.

⁸⁰ A transferee of stock who signs a paper purporting to be an original subscription, and expressly agrees to pay the amount subscribed as the board of directors may order, assumes the liability of the original stockholder, and is liable for the amount unpaid on the stock. *Citizens' & Miners' Sav. Bank & Trust Co. v. Gillespie*, 115 Pa. St. 564, 9 Atl. 73.

fer of the stock to him on the books of the company,⁸¹ or where he pays a portion of the amount called for and asks for further time in which to pay the balance.⁸²

As was shown in a former chapter, it is held in a few states that, where a statute allows a corporation to forfeit shares for nonpayment of assessments, the law does not imply a promise to pay, so as to render a subscriber liable to an action, but that, to support an action, there must be an express promise. And in these jurisdictions, no promise on the part of a transferee would be implied.⁸³ But even under this rule an express promise by the subscriber to pay all assessments on his shares does not bind him to pay sums assessed after he has transferred his shares to another, and he does not become liable for such assessments by subsequently repurchasing the same shares.⁸⁴

In order that a stockholder may be released from liability for calls on his shares after he has transferred the same, the transfer must be bona fide.⁸⁵ He is not released by an assignment to a fictitious person.⁸⁶ And when the corporation is insolvent, a transfer, in order that it may release the transferrer from liability to or for the benefit of creditors for a balance due on the stock, or even to the corporation, must be made to a person who is legally capable of assuming liability, and, by the weight of authority, who is financially responsible, or at least apparently so.⁸⁷

A stockholder cannot escape liability by transferring his stock to a third person without the latter's knowledge or consent.⁸⁸ And the transferrer also remains liable where the stock has never been delivered to the transferee and the latter refuses to accept it and notifies the corporation not to transfer it to him on the books, although he thereby becomes liable to the transferrer in damages for breach of contract.⁸⁹

⁸¹ *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194, aff'g 58 N. Y. App. Div. 436, 69 N. Y. Supp. 295.

⁸² *San Gabriel Valley Land & Water Co. v. Dennis*, 99 Cal. xix, 34 Pac. 441.

⁸³ See § 658, *supra*.

⁸⁴ *Franklin Glass Co. v. Alexander*, 2 N. H. 380, 9 Am. Dec. 92.

⁸⁵ *Rochester & K. F. Land Co. v. Raymond*, 158 N. Y. 576, 47 L. R. A. 246, 53 N. E. 507, aff'g 4 N. Y. App. Div. 600, 39 N. Y. Supp. 145.

⁸⁶ *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio 120, 42 Am. Dec. 191. It was said in this case: "The assignment to a fictitious person is a

mere nullity. It transferred no right simply because there was no real person to receive it on its passing from the original proprietor. Assuming it to be sufficient evidence of an abandonment, it still does not help the defendant, for an individual cannot release himself from the obligation of a contract against the consent of the obligee; and the defendant's subscription to the capital stock of the plaintiff is a contract."

⁸⁷ See subd. xxxiii, *infra*.

⁸⁸ *Rider v. Morrison*, 54 Md. 429.

⁸⁹ *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905.

A director who fraudulently procures stock to be issued to himself in excess of the number of shares for which he has subscribed may be held liable for the par value of the excess shares although he has sold them.⁹⁰

If a corporation allows a person to remain on its books as a stockholder, to vote the stock, and continue as an officer, after the stock has been sold to him, or under an execution against him, it will be estopped to deny that he owns the stock, and to sue the purchaser to recover an assessment thereon.⁹¹ And similarly where it ratifies a sale by canceling the certificate issued to the seller and issuing a new one to the purchaser, and recovers and enforces a judgment against the purchaser for the amount of a call, it cannot thereafter hold the seller liable as a stockholder.⁹²

§ 3770. — Charter or statutory provisions. The liability for calls after a transfer of shares is sometimes fixed by express provision in the charter of a corporation, or by a general law. In some states it is provided that both the transferrer and the transferee shall be liable for the full amount remaining unpaid on the shares, whether the calls are made before or after the transfer.⁹³ In others the general rule, previously stated,⁹⁴ that the transferee is liable for all calls made after the transfer, while the transferrer is liable for all calls made prior to the transfer, but not for those made afterwards, has been laid down by statute.⁹⁵

⁹⁰ *Whitewater Tile & Pressed Brick Mfg. Co. v. Baker*, 142 Wis. 420, 125 N. W. 984.

⁹¹ *Vale Mills v. Spalding*, 62 N. H. 605.

⁹² *Rochester & K. F. Land Co. v. Raymond*, 158 N. Y. 576, 47 L. R. A. 246, 53 N. E. 507, aff'g 4 N. Y. App. Div. 600, 39 N. Y. Supp. 145.

⁹³ *United States. Priest v. Glenn*, 51 Fed. 400.

Alabama. Morris v. Glenn, 87 Ala. 628, 7 So. 90.

Illinois. Sprague v. National Bank of America, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19.

Iowa. White v. Green, 105 Iowa 176, 74 N. W. 928.

Maryland. Hambleton v. Glenn, 72 Md. 331, 20 Atl. 115; *McKim v. Glenn*, 66 Md. 479, 8 Atl. 130.

Missouri. Glenn v. Hunt, 120 Mo. 330, 25 S. W. 181.

Virginia. Hamilton v. Glenn, 85 Va. 901, 9 S. E. 129.

A statute providing that all sales of corporate stock shall transfer to the purchaser all the original holder's rights, and subject him to any unpaid balance due on the stock, does not apply where a stockholder who is indebted to the company conveys all his stock to a person as trustee to sell the same to any one who will pay his indebtedness to the company, and get a discharge therefrom, so as to render the trustee liable for an unpaid balance due on the stock, for such a transfer is not a sale of the stock, within the meaning of the statute. *Powell v. Willamette Valley R. Co.*, 15 Ore. 393, 15 Pac. 663.

⁹⁴ See § 3769, *supra*.

⁹⁵ This is true in Pennsylvania, under Act of June 24, 1895 (P. L. 258). *Morris v. Dunbar*, 177 Fed. 159.

Under a constitutional or statutory provision making the original subscribers for stock in a corporation liable for claims against the corporation to the extent of their unpaid subscriptions, and declaring that "the liability for the unpaid subscriptions shall follow the stock," it has been held that original subscribers for stock remain liable for the amount unpaid on their subscriptions after they have transferred their shares, and the transferee's liability is merely cumulative.⁹⁶

It is sometimes provided in stock certificates that, after payment of a specified amount per share, the subscribers shall not be liable for any balance of their subscriptions excepting upon such shares as shall stand in their respective names on the books of the company at the time when any subsequent assessments or calls are made, but that the holders of such shares of record on the books of the company, and they only, shall be liable for the same.⁹⁷

A statute providing that no transfer of stock shall exempt the transferrer from the obligation to pay instalments afterwards called for, until 50 per cent. on each share shall have been paid, exempts from liability to the company those only who have transferred their shares after the payment of 50 per cent. on each share, before the instalments have matured, and payment has been demanded.⁹⁸

§ 3771. — Stock issued as full paid; watered or fictitiously paid up stock. When stock is issued as full paid, purchasers have a right to rely upon the representation, unless they have notice that it is false. In such a case, therefore, bona fide purchasers are not liable for calls, either to the corporation or to creditors, if the shares are not in fact fully paid for.⁹⁹ This rule clearly applies where the stock

⁹⁶ Commercial Nat. Bank of Omaha v. Gibson, 37 Neb. 750, 56 N. W. 616.

⁹⁷ Campbell v. American Alkali Co., 125 Fed. 207.

⁹⁸ Vicksburg, S. & T. R. Co. v. McKeen, 14 La. Ann. 724.

⁹⁹ United States. Clark v. Johnson, 245 Fed. 442; Enright v. Heckscher, 240 Fed. 863; In re Remington Automobile & Motor Co., 153 Fed. 345, modifying judgment 139 Fed. 766; Rood v. Whorton, 67 Fed. 434, 74 Fed. 118; Du Pont v. Tilden, 42 Fed. 87; Cleveland Rolling-Mill Co. v. Texas & St. L. R. Co., 27 Fed. 250;

Foreman v. Bigelow, 4 Cliff. 508, Fed. Cas. No. 4,934; Steacy v. Little Rock & Ft. S. R. Co., 5 Dill. 348, Fed. Cas. No. 13,329; Phelan v. Hazard, 5 Dill. 45, Fed. Cas. No. 11,068.

Illinois. Garden City Sand Co. v. American Refuse Crematory Co., 205 Ill. 42, 68 N. E. 724; Sprague v. National Bank of America, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, aff'g 66 Ill. App. 320; Coleman v. Howe, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, aff'g 53 Ill. App. 82; Cohen v. Toy Gun Mfg. Co., 172 Ill. App. 330.

certificates recite that the shares represented thereby are fully paid

Iowa. Wishard v. Hansen, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691.

Kentucky. Hess v. Trumbo, 27 Ky. L. Rep. 320, 84 S. W. 1153.

Maine. Morgan v. Howland, 89 Me. 484, 36 Atl. 990; Libby v. Tobey, 82 Me. 397, 19 Atl. 904.

Maryland. Brant v. Ehlen, 59 Md. 1.

Michigan. Young v. Erie Iron Co., 65 Mich. 111, 31 N. W. 814.

Minnesota. Wallace v. Carpenter Elec. Heating Mfg. Co., 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189.

Missouri. Berry v. Rood, 168 Mo. 316, 67 S. W. 644; Erskine v. Loewenstein, 82 Mo. 301, aff'd 11 Mo. App. 595; Johnson v. Lullman, 15 Mo. App. 55; Keystone Bridge Co. v. McCluney, 8 Mo. App. 496.

Nebraska. Troup v. Horbach, 53 Neb. 795, 74 N. W. 326.

New Hampshire. Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

New Jersey. Easton Nat. Bank v. American Brick & Tile Co., 69 N. J. Eq. 326, 60 Atl. 54, aff'd 70 N. J. Eq. 722, 64 Atl. 1095.

New York. Van Slochem v. Villard, 154 App. Div. 161, 138 N. Y. Supp. 852.

Pennsylvania. French v. Harding, 46 Pa. Super. Ct. 363, aff'd 235 Pa. 79, Ann. Cas. 1914 B 744, 83 Atl. 586.

Tennessee. Albitztigui v. Guadalupe Y Caloo Min. Co., 92 Tenn. 598, 22 S. W. 739; West Nashville Planing-Mill Co. v. Nashville Sav. Bank, 86 Tenn. 252, 6 Am. St. Rep. 835, 6 S. W. 340.

Washington. Davies v. Ball, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

"A purchaser or assignee of stock, which has not been fully paid, does not become liable to the corporate

creditors for the unpaid balance, where the stock has been issued as fully paid, and he has acquired the same in good faith and without notice that it has not been fully paid." Coleman v. Howe, 154 Ill. 458, 471, 45 Am. St. Rep. 133, 39 N. E. 725.

"The rule which makes a transferee liable for unpaid calls is based upon the implied agreement arising where one takes shares subject to calls, and causes them to be transferred to himself. But where the purchaser of such shares buys them as paid up shares and without notice that they are not in fact paid up, then no implication arises of an agreement to pay anything to the corporation for such shares. In such case there are no facts from which to imply an agreement. The representation made by the corporation, either upon the face of the stock certificate or by its officers, that the shares are paid up will, as between the corporation and such transferee, prevent any contract by implication." West Nashville Planing-Mill Co. v. Nashville Sav. Bank, 86 Tenn. 252, 6 Am. St. Rep. 835, 6 S. W. 340.

"The liability for subscription to the stock of a corporation is founded on contract. Where one agrees to take a certain number of shares, the law implies a promise to pay for them according to the terms of his subscription. If they are sold before all instalments are paid, and are bought with such knowledge, the law implies a promise on the part of the purchaser to pay whatever may be due thereon, according to the terms of the original subscription. In such cases the purchaser stands in the shoes of the original subscriber. These are elementary principles, about which there can be no contention. But where shares are issued by the company to the subscriber as full-

and nonassessable.¹ And some courts hold that it applies even where the certificates contain no such recital, if they do not show that the stock has not been fully paid, on the theory that the issuance of certificates in that form is a representation that the stock has been fully paid for.² Other courts, however, hold that, in the absence of

paid shares, and are sold by the subscriber as such, there is no ground on which a promise can be implied on the part of the purchaser without notice, to be answerable either to the company or to its creditors, should the representations on the faith of which he purchased, prove to be false. He could not be held liable on the ground of contract, because he never agreed to purchase any other shares than full-paid shares; and if it be said that the shares were fraudulently issued, he could not be held liable on the ground of fraud, because he was in no sense a party to the fraud." *Brant v. Ehlen*, 59 Md. 1, 23.

1 United States. *Clark v. Johnson*, 245 Fed. 442; *In re Remington Automobile & Motor Co.*, 153 Fed. 345, modifying judgment 139 Fed. 766; *Rood v. Whorton*, 67 Fed. 434, aff'd on other grounds without determining this question 74 Fed. 118; *Stacey v. Little Rock & Ft. S. R. Co.*, 5 Dill. 348, Fed. Cas. No. 13,329. See also *Phelan v. Hazard*, 5 Dill. 45, Fed. Cas. No. 11,068.

Delaware. See *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Illinois. *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 373, 411, 82 N. E. 891.

Iowa. See *Wishard v. Hansen*, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691.

Kentucky. *Hess v. Trumbo*, 27 Ky. L. Rep. 320, 84 S. W. 1153.

Michigan. *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814.

Nebraska. *Troup v. Horbach*, 53 Neb. 795, 74 N. W. 326.

New Jersey. *Easton Nat. Bank v. American Brick & Tile Co.*, 69 N. J. Eq. 326, 60 Atl. 54, aff'd 70 N. J. Eq. 722, 64 Atl. 1095.

Tennessee. *Albitztigui v. Guadalupe Y Caloo Min. Co.*, 92 Tenn. 598, 22 S. W. 739.

Washington. *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

2 *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496; *Finletter v. Appleton*, 195 Pa. 349, 45 Atl. 1063; *French v. Harding*, 46 Pa. Super. Ct. 363, aff'd 235 Pa. 79, Ann. Cas. 1914 B 744, 83 Atl. 586; *West Nashville Planing-Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 Am. St. Rep. 835, 6 S. W. 340. See also *Clark v. Johnson*, 245 Fed. 442; *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

In *Du Pont v. Tilden*, 42 Fed. 87, the certificates apparently contained no such recital.

In *Brant v. Ehlen*, 59 Md. 1, it does not clearly appear whether the certificates contained such a recital, but apparently they did not, for the court says that they were in the ordinary form of full paid stock, with nothing on their face to indicate that they were not fully paid.

"The corporation, in putting such shares upon the market, has put it in the power of the subscriber to sell the same to persons innocent of the true fact," and hence ought not to be suffered to demand from an innocent transferee for value the balance of the subscription price. *West Nashville Planing-Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 Am. St. Rep. 835, 6 S. W. 340.

any requirement to the contrary, the corporation is not bound to have the certificate show full or any payment, or the terms upon which it was issued, and that the purchaser has no right to assume anything in regard to payment merely because the certificate is silent on the subject, and that no estoppel by representation can be invoked against the corporation merely because the certificates do not recite that the stock has been paid for in full.³ And they hold that since certificates of stock are not negotiable instruments, a purchaser of them in the open market takes them subject to all the liabilities and obligations of his assignor respecting them,⁴ and is liable for calls in case the stock which they represent is not full paid although there is nothing in the certificates to indicate that such was the case.⁵

The transferrer, if he was not himself a bona fide purchaser, remains liable, notwithstanding the transfer.⁶

“If any presumption of fact arises from the face of a stock certificate in customary form, * * * it is, that the stock certified to belongs to the holder; is his without incumbrance—in other words, is fully paid for.” *Johnson v. Lullman*, 15 Mo. App. 55, aff’d 88 Mo. 567.

³ *Perkins v. Cowles*, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711; *O’Dea v. Hollywood Cemetery Ass’n*, 154 Cal. 53, 97 Pac. 1. Attention is called in both of these cases to the fact that the certificates in question were issued before Civ. Code, § 323, was amended so as to require certificates issued prior to the payment of the full amount due to state the amount paid.

⁴ See § 3779, *infra*.

⁵ *Perkins v. Cowles*, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711; *O’Dea v. Hollywood Cemetery Ass’n*, 154 Cal. 53, 97 Pac. 1.

See also *Stockton Combined Harvester & Agricultural Works v. Houser*, 109 Cal. 1, 41 Pac. 809, where it is held that where stock is issued by a corporation at less than par in payment for property, and there is no indorsement on the certificate that it is for fully paid or nonassessable

stock, and no showing that there was any agreement that it should be non-assessable, it must be presumed that the stock was taken and held by the person to whom it was issued subject to the same conditions and liabilities that it would have been subject to if he had been an original subscriber for it, or had purchased it from an original subscriber, and that he was liable to calls for the difference between the par value of the stock and the price at which he took it.

In *Perkins v. Cowles*, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711, it is said that the authorities adopting the contrary rule, with a few exceptions, proceed on the theory that certificates of stock are negotiable or quasi negotiable instruments, or at least should be so treated.

⁶ *Sprague v. National Bank of America*, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, aff’g 66 Ill. App. 320; *Wishard v. Hansen*, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691; *Morgan v. Howland*, 89 Me. 484, 36 Atl. 990.

It has been held that the word “nonassessable” upon a certificate of stock does not cancel or impair the obligation to pay the full amount due

The rule applies where watered stock is issued, and it is sought to hold transferees liable for the benefit of creditors of the corporation.⁷

If a transferee of watered or fictitiously paid up stock has notice that it has not been fully paid, he is subject to the same liability thereon as his transferor.⁸ And the circumstances may be such as to render

upon the shares created by the acceptance and holding of such certificate; that at most, its legal effect is a stipulation against liability from further assessment after the whole subscription of 100 per cent. shall have been paid. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203.

7 United States. *Enright v. Heckscher*, 240 Fed. 863; *In re Remington Automobile & Motor Co.*, 153 Fed. 345, modifying judgment 139 Fed. 766; *Rood v. Whorton*, 67 Fed. 434, aff'd on other grounds without determining this question 74 Fed. 118; *Du Pont v. Tilden*, 42 Fed. 87; *Foreman v. Bigelow*, 4 Cliff. 508, Fed. Cas. No. 4,934; *Stacey v. Little Rock & Ft. S. R. Co.*, 5 Dill. 348, Fed. Cas. No. 13,329. See also *Phelan v. Hazard*, 5 Dill. 45, Fed. Cas. No. 11,068.

Illinois. *Sprague v. National Bank of America*, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, aff'g 66 Ill. App. 320; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, aff'g 53 Ill. App. 82.

Kentucky. *Hess v. Trumbo*, 27 Ky. L. Rep. 320, 84 S. W. 1153.

Maine. *Morgan v. Howland*, 89 Me. 484, 36 Atl. 990; *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904.

Maryland. *Brant v. Ehlen*, 59 Md. 1.

Michigan. *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814.

Minnesota. See *Wallace v. Carpenter Elec. Heating Mfg. Co.*, 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189.

Missouri. *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644; *Erskine v. Loewenstein*, 82 Mo. 301, aff'g 11 Mo. App. 595; *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496.

New Jersey. *Easton Nat. Bank v. American Brick & Tile Co.*, 69 N. J. Eq. 326, 60 Atl. 54, aff'd 70 N. J. Eq. 722, 64 Atl. 1095.

Tennessee. *Albitzigu v. Guadalupe Y Caloo Min. Co.*, 92 Tenn. 598, 22 S. W. 739.

Washington. *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

See also cases cited in preceding notes, and § 3517 et seq., *supra*.

8 United States. *Enright v. Heckscher*, 240 Fed. 863; *Cleveland Rolling-Mill Co. v. Texas & St. L. Ry. Co.*, 27 Fed. 250.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Illinois. *Garden City Sand Co. v. American Refuse Crematory Co.*, 205 Ill. 42, 68 N. E. 724; *Sprague v. National Bank of America*, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, aff'g 66 Ill. App. 320; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, aff'g 53 Ill. App. 82; *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330; *Moore v. United States One Stave Barrel Co.*, 141 Ill. App. 104, aff'd 238 Ill. 544, 128 Am. St. Rep. 153, 87 N. E. 536.

Iowa. *White v. Greene*, 70 N. W. 182; *Wishard v. Hansen*, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691; *Tuthill Spring Co. v. Smith*, 90 Iowa 331, 57 N. W. 853; *Boulton Carbon Co. v. Mills*, 78 Iowa 460, 5 L. R. A. 649, 43 N. W. 290; *Jackson v. Traer*, 64 Iowa 469, 52 Am. Rep. 449, 20 N. W. 764.

Kentucky. See *Hess v. Trumbo*, 27 Ky. L. Rep. 320, 84 S. W. 1153.

Maryland. *Brant v. Ehlen*, 59 Md. 1.

notice imputable to a transferee without any proof of actual notice, on the principle that a person is chargeable with the knowledge of such facts as he would have ascertained if he had acted with reasonable diligence and prudence upon the information he possessed.⁹ Thus, where a certificate of stock issued for property at an overvaluation purported to be full paid, but provided nevertheless that the stock might be assessed to raise moneys to pay certain mortgage indebtedness, and also for improving the property of the corporation, and other necessary expenses, and a purchaser of the certificate knew the amount of the capital stock of the corporation and the value of its property, and that the property which was the basis of the stock was of much less value than the amount of the stock, it was held that the court was justified in finding that the stock was purchased with knowledge that it had not been fully paid up, and that the purchaser was liable for the balance due thereon.¹⁰ And it has also been held that the fact that the corporation had just been organized and that its stock was being transferred without, or practically without, any valuable consideration, was sufficient to put a reasonably prudent man

Minnesota. *Wallace v. Carpenter Elec. Heating Mfg. Co.*, 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189.

Missouri. *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644; *Van Cleve v. Berkeley*, 143 Mo. 109, 42 L. R. A. 593, 44 S. W. 743.

Nebraska. See *Troup v. Horbach*, 53 Neb. 795, 74 N. W. 326.

New Jersey. *Easton Nat. Bank v. American Brick & Tile Co.*, 69 N. J. Eq. 326, 60 Atl. 54, aff'd 70 N. J. Eq. 722, 64 Atl. 1095.

Washington. *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833; *Campbell v. McPhee*, 36 Wash. 593, 79 Pac. 206.

One who purchases with knowledge that the stock is unpaid assumes towards the creditors of the corporation the liability of the original subscriber, jointly with him or severally as the creditors may elect. *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644.

⁹ *Enright v. Heckscher*, 240 Fed. 863; *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 373, 82 N. E. 891; *Garden City Sand Co. v. American Refuse*

Crematory Co., 205 Ill. 42, 68 N. E. 724; *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330; *Wishard v. Hansen*, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691. See *Troup v. Horbach*, 53 Neb. 795, 74 N. W. 326.

“Notice in this connection * * * means knowledge that the stock was unpaid, or knowledge of such facts as would have put an ordinarily prudent man upon inquiry, when the inquiry might reasonably be expected to have led him to knowledge that the stock was unpaid.” *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 373, 411, 82 N. E. 891.

It is sufficient to show facts properly leading to an inference of knowledge that the property for which the stock was issued was overvalued. *Garden City Sand Co. v. American Refuse Crematory Co.*, 205 Ill. 42, 68 N. E. 724; *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330.

¹⁰ *Wishard v. Hansen*, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691.

upon inquiry which would have led to knowledge that the stock was wholly unpaid.¹¹ And also that the fact that one received a large amount of treasury stock for effecting the sale of a much smaller amount, was sufficient to indicate, in the absence of proof to the contrary, that he knew that the stock was not fully paid, and to cast the burden of showing good faith upon him.¹² Incorporators who participate in the transaction whereby stock is issued for property and then returned to the treasury are chargeable with knowledge that the property was overvalued, where such was the case.¹³ Knowledge of the agent of the transferee in this regard is deemed notice to the principal.¹⁴ But the fact that treasury stock or the stock of an original subscriber in a mining company is sold at a discount does not charge the purchaser with notice that it has not been paid in full.¹⁵ The fact that some of the indebtedness which it is sought to liquidate was incurred upon representations made by the transferee after the transfer to him, does not affect his bona fides or render him liable where he purchased in good faith.¹⁶ The fact that the transferor falsely represents that the stock is fully paid will not relieve the transferee from liability to the corporation or its creditors for the balance due on the original subscription,¹⁷ but his only remedy is by an action against the transferor personally for damages or rescission of the contract of sale.¹⁸ Statements that stock is fully paid, made in good faith by the president of the corporation, are not binding on the corporation and will not preclude it or its creditors from recovering the balance due on the subscription price, when, in making them, he was not representing the corporation, but was acting in his own behalf in an effort to dispose of a portion of his own stock owned by himself and by others.¹⁹

¹¹ *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 373, 82 N. E. 891.

¹² *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

¹³ *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

¹⁴ *Enright v. Heckscher*, 240 Fed. 863.

¹⁵ *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644.

Knowledge that the stock is treasury stock which had been returned to the corporation by the person to whom it was originally issued to be sold for its benefit is not notice that it was not fully paid even though it is purchased below par. *Davies v. Ball*,

64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

¹⁶ *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

¹⁷ *Perkins v. Cowles*, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711.

¹⁸ *Perkins v. Cowles*, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711.

As to the liability of the transferor under such circumstances, see § 3867, *infra*.

¹⁹ *Perkins v. Cowles*, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711.

See generally § 2160 et seq., *supra*.

It has been held that where a judgment creditor seeks to collect his debt against an insolvent corporation from the holder of watered stock, the latter has the burden of proving that he acquired the stock in good faith, without actual notice of facts making its issue fraudulent as against creditors, or that he purchased it from a bona fide transferee.²⁰ On the other hand it has been held that where a receiver seeks to recover from one purchasing in the open market stock issued as fully paid, on the ground that it was fraudulently issued and was not fully paid, the burden is on the receiver to allege and prove that the purchaser was not a holder for value or that he had notice of the alleged fraud, since he is presumed to have acquired it in good faith and for value.²¹

§ 3772. — Defenses available to transferee. A transferee of shares, when sued for unpaid instalments thereon, cannot set up any defense which was personal to the transferrer, and which he could waive. Thus, he cannot set up the defense that his transferrer was induced to subscribe for the shares by false and fraudulent representations.²² Similarly, one who takes an assignment of stock with knowledge of facts which estop his transferrer from setting up the invalidity of an assessment for nonpayment of which the stock was sold will be equally estopped from setting up the invalidity of the assessment.²³

As we have seen, a transferee may defeat an action for calls by showing that the stock was issued as paid up stock, and that he purchased the same in good faith, and without any notice to the contrary.²⁴

§ 3773. Assessments beyond the amount of the shares. When a statute or the charter of a corporation authorizes it to make calls or assessments upon stockholders over and above the par value of their shares, as is sometimes the case,²⁵ a bona fide and valid transfer relieves the transferrer from any liability to such an assessment after the transfer, for he is no longer a "stockholder," and the transferee takes his place with respect to such liability.²⁶

²⁰ Wallace v. Carpenter Elec. Heating Mfg. Co., 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189.

²¹ Finletter v. Appleton, 195 Pa. St. 349, 45 Atl. 1063.

This is true where the certificate recites that it is fully paid. Davies v. Ball, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

²² Lewis v. Berryville Land & Im-

provement Co., 90 Va. 693, 19 S. E. 781.

²³ Hatch v. Lucky Bill Min. Co., 25 Utah 405, 71 Pac. 865.

²⁴ See § 3771, supra.

²⁵ See subd. xxxv, infra.

²⁶ Chouteau Spring Co. v. Harris, 20 Mo. 382. See also Libby v. Tobey, 82 Me. 397, 19 Atl. 904.

§ 3774. Action for conversion of stock. A transfer of stock carries with it a right of action for its conversion, whether the conversion was by the corporation or by a third person, and the action may be brought by the transferee.²⁷

§ 3775. Right to complain of issue of watered or fictitiously paid up stock. A person who purchases shares of watered or fictitiously paid up stock with knowledge of the illegality of the issue, is clearly not in a position to attack the issue and sue to compel the return and cancellation of shares in the hands of other stockholders.²⁸

A purchaser of watered or fictitiously paid up stock, without notice, may maintain an action for damages against the person who falsely represented the stock to be paid up, and thereby induced him to purchase the same, whether such person or persons were the transferrer, or the promoters, directors or other officers of the corporation. And he may also maintain such an action against the corporation if it was a party to the fraud.²⁹

§ 3776. Assignment in bankruptcy. It is a general rule that an assignee in bankruptcy is not bound to accept property of the bankrupt which may be onerous or unprofitable to the estate, and this is true of shares of stock belonging to the bankrupt which have not been paid for. It follows that an assignee in bankruptcy of a stockholder in a corporation does not become a stockholder in the place of the bankrupt, so as to become liable as such for calls, either personally or as assignee, merely by reason of the assignment, although he becomes so by accepting the shares or acting as a stockholder.³⁰

§ 3777. Conflict of laws. The mode of transferring shares of stock,³¹ and the validity³² and effect of transfers are governed by

²⁷ *Mahaney v. Walsh*, 16 N. Y. App. Div. 601, 44 N. Y. Supp. 969; *Birdsall v. Davenport*, 43 Hun (N. Y.) 552; *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52, 21 S. W. 556. See also *Barrett v. King*, 181 Mass. 476, 63 N. E. 934.

And see § 3445 et seq., supra.

²⁸ See § 3586 et seq., supra.

²⁹ See § 3867, infra.

³⁰ *American File Co. v. Garrett*, 110 U. S. 288, 28 L. Ed. 149. See also *In re East India Cotton Agency (Furdoonjee's Case)* 3 Ch. Div. 268; *South*

Staffordshire Ry. Co. v. Burnside, 5 Exch. 129. And see standard works on bankruptcy.

³¹ *Shaw v. Goebel Brewing Co., Ltd.*, 202 Fed. 408, 45 L. R. A. (N. S.) 1090; *Husband v. Linehan*, 168 Ky. 304, Ann. Cas. 1917 D 954, 181 S. W. 1089; *Dean Rapid Tel. Co. v. Howell*, 162 Mo. App. 100, 144 S. W. 135.

³² *Black v. Zacharie*, 3 How. (U. S.) 483, 11 L. Ed. 690; *Masury v. Arkansas Nat. Bank*, 87 Fed. 381, judgment rev'd on other grounds 93 Fed. 603. See also *London, P. & A. Bank*,

the laws of the state or country in which the corporation was created,³³ although the transfer may be made in another state or country, and both of the parties may reside there.³⁴ "From the nature of the stock of a corporation, which is created by and under the authority of a state, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that state, and not by the local law of any foreign state."³⁵ So the law of the state in which the corporation was created will govern in determining the liability for calls as between the transferrer of stock and the transferee,³⁶ and the effect of unrecorded transfers³⁷ and whether they are valid as against attaching creditors of the transferrer.³⁸ And the same law governs in respect to the alienation of shares as against the stockholders by compulsory process of any kind.³⁹ But since a state may impose

Ltd. v. Aronstein, 117 Fed. 601, certiorari denied 187 U. S. 641, 47 L. Ed. 345 (mem. dec.); *Ashley v. Quintard*, 90 Fed. 84; *Doty v. First Nat. Bank of Larimore*, 3 N. D. 9, 17 L. R. A. 259, 53 N. W. 77.

A power of attorney to transfer stock, executed in blank, will be deemed sufficient and will be held to authorize the holder to fill it up and use it as a valid power, if that is the rule in the state where the transfer books are kept and the registration in question is required to be made. *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

³³ *Black v. Zacharie*, 3 How. (U. S.) 483, 11 L. Ed. 690.

³⁴ The Uniform Stock Transfer Act provides that the word "certificate," as used therein, "means a certificate of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this act." This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

The act has no extraterritorial application. *Barstow v. City Trust Co.*, 216 Mass. 330, 103 N. E. 911.

In *Boston Safe Deposit & Trust Co.*

v. Adams, 224 Mass. 442, L. R. A. 1916 F 488, 113 N. E. 277, it was held that, by virtue of this provision, the act did not apply to a transfer of shares in a foreign corporation.

³⁵ *Black v. Zacharie*, 3 How. (U. S.) 483, 11 L. Ed. 690, quoted with approval in *Masury v. Arkansas Nat. Bank*, 87 Fed. 381, judgment rev'd on other grounds 93 Fed. 603.

³⁶ *United States. Priest v. Glenn*, 51 Fed. 400.

Alabama. Morris v. Glenn, 87 Ala. 628, 7 So. 90.

Maryland. Hambleton v. Glenn, 72 Md. 331, 20 Atl. 115; *McKim v. Glenn*, 66 Md. 479, 8 Atl. 130.

Missouri. Glenn v. Hunt, 120 Mo. 330, 25 S. W. 181.

Pennsylvania. Merrimac Min. Co. v. Levy, 54 Pa. St. 227, 93 Am. Dec. 697.

³⁷ *Black v. Zacharie*, 3 How. (U. S.) 483, 11 L. Ed. 690.

³⁸ *Black v. Zacharie*, 3 How. (U. S.) 483, 11 L. Ed. 690; *Hair v. Burnell*, 106 Fed. 280; *Masury v. Arkansas Nat. Bank*, 87 Fed. 381, judgment rev'd on other grounds, 93 Fed. 603; *Dean Rapid Tel. Co. v. Howell*, 162 Mo. App. 100, 144 S. W. 135.

³⁹ *Ashley v. Quintard*, 90 Fed. 84.

such conditions as it sees fit on the right of a foreign corporation to do business within its borders,⁴⁰ a corporation doing business in a state other than that in which it was incorporated is subject to the provisions of its laws relating to the transfer of shares by foreign corporations.⁴¹

The negotiability or transferable quality of the stock of national banks,⁴² the rules which regulate its transfer,⁴³ and the effect of an unrecorded transfer of shares in such a bank as against attaching creditors of the transferrer,⁴⁴ are to be determined by the federal statutes relative to such banks, rather than by state statutes.

The validity and effect of a contract for the sale of stock, as distinguished from a transfer of the stock, is governed by the law of the state in which it is made. It has been held, however, that where a contract for the sale of stock is entered into in one state, but is executed by delivery of the certificates in another state, the validity of the contract is determined by the law of the latter state.⁴⁵

The succession to stock on the death of the owner is governed by the law of the owner's domicile,⁴⁶ and, in case he dies testate, the

⁴⁰ See the chapter on Foreign Corporations, *infra*.

⁴¹ Under the laws of California an executor is entitled to have shares of stock owned by his testator transferred to his name as executor, and since the constitution of that state requires all corporations doing business therein to maintain an office in the state where transfers of stock shall be made, a British corporation doing business in California maintained an office there in charge of managers who were authorized to make transfers and issue certificates, and there sold stock and issued certificates therefor to a resident of that state. It was held that the transfer of such stock was governed by the laws of California, and that on the death of such stockholder his executor appointed in California was entitled to have the stock transferred to him as executor at the California office, and that the corporation was not entitled to refuse to make the transfer until there had been an ad-

ministration of the estate in England. *London, P. & A. Bank, Ltd. v. Aronstein*, 117 Fed. 601, certiorari denied 187 U. S. 641, 47 L. Ed. 345 (mem. dec.).

⁴² *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369; *Bath Sav. Institution v. Sagadahoc Nat. Bank*, 89 Me. 500, 36 Atl. 996; *Doty v. First Nat. Bank of Larimore*, 3 N. D. 9, 17 L. R. A. 259, 53 N. W. 77.

⁴³ *Scott v. Pequonnock Nat. Bank*, 21 Blatchf. 203, 15 Fed. 494.

⁴⁴ *Black v. Zacharie*, 3 How. (U. S.) 483, 11 L. Ed. 690; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369; *Scott v. Pequonnock Nat. Bank*, 21 Blatchf. 203, 15 Fed. 494; *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 515; *Doty v. First Nat. Bank of Larimore*, 3 N. D. 9, 17 L. R. A. 259, 53 N. W. 77.

⁴⁵ See § 3857, *infra*.

⁴⁶ *Lowndes v. Cooch*, 87 Md. 478, 40 L. R. A. 380, 39 Atl. 1045; *Bellows Falls Power Co. v. Com.*, 222 Mass. 51, Ann. Cas. 1916 C 834, 109 N. E. 891.

validity and effect of the provisions of the will disposing of such stock is to be determined by that law, rather than by the law of the domicile of the corporation.⁴⁷

§ 3778. Effect of pending judicial proceedings; lis pendens. When shares of stock are sold, and the certificate therefor transferred to a bona fide purchaser pending a suit involving the title thereto, the purchaser is not chargeable with notice of the suit, and his title cannot be affected by any judgment or decree subsequently rendered therein, for the doctrine of lis pendens has no application. This is clearly so where the suit is pending in another state, because, if for no other reason, "the doctrine that lis pendens is notice to all the world has no extraterritorial application, and must be restricted to parties living within the jurisdiction where the action is pending."⁴⁸ And it is so, even when the action is pending in the same state in which the parties reside and the transfer is made, for the doctrine of lis pendens does not apply to sales and transfers of stock.⁴⁹

⁴⁷ *Lowndes v. Cooch*, 87 Md. 478, 40 L. R. A. 380, 39 Atl. 1045.

A bequest of stock to a person who dies before the death of the testator will be deemed to have lapsed, where it would lapse under the laws of the state where the testator's domicile is, though there is a statute in the state of the corporation's domicile which would prevent a lapse under such circumstances. *Lowndes v. Cooch*, 87 Md. 478, 40 L. R. A. 380, 39 Atl. 1045.

⁴⁸ *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Shelton v. Johnson*, 4 Sneed (Tenn.) 672, 70 Am. Dec. 265.

⁴⁹ *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722; *Central Sav. Bank v. Smith*, 43 Colo. 90, 95 Pac. 307; *Davis v. Miller Signal Co.*, 105 Ill. App. 657; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Leitch v. Wells*, 48 N. Y. 585; *American Press Ass'n v. Brantingham*, 75 N. Y. App. Div. 435, 78 N. Y. Supp. 305, appeal dismissed 173 N. Y. 601, 66 N. E. 1103.

In *Foss v. People's Gaslight & Coke Co.*, 145 Ill. App. 215, it was said that

one who, pending a suit involving the ownership of stock, acquired part of the stock of the complainant, and who thereupon filed a cross-bill, was circumscribed by the doctrine of lis pendens in his ability to prevail. The judgment of the Appellate Court in this case was affirmed by the Supreme Court (241 Ill. 238, 89 N. E. 351) without mentioning this point. The statement referred to was made in considering the refusal of the chancellor to allow an amendment of the bill, and it was held that such refusal was not an abuse of discretion, so that such statement is apparently mere dictum.

In *Buford v. Keokuk Northern Line Packet Co.*, 3 Mo. App. 159, aff'd 69 Mo. 611, it was held that the pendency of a suit to cancel stock claimed to have been legally issued was notice to all the world that its validity was in litigation, and that a subsequent decree of cancellation would reach the stock in the hands of persons to whom it might be transferred pending suit.

XX. NEGOTIABILITY OF STOCK CERTIFICATES AND TITLE OF BONA FIDE
TRANSFEREES

§ 3779. General rules. A certificate of stock is not a negotiable instrument in the same sense that a bill or note is negotiable,⁵⁰ even

50 United States. National Safe Deposit Savings & Trust Co. v. Hibbs, 229 U. S. 391, 57 L. Ed. 1241, aff'g 32 App. Cas. (D. C.) 459; Hammond v. Hastings, 134 U. S. 401, 33 L. Ed. 960; Weniger v. Success Min. Co., 227 Fed. 548; National City Bank of Chicago v. Wagner, 216 Fed. 473; O'Neil v. Wolcott Min. Co., 174 Fed. 527, 27 L. R. A. (N. S.) 200; Church v. Citizens' St. R. Co., 78 Fed. 526; Bangor Elec. Light & Power Co. v. Robinson, 52 Fed. 520; Matthews v. Massachusetts Nat. Bank, Holmes 396, Fed. Cas. No. 9,286.

Alabama. Nelson v. Owen, 113 Ala. 372, 21 So. 75; Winter v. Montgomery Gas-Light Co., 89 Ala. 544, 7 So. 773; East Birmingham Land Co. v. Dennis, 85 Ala. 565, 2 L. R. A. 836, 7 Am. St. Rep. 73, 5 So. 317; Mobile Mut. Ins. Co. v. Cullom, 49 Ala. 558.

Arizona. Hook v. Hoffman, 16 Ariz. 540, 147 Pac. 722.

Arkansas. Bankers' Trust Co. of St. Louis v. McCloy, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205.

California. Ramage v. Gould, 169 Pac. 670; Perkins v. Cowles, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711; O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 97 Pac. 1; Craig v. Hesperia Land & Water Co., 113 Cal. 7, 35 L. R. A. 306, 54 Am. St. Rep. 316, 45 Pac. 10; Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 303, 22 Pac. 665; Barstow v. Savage Min. Co., 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; Winter v. Belmont Min. Co., 53 Cal. 428; Sherwood v. Meadow Valley Min. Co., 50 Cal. 412.

Colorado. O'Mara v. Newcomb, 38 Colo. 275, 88 Pac. 167.

District of Columbia. National Safe Deposit, Savings & Trust Co. v. Hibbs, 32 App. Cas. 459, aff'd 229 U. S. 391, 57 L. Ed. 1241; National Safe Deposit, Savings & Trust Co. v. Gray, 12 App. Cas. 276.

Georgia. Bank of Culloden v. Bank of Forsyth, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226.

Illinois. Hall v. Rose Hill & E. Road Co., 70 Ill. 673; Healy v. Defiance City Bank, 160 Ill. App. 628; Miller v. Doran, 151 Ill. App. 527, aff'd 245 Ill. 200, 91 N. E. 1039.

Iowa. Mudge v. Railway Mail Equipment Co., 167 Iowa 656, 149 N. W. 867; Sykes v. Pure Food Cider Co., 157 Iowa 601, 138 N. W. 554; Clark v. American Coal Co., 86 Iowa 436, 17 L. R. A. 557, 53 N. W. 291.

Kansas. Barnhouse v. Dewey, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081; Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273.

Kentucky. Will's Adm'r v. George Wiedemann Brewing Co., 171 Ky. 681, 188 S. W. 778.

Louisiana. Sinnot v. Hibernia Nat. Bank, 105 La. 705, 30 So. 233; Smith v. Crescent City Live-Stock Landing & Slaughter-House Co., 30 La. Ann. 1378; Harris v. Bank of Mobile, 5 La. Ann. 538.

Maryland. Brant v. Ehlen, 59 Md. 1.

Massachusetts. Herbert v. Simson, 220 Mass. 480, L. R. A. 1915 D 733, 108 N. E. 65; Barstow v. City Trust Co., 216 Mass. 330, 103 N. E. 911; Baker v. Davie, 211 Mass. 429, 37 L.

when it is indorsed in blank. And it has been repeatedly held, there-

R. A. (N. S.) 944, 97 N. E. 1094; O'Herron v. Gray, 168 Mass. 573, 40 L. R. A. 498, 60 Am. St. Rep. 411, 47 N. E. 429; Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Sewell v. Boston Water Power Co., 4 Allen 277, 282, 81 Am. Dec. 701.

Michigan. Austin v. Hayden, 171 Mich. 38, Ann. Cas. 1915 B 894, 137 N. W. 317; May v. Cleland, 117 Mich. 45, 44 L. R. A. 163, 75 N. W. 129.

Minnesota. Schumacher v. Greene Cananea Copper Co., 117 Minn. 124, 38 L. R. A. (N. S.) 180, Ann. Cas. 1913 C 1115, 134 N. W. 510; Wallace v. Carpenter Elec. Heating Mfg. Co., 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189; Guilford v. Western U. Tel. Co., 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324.

Mississippi. Bank of Holly Springs v. Pinson, 58 Miss. 421, 38 Am. Rep. 330.

Missouri. Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co., 118 Mo. 447, 24 S. W. 129; Bank of Atchison County v. Durfee, 118 Mo. 431, 40 Am. St. Rep. 396, 24 S. W. 133; Watson v. Sidney F. Woody Printing Co., 56 Mo. App. 145. See also National Bank of Webb City v. Newell-Morse Royalty Co., 259 Mo. 637, 168 S. W. 699.

Nebraska. Herrick v. Humphrey Hardware Co., 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685.

Nevada. Bercich v. Marye, 9 Nev. 312.

New York. American Exch. Nat. Bank v. Woodlawn Cemetery, 194 N. Y. 116, 87 N. E. 107, rev'g 120 App. Div. 119, 105 N. Y. Supp. 305; Knox v. Eden Musee American Co., 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; Weaver v. Barden, 49 N. Y. 286, rev'g 3 Lans. 338; New York & N. H. R. Co. v.

Schuyler, 34 N. Y. 30; Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599; Talcott v. Standard Oil Co., 149 App. Div. 694, 134 N. Y. Supp. 617; Treadwell v. Clark, 114 App. Div. 493, 100 N. Y. Supp. 1, aff'd 190 N. Y. 51, 82 N. E. 505; Hall v. Wagner, 111 App. Div. 70, 97 N. Y. Supp. 570; Lyman v. State Bank of Randolph, 81 App. Div. 367, 80 N. Y. Supp. 901, aff'd 179 N. Y. 577, 72 N. E. 1145; American Press Ass'n v. Brantingham, 75 App. Div. 435, 78 N. Y. Supp. 305, appeal dismissed 173 N. Y. 601, 66 N. E. 1103; Hawes v. Gas Consumers' Ben. Co., 36 N. Y. St. Rep. 48, 12 N. Y. Supp. 924, rev'g on other grounds 9 N. Y. Supp. 490.

Ohio. Farmers' Bank v. Diebold Safe & Lock Co., 66 Ohio St. 367, 58 L. R. A. 620, 90 Am. St. Rep. 586, 64 N. E. 518. See also Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351, 43 L. R. A. 777, 47 N. E. 249.

Oklahoma. Litchfield v. Henson Oil Co., 157 Pac. 137.

Oregon. Beckwith v. Galice Mines Co., 50 Ore. 542, 16 L. R. A. (N. S.) 723, 93 Pac. 453.

Pennsylvania. Shattuck v. American Cement Co., 205 Pa. 197, 97 Am. St. Rep. 735, 54 Atl. 785.

Rhode Island. Talbot v. Talbot, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

South Carolina. Hampton & B. Railroad & Lumber Co. v. Bank of Charleston, 48 S. C. 120, 26 S. E. 238.

Tennessee. Smith v. Railroad, 91 Tenn. 221, 18 S. W. 546; Young v. South Tredegar Iron Co., 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202; Cornick v. Richards, 3 Lea 1.

Utah. Brown v. Wright, 48 Utah 633, 161 Pac. 448.

fore, that, in the absence of any estoppel,⁵¹ a bona fide purchaser of such certificates acquires no better title to the shares than his transferrer had,⁵² and that he takes the same subject to equities existing against the transferrer in favor of the corporation, or of third persons.⁵³

Virginia. Shenandoah Valley R. Co. v. Griffith, 76 Va. 913.

Washington. Whitfield v. Nonpariel Consol. Copper Co., 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078.

West Virginia. Lipsecomb's Adm'r v. Condon, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

England. Colonial Bank v. Cady, L. R. 15 App. Cas. 267.

"A certificate of stock indorsed in blank is not negotiable. It is not governed by the law as to negotiable instruments." Baker v. Davie, 211 Mass. 429, 37 L. R. A. (N. S.) 944, 97 N. E. 1094.

"Upon principle and authority, it is manifest, the certificate has not in it the elements and characteristics of negotiable or commercial paper; it is not evidence of debt; it is not a promise to pay nor an order for the payment of money; it is but a muniment of title." Nelson v. Owen, 113 Ala. 372, 21 So. 75.

"They are not negotiable in form, they represent no debt and are not securities for money." Knox v. Eden Musee American Co., 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988.

"It is not a promise to pay money, and it has no period of maturity as such instruments have." Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351, 43 L. R. A. 77, 47 N. E. 249.

They are non-negotiable in the sense that a complete transfer of title, good as against the corporation, can only be made by a transfer in accordance with a governing

statute. Whitfield v. Nonpariel Consol. Copper Co., 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078.

⁵¹ See § 3853, *infra*.

⁵² **United States.** Church v. Citizens' St. R. Co., 78 Fed. 526.

Alabama. East Birmingham Land Co. v. Dennis, 85 Ala. 565, 2 L. R. A. 836, 7 Am. St. Rep. 73, 5 So. 317.

California. Ramage v. Gould, 169 Pac. 670; Perkins v. Cowles, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711; O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 97 Pac. 1.

Illinois. McCarthy v. Crawford, 238 Ill. 38, 86 N. E. 750.

Missouri. State v. Bank of Missouri, 45 Mo. 528; Watson v. Sidney F. Woody Printing Co., 56 Mo. App. 145.

New York. Weaver v. Barden, 49 N. Y. 286, rev'g 3 Lans. 338; Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599; Hawes v. Gas Consumers' Ben. Co., 36 N. Y. St. Rep. 48, 12 N. Y. Supp. 924, rev'g on other grounds 9 N. Y. Supp. 490.

Tennessee. Young v. South Tredgar Iron Co., 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202; Cornick v. Richards, 3 Lea 1.

Virginia. Shenandoah Valley R. Co. v. Griffith, 76 Va. 913.

⁵³ **United States.** Church v. Citizens' St. R. Co., 78 Fed. 526.

California. Perkins v. Cowles, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711; O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 97 Pac. 1; Craig v. Hesperia Land & Water Co., 113 Cal. 7, 35 L. R. A. 306, 54 Am. St. Rep. 316, 45 Pac. 10.

Thus, a bona fide purchaser of a lost or stolen certificate of stock, indorsed in blank by the owner, acquires no title as against the owner, unless the latter has been guilty of such negligence as estops him from asserting his title. And the same is true where an assignment of a certificate of stock and power of attorney to transfer the same on the books of the corporation are forged, or where an assignment of a part of the shares represented by a certificate is fraudulently altered, so as to cover all the shares.⁵⁴ And a sale of shares by transfer of the certificate of stock is of no effect as against an attachment levied upon the shares before the transfer, even though the transferee be a bona fide purchaser.⁵⁵

§ 3780. Custom or usage. Certificates of stock cannot be given the character of negotiable instruments by any usage or custom among stock brokers or others, for it is an established principle of law that such certificates are not to be regarded as negotiable paper, and no usage or custom is good if it conflicts with an established principle of law.⁵⁶ But the existence of a custom among brokers whereby

Illinois. *Healy v. Defiance City Bank*, 160 Ill. App. 628.

Iowa. *Clark v. American Coal Co.*, 86 Iowa 436, 17 L. R. A. 557, 53 N. W. 291.

New York. *Weaver v. Barden*, 49 N. Y. 286, rev'g 3 Lans. 338; *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599.

South Carolina. *Maxwell v. Foster*, 67 S. C. 377, 45 S. E. 927; *Hampton & B. Railroad & Lumber Co. v. Bank of Charleston*, 48 S. C. 120, 26 S. E. 238.

Tennessee. *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202; *Cornick v. Richards*, 3 Lea 1.

Virginia. *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913.

Where a stockholder was present at a meeting, and agreed that the assets of the corporation should be sold and applied to the payment of debts, and any surplus divided among the stockholders, and that the old stock should be canceled, and new stock issued and paid for at full par value,

and afterwards sold his stock, it was held that the purchaser took the same subject to all the equities existing against the seller, and could not invoke the doctrine of innocent purchaser for value to compel the corporation to issue to him a certificate of the new stock in exchange for the old stock. *Stoddard v. Decatur Cracker Co.*, 184 Ill. 53, 56 N. E. 327, aff'g 84 Ill. App. 374.

⁵⁴ See § 3834, *infra*.

⁵⁵ See § 3444, *supra*.

⁵⁶ **Alabama.** *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 2 L. R. A. 836, 7 Am. St. Rep. 73, 5 So. 317.

District of Columbia. See *National Safe Deposit, Savings & Trust Co. v. Hibbs*, 32 App. Cas. 459, aff'd 229 U. S. 391, 57 L. Ed. 1241.

Maryland. *German Sav. Bank of Baltimore City v. Renshaw*, 78 Md. 475, 28 Atl. 281. See also *First Nat. Bank of Baltimore v. Taliaferro*, 72 Md. 164, 19 Atl. 364, 71 Md. 200, 17 Atl. 1036.

Massachusetts. *Shaw v. Spencer*,

certificates indorsed in blank pass from hand to hand without inquiry, the same as negotiable paper, has been taken into consideration by some courts on the question of the estoppel of one who delivers certificates so indorsed to a third person to deny the authority of the latter to transfer them.⁵⁷

§ 3781. Quasi negotiability; estoppel. While certificates of stock are not negotiable instruments in any proper sense, the courts, in view of the extensive dealings in such securities, and the interest, both of the public and of the corporations issuing them, in making them readily transferable and convertible, have, largely by application of the equitable doctrine of estoppel, clothed them with some of the characteristics of negotiable paper.⁵⁸ They are frequently said to be

100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115.

Minnesota. *Schumacher v. Greene Cananea Copper Co.*, 117 Minn. 124, 38 L. R. A. (N. S.) 180, Ann. Cas. 1913 C 1115, 134 N. W. 510.

⁵⁷ See § 3853, *infra*.

⁵⁸ **United States.** *Masury v. Arkansas Nat. Bank*, 93 Fed. 603; *Bangor Elec. Light & Power Co. v. Robinson*, 52 Fed. 520; *Matthews v. Massachusetts Nat. Bank*, Holmes, 396, Fed. Cas. No. 9,286.

Colorado. See *Central Sav. Bank v. Smith*, 43 Colo. 90, 95 Pac. 307.

Illinois. *Miller v. Doran*, 151 Ill. App. 527, *aff'd* 245 Ill. 200, 91 N. E. 1039.

Iowa. See *Mudge v. Railway Mail Equipment Co.*, 167 Iowa 656, 149 N. W. 867.

Michigan. *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147.

Missouri. *National Bank of Webb City v. Newell-Morse Royalty Co.*, 259 Mo. 637, 168 S. W. 699.

New York. *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Lyman v. State Bank of Randolph*, 81 App. Div. 367, 80 N. Y. Supp. 901, *aff'd* 179 N. Y. 577, 72 N. E. 1145; *American Press*

Ass'n v. Brantingham, 75 App. Div. 435, 78 N. Y. Supp. 305, appeal dismissed, 173 N. Y. 601, 66 N. E. 1103.

Ohio. *Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 43 L. R. A. 777, 47 N. E. 249.

Oregon. *Beckwith v. Galice Mines Co.*, 50 Ore. 542, 16 L. R. A. (N. S.) 723, 93 Pac. 453.

South Carolina. *Maxwell v. Foster*, 67 S. C. 377, 45 S. E. 927; *Hampton & B. Railroad & Lumber Co. v. Bank of Charleston*, 48 S. C. 120, 26 S. E. 238.

Utah. *Brown v. Wright*, 48 Utah 633, 161 Pac. 448.

"While certificates of stock are not negotiable in the strict sense of the law merchant, they are negotiable in fact." *O'Neil v. Wolcott Min. Co.*, 174 Fed. 527, 27 L. R. A. (N. S.) 200.

"The holder is entitled to every right respecting them, as against third parties, which the law confers upon the holder of commercial paper." *Mandlebaum v. North American Min. Co.*, 4 Mich. 465, quoted with approval in *May v. Cleland*, 117 Mich. 45, 44 L. R. A. 163, 75 N. W. 129.

"The nature and extent of the dealings in them, in which they are passed from hand to hand like negotiable

quasi negotiable,⁵⁹ and the trend of modern decisions is to make them

paper and in so many ways enter into the basis of credit, have influenced courts to accord to them the character of negotiability in order to meet a commercial need of the day." *American Exch. Nat. Bank v. Woodlawn Cemetery*, 194 N. Y. 116, 87 N. E. 107, rev'g 120 N. Y. App. Div. 119, 105 N. Y. Supp. 305, quoted with approval in *Bassett v. Perkins*, 65 N. Y. Misc. 103, 119 N. Y. Supp. 354.

Though not negotiable instruments, certificates assigned in blank "so approximate them as that the ordinary rules of agency and estoppel which apply in the case of chattels are applied to them with greater liberality in the behalf of an innocent purchaser." *National Safe Deposit, Savings & Trust Co. v. Hibbs*, 32 App. Cas. (D. C.) 459, aff'd 229 U. S. 391, 57 L. Ed. 1241.

Shares of stock "partake of the qualities of a negotiable security to such an extent that they pass from indorser to indorsee shorn of all secret liens against the stock in the hands of the original owner." *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685.

"Necessities of business require that shares of stock should be treated prima facie as evidence of unincumbered ownership of the holder thereof named in the certificates and upon the books of the company." *Bankers' Trust Co. of St. Louis v. McCloy*, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205.

Shares partake of the nature of negotiable instruments since the enactment of section 52 of chapter 77 of the statutes. *Douglas v. Aurora Daily News Co.*, 160 Ill. App. 506.

They are frequently sold in the open market as negotiable securities are. *National Safe Deposit, Savings & Trust Co. v. Hibbs*, 229 U. S. 391,

57 L. Ed. 1241, aff'g 32 App. Cas. (D. C.) 459; *National City Bank of Chicago v. Wagner*, 216 Fed. 473.

⁵⁹ *United States*. *Bangor Elec. Light & Power Co. v. Robinson*, 52 Fed. 520; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369.

Alabama. *Nelson v. Owen*, 113 Ala. 372, 21 So. 75.

Arizona. *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

Arkansas. *Bankers' Trust Co. of St. Louis v. McCloy*, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205.

Illinois. *Healy v. Defiance City Bank*, 160 Ill. App. 628.

Maryland. *Brant v. Ehlen*, 59 Md. 1.

Michigan. *Austin v. Hayden*, 171 Mich. 38, Ann. Cas. 1915 B 894, 137 N. W. 317.

Missouri. *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454, aff'd 74 Mo. 77.

New York. *American Exch. Nat. Bank v. Woodlawn Cemetery*, 194 N. Y. 116, 87 N. E. 107, rev'g 120 App. Div. 119, 105 N. Y. Supp. 305.

Pennsylvania. *Shattuck v. American Cement Co.*, 205 Pa. 197, 97 Am. St. Rep. 735, 54 Atl. 785.

Tennessee. *Smith v. Railroad*, 91 Tenn. 221, 18 S. W. 546; *West Nashville Planing-Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 Am. St. Rep. 835, 6 S. W. 340.

Utah. *Coray v. Perry Irrigation Co.*, 166 Pac. 672.

West Virginia. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

"While not negotiable instruments, they are considered as having many, if not all, the elements of negotiability, or, as so often expressed, a quasi negotiability." *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

as nearly negotiable as possible.⁶⁰ Such certificates, said Mr. Justice Davis, "although neither in form nor character negotiable paper, approximate to it as nearly as practicable."⁶¹ So title to them will pass, as between the parties, by indorsement and delivery of the certificates, as in the case of negotiable instruments,⁶² they are not

Certificates of stock indorsed in blank "have a certain quasi negotiability, arising largely, if not entirely, from the fact that the holder has voluntarily made delivery to some other person, and thus precluded himself by the general principles of estoppel; and more particularly by the fact that he has given an apparently unrestricted authority, which cannot be limited to the injury of others by undisclosed instructions." *Bangor Elec. Light & Power Co. v. Robinson*, 52 Fed. 520.

⁶⁰ *Masury v. Arkansas Nat. Bank*, 93 Fed. 603, rev'g 87 Fed. 381; *O'Mara v. Newcomb*, 38 Colo. 275, 88 Pac. 167; *Rice v. Gilbert*, 173 Ill. 348, 50 N. E. 1087, aff'g 72 Ill. App. 649; *Healy v. Smith*, 160 Ill. App. 627.

"The custom of business, the necessities of commerce, and the multitude of transactions tend more and more to force the transfer of stock under the rule applicable to the sale of negotiable instruments." *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226.

Stock certificates nearly approximate negotiable paper where they are indorsed in blank by the owner with power of attorney to transfer them. *Will's Adm'r v. George Wiedemann Brewing Co.*, 171 Ky. 681, 188 S. W. 778.

In view of the fact that they are constantly and frequently sold in the open market, and are the subject of a multitude of commercial transactions, their validity, like that of negotiable paper, should be sustained, where no insuperable legal obstacle

forbids. *Weniger v. Success Min. Co.*, 227 Fed. 548.

⁶¹ *First Nat. Bank of South Bend v. Lanier*, 11 Wall. (U. S.) 369, 377, 20 L. Ed. 172.

This statement has been quoted with approval in the following cases:

United States. *National Safe Deposit, Savings & Trust Co. v. Hibbs*, 229 U. S. 391, 57 L. Ed. 1241, aff'g 32 App. Cas. (D. C.) 459; *National City Bank of Chicago v. Wagner*, 216 Fed. 473; *Matthews v. Massachusetts Nat. Bank*, Holmes, 396, Fed. Cas. No. 9,286.

Louisiana. *Smith v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 30 La. Ann. 1378.

Mississippi. *Bank of Holly Springs v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330.

Missouri. *Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S. W. 129; *Bank of Atchison County v. Durfee*, 118 Mo. 431, 40 Am. St. Rep. 396, 24 S. W. 133; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454, aff'd 74 Mo. 77.

Ohio. *Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 43 L. R. A. 777, 47 N. E. 249.

Oklahoma. *Litchfield v. Henson Oil Co.*, 157 Pac. 137.

Tennessee. *Smith v. Railroad*, 91 Tenn. 221, 18 S. W. 546.

Utah. *Kimball v. Success Min. Co.*, 38 Utah 78, 110 Pac. 872, concurring opinion of Frick, J.

⁶² *O'Mara v. Newcomb*, 38 Colo. 275, 88 Pac. 167; *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St.

subject to *lis pendens*,⁶³ and the transferee may, under certain circumstances, acquire a better title than his transferrer has.⁶⁴

Thus it is now well settled that a bona fide purchaser of a certificate of stock takes the same free from any secret liens in favor of the corporation created by contract⁶⁵ or by-laws.⁶⁶ In like manner, a transferee of a certificate of stock in good faith and for value takes the stock free from any secret trusts or latent equities in favor of the corporation, or of prior parties in the line of transmission, or of third persons.⁶⁷

Rep. 586, 15 Pac. 691; National Safe Deposit, Savings & Trust Co. v. Gray, 12 App. Cas. (D. C.) 276; Barnhouse v. Dewey, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081; Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273.

"While not negotiable, shares are freely assignable and in this respect resemble negotiable choses in action and tangible property rather than other non-negotiable choses in action." *Herbert v. Simson*, 220 Mass. 480, L. R. A. 1915 D 733, 108 N. E. 65.

"They are not negotiable in the commercial sense of that word, though by proper assignment and transfer thereof the legal title of the shares of stock referred to therein may be shifted." *Sinnot v. Hibernia Nat. Bank*, 105 La. 705, 30 So. 233.

See also § 3784, *infra*.

⁶³ See § 3778, *supra*.

⁶⁴ *Bangor Elec. Light & Power Co. v. Robinson*, 52 Fed. 520.

The substance of the rule of negotiability as extended to stock certificates "is that the possessor of such an instrument has power to give, by delivery to a bona fide purchaser for value, a good title notwithstanding any defectiveness in his own." *American Exch. Nat. Bank v. Woodlawn Cemetery*, 194 N. Y. 116, 87 N. E. 107, *rev'd* 120 N. Y. App. Div. 119, 105 N. Y. Supp. 305.

⁶⁵ See § 3602, *supra*.

⁶⁶ See § 515, *supra*.

⁶⁷ *United States. Masury v. Ar-*

kansas Nat. Bank, 93 Fed. 603; *Lowry v. Commercial & Farmers' Bank, Taney*, 310, Fed. Cas. No. 8,581.

Alabama. *Winter v. Montgomery Gas-Light Co.*, 89 Ala. 544, 7 So. 773.

Arizona. See *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

Arkansas. *Bankers' Trust Co. of St. Louis v. McCloy*, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205.

California. *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84; *Brewster v. Sime*, 42 Cal. 139.

Colorado. *Ironstone Ditch Co. v. Equitable Securities Co.*, 52 Colo. 268, 121 Pac. 174.

District of Columbia. *National Safe Deposit, Savings & Trust Co. v. Gray*, 12 App. Cas. 276.

Georgia. *Nutting v. Thomason*, 46 Ga. 34.

Massachusetts. *Loring v. Salisbury Mills*, 125 Mass. 138; *Salisbury Mills v. Townsend*, 109 Mass. 115.

Michigan. *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147.

Missouri. *National Bank of Webb City v. Newell-Morse Royalty Co.*, 259 Mo. 637, 168 S. W. 699.

New Jersey. *New York & Eastern Telegraph & Telephone Co. v. Great Eastern Tel. Co.*, 74 N. J. Eq. 221, 69 Atl. 528, *aff'd* 75 N. J. Eq. 297, 298, 72 Atl. 1119.

New York. *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N.

As we shall see in another section, the owner of a certificate of stock may be estopped to assert his title as against a bona fide pur-

E. 988; *Lyman v. State Bank of Randolph*, 81 App. Div. 367, 80 N. Y. Supp. 901, aff'd 179 N. Y. 577, 72 N. E. 1145.

Ohio. *Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589, 57 N. E. 455.

South Carolina. *Maxwell v. Foster*, 67 S. C. 377, 45 S. E. 927.

Tennessee. *Smith v. Railroad*, 91 Tenn. 221, 18 S. W. 546.

Texas. *Anderson v. Waco State Bank*, 92 Tex. 506, 71 Am. St. Rep. 867, 49 S. W. 1030.

Utah. *Kimball v. Success Min. Co.*, 38 Utah 78, 110 Pac. 872.

England. *Dodds v. Hills*, 2 Hem. & M. 424.

"The recognized usage of indorsing such certificates in blank and so transferring title, to them and what they represent, by delivery has given them a quasi negotiable character to such an extent that they are often held, as they pass from hand to hand, free from undisclosed antecedent equities." *Austin v. Hayden*, 171 Mich. 38, Ann. Cas. 1915 B 894, 137 N. W. 317.

"The transferee in good faith and for value, holds his title free from latent equities, between prior parties in the line of transmission." *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988.

Where, for the purpose of qualifying a person to be one of its directors, a corporation issued a certificate of stock to him, on his secret agreement to retransfer the stock on ceasing to be a director, and he afterwards agreed with a third person to assign it to him as collateral security, on the latter's becoming surety for him on a note, which the latter did, in reliance on such promise, and without

knowledge of the secret trust on which the stock was held, it was held that the equities of such third person were superior to those of the corporation, and that he was entitled to an equitable lien on the stock as against it. *Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589, 57 N. E. 455.

Where partners form a corporation to carry on the business of the firm, and a portion of the shares is issued to the partners individually, but by agreement between themselves they are interested therein as partners, and the remainder to the firm, a purchaser of shares, either from the firm or from one of the partners, without notice of the agreement, is not bound thereby. *Behlow v. Fischer*, 102 Cal. 208, 36 Pac. 509.

Where a syndicate owning a majority of the stock of a railroad company had the title put in a trust company to vote for five years according to the direction of a committee, who had no title to the stock, and the trust company, in accordance with the trust agreement, and by direction of the syndicate, issued trust certificates declaring that the holder owned the equitable title to a certain number of shares, and, on the termination of the trust, on surrender of the certificate, would be entitled to have that number of shares transferred to him, it was held that subsequent purchasers of the stock certificates took the same, with the right to the stock, free from any partnership agreement of the syndicate. *Bostwick v. Chapman* (*Shepaug Voting Trust Cases*), 60 Conn. 553, 24 Atl. 32.

That a bona fide purchaser of a certificate takes the same free from any secret liens in favor of the corpora-

chaser from one whom he has clothed with apparent title or authority to transfer the stock.⁶⁸

§ 3782. Statutory provisions. In Louisiana it has been held that stock certificates are made negotiable instruments by a statute making them transferable by delivery with a written transfer of the certificate or a written power to sell, assign and transfer the same.⁶⁹ And such would also seem to be the effect of the Uniform Stock Transfer Act which has recently been adopted in a number of states.⁷⁰

tion created by contract, see § 3602, *supra*.

That he takes free from any secret liens created by the by-laws, see § 515, *supra*.

As to the rights of purchasers from persons holding stock in trust, see § 3837 *et seq.*, *infra*.

⁶⁸ This rule, however, is not based upon any idea that certificates of stock are negotiable instruments, but upon the doctrine of equitable estoppel. See § 3853, *infra*.

⁶⁹ Act No. 180, p. 370, of 1904. Succession of Desina, 123 La. 468, 49 So. 23.

The Uniform Stock Transfer Act is now in force in this state. See next note following.

⁷⁰ Section 1 of the act provides that the title to a certificate and to the stock represented thereby shall be transferred only by delivery of the certificate indorsed by the person appearing by the certificate to be the owner of the shares represented thereby, or by delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by such person. Section 4 provides that the title of a transferee of a certificate under a power of attorney or assignment not written on the certificate, or of any person claiming under him, shall cease and determine if, at any time prior to the surrender of the certificate to the corporation issuing it,

another person, for value in good faith, and without notice of the prior transfer, shall purchase and obtain delivery of such certificate with the indorsement of the person appearing thereby to be the owner thereof, or with the written assignment or power of attorney of such person, though contained in a certain document. Section 5 provides that the delivery of a certificate to transfer title in accordance with the provisions of section 1, shall be effectual, except as provided in section 7, though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title. Section 6 provides that the indorsement of the certificate by the person appearing by the certificate to be the owner of the shares represented thereby shall be effectual, except as provided in section 7, though the indorser or transferrer was induced by fraud, duress or mistake, to make the indorsement or delivery, or has revoked the delivery of the certificate, or the authority given by the indorsement or delivery of the certificate, or has died or become legally incapacitated after the indorsement, whether before or after the delivery of the certificate, or has received no consideration. Section 7 provides that the possession of the certificate may be reclaimed and the transfer thereof rescinded under certain circumstances "unless the certificate has been transferred to a purchaser for value in good faith

§ 3783. Bona fide purchasers. In order that a purchaser of stock may acquire a title free from secret liens in favor of the corporation, or latent equities between prior parties, he must be in the position of a bona fide purchaser for value. He takes subject to such liens or equities if he has notice of them at the time of his purchase,⁷¹ or notice of facts sufficient to put him on inquiry,⁷² or if he is not a purchaser for value.⁷³

without notice of any facts making the transfer wrongful." Section 8 provides that although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible right to the certificate and the shares represented thereby. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁷¹ *Mudge v. Railway Mail Equipment Co.*, 167 Iowa 656, 149 N. W. 867; *American Press Ass'n v. Brantingham*, 75 N. Y. App. Div. 435, 78 N. Y. Supp. 305, appeal dismissed 173 N. Y. 601, 66 N. E. 1103.

If the purchaser of stock knows that the seller has only the equitable title he takes only such equity as the seller has. *Barker v. Montana Gold, Silver, Platinum & Tellurium Min. Co.*, 35 Mont. 351, 89 Pac. 66.

One who takes stock upon a pre-existing debt and with knowledge of the claims of the corporation against it is not a bona fide purchaser, holds it subject to such claims. *Eureka Mining, Smelting & Power Co. v. Lively*, 59 Wash. 550, 110 Pac. 425.

A person who purchases stock, knowing that it has been pledged, and receives title by means of an as-

signment to a third person, who assigns to him, both assignments reciting that the stock has been pledged, and the certificate not being produced, is not a bona fide purchaser as against one whose funds were wrongfully used by the seller to pay the pledgee. *Tecumseh Nat. Bank v. Russell*, 50 Neb. 277, 69 N. W. 763.

The holder of an equity in corporate stock may, by clothing himself with the legal title, secure priority over an earlier equity, where he acquired his equity without notice of the earlier one, although he may have such notice when he acquires the legal title. *Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589, 57 N. E. 455.

Whether a purchaser has such notice is a question of fact. *Chandler v. Blanke Tea & Coffee Co.*, 183 Mo. App. 91, 165 S. W. 819.

See also §§ 3815, 3854, *infra*.

⁷² *Jennings v. Bank of California*, 79 Cal. 323, 5 L. R. A. 233, 12 Am. St. Rep. 145, 21 Pac. 852; *Mudge v. Railway Mail Equipment Co.*, 167 Iowa 656, 149 N. W. 867; *Hampton & B. Railroad & Lumber Co. v. Bank of Charleston*, 48 S. C. 120, 26 S. E. 238.

"Facts sufficient to put a party on inquiry which if pursued with due diligence would have led to knowledge of other facts, are equivalent to notice of the facts that would have been disclosed by the inquiry." *Maxwell v. Foster*, 67 S. C. 377, 45 S. E. 927.

Whether he has such notice is a question of fact. *Chandler v. Blanke Tea & Coffee Co.*, 183 Mo. App. 91, 165 S. W. 819.

⁷³ *American Press Ass'n v. Brant-*

It has been held that where the transferee takes merely an equitable title because the transfer is not registered, he is not protected as against prior equities of the corporation or third persons, since where the equity of the parties is equal, and neither has the legal title, he who is first in time is strongest in right.⁷⁴

Transferees of certificates of stock are chargeable with notice of all provisions or recitals therein, and of all facts as to which they are thereby put upon inquiry.⁷⁵ Thus, if a certificate of stock declares that no transfer of the shares therein described will be made upon the books of the corporation until payment of all indebtedness due to the corporation from the holder, a purchaser of the certificate takes subject to such condition.⁷⁶

A transferee of stock is also chargeable with notice of all provisions in the charter of the corporation or the general law,⁷⁷ and therefore

ingham, 75 N. Y. App. Div. 435, 78 N. Y. Supp. 305, appeal dismissed 173 N. Y. 601, 66 N. E. 1103.

One who has agreed to transfer property in consideration of the receipt by him of a certificate of stock is not a purchaser of the stock for value if he has not transferred the property. *Tecumseh Nat. Bank v. Russell*, 50 Neb. 277, 69 N. W. 763.

A bank is not a purchaser of stock for value, as against the corporation asserting a lien thereon, where it took the same from a debtor as collateral, taking also a demand note for the indebtedness, the note being suable immediately, although it may have orally agreed to forbear suit. *Bronson Elec. Co. v. Rheubottom*, 122 Mich. 608, 81 N. W. 563.

A creditor who extends the time of payment of a pre-existing debt, and takes a new note therefor, in consideration of a pledge of stock as security, is a bona fide holder of the stock. *Just v. State Sav. Bank*, 132 Mich. 600, 94 N. W. 200.

The Uniform Stock Transfer Act provides that an antecedent or pre-existing obligation, whether for money or not, constitutes value

within the meaning of the act, where a certificate is taken either in satisfaction thereof or as security therefor. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁷⁴ *Jennings v. Bank of California*, 79 Cal. 323, 5 L. R. A. 233, 12 Am. St. Rep. 145, 21 Pac. 852; *Vansands v. Middlesex County Bank*, 26 Conn. 144.

One who takes transfer as security for a pre-existing debt is not a bona fide purchaser for value. *Watson v. Sidney F. Woody Printing Co.*, 56 Mo. App. 145.

⁷⁵ *Jennings v. Bank of California*, 79 Cal. 323, 5 L. R. A. 233, 12 Am. St. Rep. 145, 21 Pac. 852; *Vansands v. Middlesex County Bank*, 26 Conn. 144; *Reynolds v. Bank of Mt. Vernon*, 6 N. Y. App. Div. 62, 39 N. Y. Supp. 623; *Stafford v. Produce Exch. Banking Co.*, 61 Ohio St. 160, 76 Am. St. Rep. 371, 55 N. E. 162.

⁷⁶ See § 3603, *supra*.

⁷⁷ *Hampton & B. Railroad & Lumber Co. v. Bank of Charleston*, 48 S. C. 120, 26 S. E. 238.

takes subject to any lien which may be given thereby to the corporation for any indebtedness of the transferrer.⁷⁸

He also takes subject to any lien reserved by the corporation by a by-law expressly authorized by the charter or a general law.⁷⁹ A transferee is not chargeable with notice of by-laws not authorized by the charter or general law, and does not take subject to a lien reserved thereby if he has no notice of the by-law. It is otherwise, however, if he has actual notice of the by-law.⁸⁰

A transferee of stock takes subject to a lien reserved by the corporation by contract with the transferrer for a debt due from him, where the transferee has notice of the contract, but not otherwise.⁸¹

Where shares of stock are transferable only on the books of the corporation, and are there registered in the name of a person "as trustee," this fact, according to the weight of authority, is sufficient to put purchasers or pledgors of the stock upon inquiry as to the holder's title and right to deal with the same for his own benefit.⁸² And the fact that shares are registered in the name of a person as executor is sufficient to charge purchasers from him with notice of the contents of the will under which he holds the shares.⁸³

The defense of purchaser for a valuable consideration without notice is an equitable one.⁸⁴

XXI. MODES OF TRANSFERRING SHARES; REGISTRATION

§ 3784. General principle. In the absence of express charter or statutory provision to the contrary, shares of stock may be transferred in the same manner as any other personal property.⁸⁵ At com-

⁷⁸ See § 3600, *supra*.

⁷⁹ See § 515, *supra*.

⁸⁰ See § 515, *supra*.

⁸¹ See § 3602, *supra*.

⁸² See § 3839, *infra*.

⁸³ See § 3840, *infra*.

⁸⁴ *Maxwell v. Foster*, 67 S. C. 377, 45 S. E. 927.

⁸⁵ *Alabama*. *McGowin v. Dickson*, 182 Ala. 161, 62 So. 685; *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558.

Colorado. *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546.

Delaware. *Allen v. Stewart*, 7 Del. Ch. 287, 44 Atl. 786.

Georgia. *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806.

Illinois. *People v. Devin*, 17 Ill. 84.

Massachusetts. *Boston Music Hall Ass'n v. Cory*, 129 Mass. 435; *Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351.

Tennessee. *Cornick v. Richards*, 3 Lea 1.

"As between the shareholder and his vendee a good title to stock may doubtless be conveyed by a simple indorsement and delivery of the certificate, or by a bill of sale, or any other conveyance which is adequate to transfer the title to any other species of personal property." *Bank of Commerce v. Bank of Newport*, 63 Fed. 898.

mon law, the delivery of a stock certificate with a written transfer of the same to the purchaser is sufficient to transfer the title to the shares represented thereby,⁸⁶ and this is now the rule in many states by statute. So it is frequently provided that the delivery of a stock certificate to a bona fide purchaser or pledgee, for value, together with a written transfer of the same, or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties.⁸⁷

"It requires a clear provision of the charter itself, or of some statute, to take from the owner of such property the right to transfer it in accordance with known rules of the common law." *Boston Music Hall Ass'n v. Cory*, 129 Mass. 435.

86 United States. *Bank of Commerce v. Bank of Newport*, 63 Fed. 898; *Scott v. Pequonnock Nat. Bank*, 21 Blatchf. 203, 15 Fed. 494.

California. *Brown v. San Francisco Gaslight Co.*, 58 Cal. 426.

Connecticut. *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663.

Illinois. *People v. Devin*, 17 Ill. 84.

Massachusetts. *Boston Music Hall Ass'n v. Cory*, 129 Mass. 435.

New Hampshire. *Scripture v. Frankestown Soapstone Co.*, 50 N. H. 571.

New Jersey. *Broadway Bank v. McElrath*, 13 N. J. Eq. 24.

New York. *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341.

Tennessee. *Cornick v. Richards*, 3 Lea 1.

West Virginia. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

In the absence of any provision requiring a transfer on the books or otherwise providing the manner of sale, the legal title passes by a transfer and delivery of the certificate by the person to whom it was issued. *Condit v. Galveston City Co.*, — Tex. App. —, 186 S. W. 395.

When shares belonging to the es-

tate of a decedent are sold by his executor or administrator, the title of the purchaser is complete when the certificate has been indorsed and delivered. *Brown v. San Francisco Gaslight Co.*, 58 Cal. 426.

A transfer and delivery of the certificate is the ordinary mode of transferring stock. *Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S. W. 129; *Lebrecht v. Nellist*, 184 Mo. App. 335, 171 S. W. 11.

"Shares of stock in a corporation may be transferred by means of an assignment and delivery of certificates." *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615.

Stock is transferable and salable by actual contract thereto and a delivery of the certificate. *New Orleans Nat. Banking Ass'n v. P. S. Wiltz & Co.*, 10 Fed. 330.

87 Louisiana. Act 180, p. 370, of 1904. *Eisenhauer v. New Orleans Cotton Exchange*, 140 La. 574, 73 So. 685; *State v. Bank of Baton Rouge*, 125 La. 138, 136 Am. St. Rep. 332, 51 So. 95; *Succession of Desina*, 123 La. 468, 49 So. 23. The Uniform Stock Transfer Act is now in force in Louisiana.

Massachusetts. St. 1903, c. 437, § 28; St. 1906, c. 463, part II, § 41 & part III, § 22; St. 1884, c. 229; R. L. § 37. *Athol Sav. Bank v. Bennett*, 203 Mass. 480, 89 N. E. 632; *Chase v. Boston*, 193 Mass. 522, 79 N. E. 736; *Clews v. Friedman*, 182 Mass. 555, 66 N. E. 201; *Andrews v. Worcester*, N.

Where, as is generally the case,⁸⁸ shares are required to be transferred on the books of the corporation, the assignment of the certificate is generally accompanied by a written power of attorney to make the transfer, although it seems that a power of attorney is not necessary.⁸⁹

The assignment need not be under seal,⁹⁰ unless it is expressly required by the charter or general law, or by an authorized by-law.⁹¹ And where a seal is not necessary, a transfer in blank is not void because it is under seal, for in such a case the seal will be disregarded as mere surplusage.⁹²

Ordinarily the transfer may be made by indorsing on the certificate⁹³

& R. R. Co., 159 Mass. 64, 33 N. E. 1109. A power of attorney signed in blank is a written power of attorney within the meaning of the statute. *Andrews v. Worcester, N. & R. R. Co.*, 159 Mass. 64, 33 N. E. 1109.

Rhode Island. Gen. Laws 1896, c. 177, § 20; Gen. Laws 1909, c. 213, § 20. This section merely provides what shall be a sufficient delivery to pass title, and "is not to be construed as defining, varying or enlarging agreements or relations which may have been entered into between owners of stock and others." It has no bearing on the question whether a given transaction is an absolute transfer or a pledge. *United Nat. Bank v. Tappan*, 33 R. I. 1, 79 Atl. 946.

Utah. The statute provides that the delivery of the certificate, together with a written transfer of the same, signed by the owner, to a bona fide purchaser or pledgee for value, shall be deemed a sufficient transfer of the title as against any creditor of the transferor and all other persons whosoever. Comp. Laws 1907, § 330. This provision is not to be construed as meaning that a bona fide purchaser can acquire title only from the real and actual owner. *Brown v. Wright*, 48 Utah 633, 161 Pac. 448.

See also the provisions of the Uniform Stock Transfer Act quoted infra, this section.

⁸⁸ See § 3788 et seq., infra.

⁸⁹ See § 3791, infra.

⁹⁰ *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476; *Atkinson v. Atkinson*, 8 Allen (Mass.) 15; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; *German Union Building & Saving Fund Ass'n v. Sendmeyer*, 50 Pa. St. 67; *In re Tahiti Cotton Co. (Ex parte Sargent)*, L. R. 17 Eq. 273, 43 Law J. Ch. 425; *In re Tees Bottle Co.*, 33 L. T. (N. S.) 834.

⁹¹ *Bishop v. Globe Co.*, 135 Mass. 132.

In England, the charters or articles of association of corporations generally require that transfers of stock shall be under seal. See *Societe Generale De Paris v. Tramways Union Co.*, 14 Q. B. Div. 424; *Societe Generale De Paris v. Walker*, 11 App. Cas. 20; *Hibblewhite v. McMorine*, 6 Mees. & W. 200.

⁹² *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *German Union Building & Saving Fund Ass'n v. Sendmeyer*, 50 Pa. St. 67; *In re Barned's Banking Co.*, 3 Ch. App. 105, 37 L. J. Ch. 81.

⁹³ *Masury v. Arkansas Nat. Bank*, 93 Fed. 603.

Under the California Code title to stock passes, as between the parties,

of stock, or by writing on a separate paper,⁹⁴ an assignment and

by indorsement and delivery. *Ash-ton v. Zeila Min. Co.*, 134 Cal. 408, 66 Pac. 494.

A statutory provision requiring a written transfer signed by the owner is satisfied by an indorsement and delivery of the certificate. *Brown v. Wright*, 48 Utah 633, 161 Pac. 448.

The Uniform Stock Transfer Act, § 21, provides that a certificate shall be deemed to be indorsed when an assignment or a power of attorney to sell, assign or transfer the certificate or the shares represented thereby is written on the certificate and signed by the person appearing by the certificate to be the owner of the shares represented thereby, or when the signature of such person is written without more upon the back of the certificate; and that in either of these cases a certificate shall be deemed to be indorsed though it has not been delivered. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁹⁴ *United States*. *Masury v. Arkansas Nat. Bank*, 93 Fed. 603; *Bank of Commerce v. Bank of Newport*, 63 Fed. 898.

Georgia. *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226.

Iowa. *First Nat. Bank v. Gifford*, 47 Iowa 575.

New Jersey. *Curtis v. Crossley*, 59 N. J. Eq. 358, 45 Atl. 905.

New York. *Mitchell v. Boyer*, 160 App. Div. 565, 145 N. Y. Supp. 715; *Talcott v. Standard Oil Co.*, 149 App. Div. 694, 134 N. Y. Supp. 617.

Rhode Island. *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

"The printed form of transfer, with power of attorney, commonly placed upon the back of a stock certificate,

furnishes a convenient and appropriate means of transfer in the ordinary course of business; but it is by no means the only means by which a transfer of stock may be made." *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

"A transfer of ownership may be made by delivery of unendorsed certificates, together with specific assignments, as well as by delivery of endorsed certificates." *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

As between the parties they may be transferred by deed. *Thompson v. Rowe*, 27 Colo. App. 361, 149 Pac. 849; *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546.

"Endorsement of the certificates is not necessary to pass the title where a deed has been executed assigning the stock and authorizing the transfer on the books." *Curtis v. Crossley*, 59 N. J. Eq. 358, 45 Atl. 905.

A statement in a collateral note that the stock has been deposited as security for the debt, and giving the lender the right to sell it on default, accompanied by delivery of the certificate, is sufficient to give the purchaser at such a sale a title which will support a demand for a transfer and a new certificate. *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226.

"Where stocks are to be transferred upon express trusts, * * * it is certainly more convenient and orderly that such transfers should be made by separate specific assignments in trust, so that the trust may be fully set forth." *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

Where a deed of trust assigned stock standing in the grantor's name on the books of the corporation, and

power of attorney to a particular person,⁹⁵ or the assignment and power of attorney may be executed in blank.⁹⁶ The Uniform Stock

authorized the trustee to transfer the same to himself or others, and the grantor delivered the certificates, it was held that the fact that the assignment on the certificates was not signed did not affect the operation of the deed, although the grantor purposely omitted to sign, with the secret intention of retaining control of the stock. *Curtis v. Crossley*, 59 N. J. Eq. 358, 45 Atl. 905.

"A fly power is a written assignment in the form generally used on the reverse of stock certificates; which, when signed and attached to such certificate, is sufficient to transfer the same in like manner as an indorsement thereon." *Carlisle v. Norris*, 157 N. Y. App. Div. 313, 142 N. Y. Supp. 393, aff'd 215 N. Y. 400, Ann. Cas. 1917 A 429, 109 N. E. 564.

⁹⁵ *Davis Laundry & Cleaning Co. v. Whitmore*, 92 Ohio St. 44, Ann. Cas. 1917 C 988, 110 N. E. 518. See also *Rice v. Gilbert*, 173 Ill. 348, 50 N. E. 1087, aff'g 72 Ill. App. 649; *First Nat. Bank v. Gifford*, 47 Iowa 575; *Prall v. Tilt*, 28 N. J. Eq. 479.

⁹⁶ *United States v. Johnston v. Lafflin*, 103 U. S. 800, 26 L. Ed. 532, aff'g 5 Dill. 65, Fed. Cas. No. 7,393; *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615; *Bank of Commerce v. Bank of Newport*, 63 Fed. 898; *Matthews v. Massachusetts Nat. Bank*, Holmes, 396, Fed. Cas. No. 9,286.

California. *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84; *Graves v. Mono Lake Hydraulic Min. Co.*, 81 Cal. 303, 22 Pac. 665; *Cahlan v. Bank of Lassen County*, 11 Cal. App. 533, 105 Pac. 765.

Colorado. *O'Mara v. Newcomb*, 38 Colo. 275, 88 Pac. 167.

Connecticut. *Bridgeport Bank v.*

New York & N. H. R. Co., 30 Conn. 231.

Illinois. *McCarthy v. Crawford*, 238 Ill. 38, 86 N. E. 750; *Coffey v. Coffey*, 179 Ill. 283, 53 N. E. 590, aff'g 74 Ill. App. 241. See *Rice v. Gilbert*, 173 Ill. 348, 50 N. E. 1087, aff'g 72 Ill. App. 649.

Kansas. *Barnhouse v. Dewey*, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081; *Culp v. Mulvane*, 66 Kan. 143, 71 Pac. 273.

Massachusetts. *Taft v. Church*, 162 Mass. 527, 39 N. E. 283; *Andrews v. Worcester, N. & R. R. Co.*, 159 Mass. 64, 33 N. E. 1109; *Fitchburg Sav. Bank v. Torrey*, 134 Mass. 239.

Michigan. *Walker v. Detroit Transit Ry. Co.*, 47 Mich. 338, 11 N. W. 187.

New Jersey. *Prall v. Tilt*, 28 N. J. Eq. 479; *Mt. Holly, L. & M. Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24.

New York. *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988, rev'g on other grounds 74 Hun 483, 26 N. Y. Supp. 482; *Cutting v. Damerel*, 88 N. Y. 410; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Hannahs v. Hammond Typewriter Co.*, 158 App. Div. 620, 143 N. Y. Supp. 939; *Union Bank of Brooklyn v. United States Exch. Bank*, 143 App. Div. 128, 127 N. Y. Supp. 661; *People v. Utah Gold & Copper Mines Co.*, 135 App. Div. 418, 119 N. Y. Supp. 852; *Aspell v. Campbell*, 64 App. Div. 393, 72 N. Y. Supp. 76; *Leavitt v. Fisher*, 4 Duer 1; *Commercial Bank v. Kortright*, 22 Wend.

Transfer Act provides: "Title to a certificate and to the shares represented thereby shall be transferred only, (a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or, (b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person. The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent." ⁹⁷

348, 34 Am. Dec. 317, aff'g 20 Wend. 91.

North Carolina. *Havens v. Bank of Tarboro*, 132 N. C. 214, 95 Am. St. Rep. 627, 43 S. E. 639.

Ohio. *Davis Laundry & Cleaning Co. v. Whitmore*, 92 Ohio St. 44, Ann. Cas. 1917 C 988, 110 N. E. 518; *Hal-deman v. Hillsborough & C. Ry.*, 2 Handy 101.

Oregon. *Gray v. Fankhauser*, 58 Ore. 423, 115 Pac. 146.

Pennsylvania. *Shattuck v. American Cement Co.*, 205 Pa. 197, 97 Am. St. Rep. 735, 54 Atl. 785; *In re Pennsylvania R. Co.'s Appeal*, 86 Pa. St. 80; *German Union Bldg. & Sav. Fund Ass'n v. Sendmeyer*, 50 Pa. St. 67; *Denny v. Lyon*, 38 Pa. St. 98, 80 Am. Dec. 463.

South Carolina. *Fraser & Dill v. Charleston*, 11 S. C. 486; *State Bank v. Cox & Co.*, 11 Rich. Eq. 344, 78 Am. Dec. 458.

England. *In re Tahiti Cotton Co. (Ex parte Sargent)*, L. R. 17 Eq. 273, 43 L. J. Ch. 425; *In re Tees Bottle Co.*, 33 L. T. (N. S.) 834.

It is not essential that the instrument of assignment be dated or that

all blanks be filled in in order to convey both the legal and equitable title. *Aspell v. Campbell*, 64 N. Y. App. Div. 393, 72 N. Y. Supp. 76.

An indorsement in blank with the intention to transfer title to a particular person has the same effect as an indorsement to him by name. *Cah-lan v. Bank of Lassen County*, 11 Cal. App. 533, 105 Pac. 765.

A power of attorney signed in blank is a "written power," within the meaning of a statute providing that shares of stock may be transferred by delivery with a written power of attorney to transfer the same. *Andrews v. Worcester, N. & R. R. Co.*, 159 Mass. 64, 33 N. E. 1109.

⁹⁷ See § 1 of the act. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

Mass. Acts 1910, c. 171, § 1. This provision has no extraterritorial application. *Barstow v. City Trust Co.*, 216 Mass. 330, 103 N. E. 911.

Page & Adams Ann. Gen. Code Ohio § 8673—1. *Davis Laundry & Cleaning Co. v. Whitmore*, 92 Ohio St.

Where the assignment and power of attorney are executed in blank, the certificate may be transferred from hand to hand by delivery, like a note indorsed in blank, and any holder thereof has authority to fill in his own name as transferee, and his own name or another's as attorney, and cause the transfer to be registered on the books of the corporation.⁹⁸ And this has been held to be true even when such blank

44, Ann. Cas. 1917 C 988, 110 N. E. 518.

In so far as the act provides that title to shares of stock shall be transferred by delivery of the certificate indorsed in blank or to a specific person, it merely carries into statute law the legal principle theretofore prevailing. *Davis Laundry & Cleaning Co. v. Whitmore*, 92 Ohio St. 44, Ann. Cas. 1917 C 988, 110 N. E. 518.

⁹⁸ *United States*. *Johnston v. Lafflin*, 103 U. S. 800, 26 L. Ed. 532, aff'g 5 Dill. 65, Fed. Cas. No. 7,393; *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615; *Matthews v. Massachusetts Nat. Bank*, Holmes, 396, Fed. Cas. No. 9,286.

California. *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84.

Colorado. *O'Mara v. Newcomb*, 38 Colo. 275, 88 Pac. 167.

Connecticut. *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

Delaware. *Lippman v. Kehoe Stenograph Co.*, — Del. Ch. —, 98 Atl. 943.

Illinois. *McCarthy v. Crawford*, 238 Ill. 38, 86 N. E. 750; *Coffey v. Coffey*, 179 Ill. 283, 53 N. E. 590, aff'g 74 Ill. App. 241; *Otis v. Gardner*, 105 Ill. 436.

Kansas. *Barnhouse v. Dewey*, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081.

Massachusetts. *Andrews v. Worcester, N. & R. R. Co.*, 159 Mass. 64, 33 N. E. 1109; *Fitchburg Sav. Bank v. Torrey*, 134 Mass. 239.

New Jersey. *Morris v. Hussong Dyeing Mach. Co.*, 81 N. J. Eq. 256,

86 Atl. 1026; *Prall v. Tilt*, 28 N. J. Eq. 479; *Mt. Holly, L. & M. Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24.

New York. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Leavitt v. Fisher*, 4 Duer 1; *Commercial Bank v. Kortright*, 22 Wend. 348, 34 Am. Dec. 317, aff'g 20 Wend. 91.

North Carolina. *Havens v. Bank of Tarboro*, 132 N. C. 214, 95 Am. St. Rep. 627, 43 S. E. 639.

Oregon. *Gray v. Fankhauser*, 58 Ore. 423, 115 Pac. 146.

Pennsylvania. *Shattuck v. American Cement Co.*, 205 Pa. 197, 97 Am. St. Rep. 735, 54 Atl. 785; *German Union Bldg. & Sav. Fund. Ass'n v. Sendmeyer*, 50 Pa. St. 67.

South Carolina. *Fraser & Dill v. Charleston*, 11 S. C. 486.

England. *In re Tahiti Cotton Co.* (Ex parte Sargent), L. R. 17 Eq. 273, 43 L. J. Ch. 425; *In re Tees Bottle Co.*, 33 L. T. (N. S.) 834.

"A blank transfer on the back of the certificate to which the holder has affixed his name is a good assignment, and a party to whom it is delivered is authorized to fill it up by writing a transfer and power of attorney over the signature." *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84.

"A blank transfer on the back of the certificate, to which the holder has affixed his name, is a good assignment and the party to whom it is delivered is authorized to fill it up. It may be filled up with the name of a

assignment or power of attorney is under seal.⁹⁹ In England, however, where transfers of stock are generally required to be under seal, it has been held that they cannot be executed in blank, since at common law a deed cannot be executed in blank.¹ But even there it has been held that they may be executed in blank where a transfer not under seal is valid.²

The right or authority of the holder of the certificate to fill up the blank assignment and power of attorney is not affected in any way by the death of the transferrer.³

§ 3785. Necessity for delivery. To constitute a transfer there must be a delivery.⁴ A mere agreement to assign shares, where the owner retains control, is not a transfer, and does not divest his title.⁵ De-

remote transferee, and the name to be inserted concerns only the purchaser." *McCarthy v. Crawford*, 238 Ill. 38, 86 N. E. 750.

"The holder of a certificate of stock accompanied by an irrevocable power of attorney, either filled up or in blank, may fill up the letter of attorney, execute his power and thus obtain legal title to the stock, and such power is not limited to the person to whom it was first delivered, but inures to each bona fide holder into whose hands the certificate and power may pass." *Morris v. Hussong Dyeing Mach. Co.*, 81 N. J. Eq. 256, 86 Atl. 1026.

A by-law to the effect that stock may be transferred by indorsement of the certificate and its surrender to the secretary for cancellation, whereupon a new certificate shall be issued to the transferee, cannot be construed as requiring an actual transfer on each assignment. *Morris v. Hussong Dyeing Mach. Co.*, 81 N. J. Eq. 256, 86 Atl. 1026.

⁹⁹ *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

¹ *Societe Generale De Paris v. Walker*, 11 App. Cas. 20; *Taylor v. Great Indian Peninsula Ry. Co.*, 4 De Gex & J. 559, 28 L. J. Ch. 709; *Hibblewhite v. McMorine*, 6 M. & W. 200; *Societe Generale De Paris v.*

Tramways Union Co., 14 Q. B. Div. 424.

In *Matthews v. Massachusetts Nat. Bank*, Holmes, 396, Fed. Cas. No. 9,286, it is said that the English holdings to this effect "were influenced not merely by a rigid adherence to the rules of the common law in relation to instruments under seal, but by the policy of the stamp system."

² In *re Barned's Banking Co.*, 3 Ch. App. 105, 37 L. J. Ch. 81; In *re Tahiti Cotton Co. (Ex parte Sargent)*, L. R. 17 Eq. 273, 43 L. J. Ch. 425; In *re Tees Bottle Co.*, 33 L. T. (N. S.) 834.

³ *Barnhouse v. Dewey*, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081; *Culp v. Mulvane*, 66 Kan. 143, 71 Pac. 273; *Leavitt v. Fisher*, 4 Duer (N. Y.) 1; *Fraser & Dill v. Charleston*, 11 S. C. 486. But see In *re Pennsylvania R. Co.'s Appeal*, 86 Pa. St. 80.

⁴ *Weber v. Bullock*, 19 Colo. 214, 35 Pac. 183; *Bank of Atchison County v. Durfee*, 118 Mo. 431, 40 Am. St. Rep. 396, 24 S. W. 133; *Lebrecht v. Nellist*, 184 Mo. App. 335, 171 S. W. 11; *Cornick v. Richards*, 3 Lea (Tenn.) 1.

⁵ A verbal agreement between the holder of stock and sureties, on notes given by him, that he is to leave his stock with the corporation as collateral security, to indemnify them

livery is defined by the Uniform Stock Transfer Act to be a "voluntary transfer of possession from one person to another."⁶ A share of stock, being intangible, is not susceptible of manual delivery, but delivery of the certificate is a symbolical delivery of the stock which it represents.⁷

There may be a constructive delivery and acceptance, unaccompanied by a manual delivery or actual change of custody resulting from acts and conduct from dealing with stock when there has been a change in the relation of the parties to it.⁸ In other words, as between the parties,⁹ "both acceptance and receipt, and therefore delivery, may be inferred from the attendant circumstances."¹⁰ "The proof of a constructive delivery and acceptance must be clear and un-

against the payment of the notes, is neither a legal nor an equitable assignment of the stock, where there is no delivery of the stock, and it does not pass from under the dominion and control of the holder, but remains in the vaults of the corporation as at the time of the agreement. *Bank of Atchison County v. Durfee*, 118 Mo. 431, 40 Am. St. Rep. 396, 24 S. W. 133.

⁶ See § 22 of the act. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁷ **United States.** *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615.

Connecticut. *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323; *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250; *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663.

New Hampshire. *Scripture v. Fracestown Soapstone Co.*, 50 N. H. 571.

South Carolina. *Fraser & Dill v. Charleston*, 11 S. C. 486.

Tennessee. *Cornick v. Richards*, 3 Lea 1.

Vermont. *Cheever v. Meyer*, 52 Vt. 66.

⁸ *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323.

"Delivery may be either actual or constructive." *Teague v. Abbot*, 51 Ind. App. 604, 100 N. E. 27.

⁹ *Teague v. Abbot*, 51 Ind. App. 604, 100 N. E. 27.

"However good as a transfer of stock between the parties the symbolical or constructive acceptance and receipt may be, it will not affect the rights of creditors or purchasers without notice." *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323.

¹⁰ *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323. See also *Teague v. Abbot*, 51 Ind. App. 604, 100 N. E. 27.

"The instances for the application of this principle to the transfer of stock will be infrequent compared to those with reference to goods. Evidence of payment by the corporation of a dividend to the transferee and his acceptance of it, would tend strongly to prove a constructive delivery and acceptance of a transfer of stock." *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323.

In *In re Hedley*, 156 Fed. 314, it was held that where a husband, who was his wife's agent, assigned certificates of stock to her, and placed them with papers and documents belonging to her, delivery and acceptance thereof would be presumed.

equivocal."¹¹ Delivery may be presumed from the fact that the certificates of stock, properly indorsed, are in the possession of the holder.¹²

In the absence of express provision to the contrary, stock may be transferred by delivery of a separate written transfer, without the delivery of any certificate,¹³ especially where no certificate has ever been issued,¹⁴ or where it is not in the possession of the transferor.¹⁵ But delivery of the certificates is sometimes expressly required by

¹¹ *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323.

¹² *Coffey v. Coffey*, 179 Ill. 283, 53 N. E. 590, aff'g 74 Ill. App. 241; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Richards v. Wells Fargo Exp. Co.*, 156 N. Y. App. Div. 268, 141 N. Y. Supp. 306.

Hence a purchaser for value is not bound to show affirmatively that the certificates were delivered by a former owner to his own grantor. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616.

Where the owner of stock executes a written transfer thereof to another, possession by the latter of the certificates, with the blank assignments and powers of attorney to transfer the same on the books, signed by the owner, raises a presumption that the delivery was valid, entitling the transferee to the stock. *Coffey v. Coffey*, 179 Ill. 283, 53 N. E. 590, aff'g 74 Ill. App. 241.

But this presumption may be overcome by proof raising a stronger presumption of continued ownership by the person claimed to have transferred it. *Richard v. Wells Fargo Exp. Co.*, 156 N. Y. App. Div. 268, 141 N. Y. Supp. 306.

¹³ *Alabama*. *Campbell v. Woodstock Iron Co.*, 83 Ala. 351, 3 So. 369.

Colorado. *Equitable Securities Co. v. Johnson*, 36 Colo. 377, 85 Pac. 840.

Kansas. See *Barnhouse v. Dewey*, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081.

New York. *Smith v. Savin*, 141 N.

Y. 315, 36 N. E. 338; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *De Caumont v. Bogert*, 36 Hun 382.

Tennessee. *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209.

As between the parties, stock may be mortgaged without a transfer of the certificate. *Campbell v. Woodstock Iron Co.*, 83 Ala. 351, 3 So. 369.

As to the necessity for delivery of the certificate in the case of a gift of stock, see § 3947, *infra*.

¹⁴ *Rasmussen v. Sevier Valley Canal Co.*, 40 Utah 371, 121 Pac. 741; *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392. See also *Dain Mfg. Co. v. Trumbull Seed Co.*, 95 Mo. App. 144, 68 S. W. 951.

¹⁵ *Everitt v. Farmers & Merchants Bank*, 82 Neb. 191, 20 L. R. A. (N. S.) 996, 117 N. W. 401.

A statute making a sale of personal property fraudulent *per se* as to purchasers from or creditors of the seller, unless the possession of the property accompanies and follows the title, does not apply where the property is in the lawful possession of a third person, and for that reason the seller is unable to deliver possession. So it does not apply to a sale of stock where the certificates have been pledged to secure an indebtedness of the seller and are in the hands of the pledgee. *First Nat. Bank of Lexington v. Bowman*, 168 Ky. 433, 182 S. W. 195.

the statute.¹⁶ And it has been held that the mere placing of the name of the vendee of stock on the corporate books without a delivery of the certificates is insufficient to warrant a recovery of the purchase price.¹⁷ The Uniform Stock Transfer Act provides that an attempted transfer without a delivery of the certificate shall have the effect of a promise to transfer, and that the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts.¹⁸

§ 3786. Delivery of certificate without indorsement or assignment.

It has been held in a number of jurisdictions that a mere delivery of the certificate, with intent to transfer the shares represented thereby, is a sufficient transfer as between the parties, without any indorsement or written assignment.¹⁹ This has been generally held to be true in the

¹⁶ Under the Oklahoma statute, an indorsement by the signature of the proprietor of the stock and a delivery of the certificates are essential to an absolute transfer. A mere transfer of the stock on the corporate books is not enough. *Haynes v. Brown*, 18 Okla. 389, 89 Pac. 1124.

¹⁷ *Lebrecht v. Nellist*, 184 Mo. App. 335, 171 S. W. 11.

¹⁸ Section 10. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

¹⁹ *Alabama*. *McGowin v. Dickson*, 182 Ala. 161, 62 So. 685.

Indiana. *Burnsville Turnpike Co. v. State*, 119 Ind. 382, 3 L. R. A. 265, 20 N. E. 421; *Teague v. Abbot*, 51 Ind. App. 604, 100 N. E. 27. But see *State v. First Nat. Bank*, 89 Ind. 302, holding that a transfer in writing is essential to a pledge of stock unless the stock is expressly made assignable by delivery of the certificate.

Massachusetts. *Boston Safe Deposit & Trust Co. v. Adams*, 224 Mass. 442, L. R. A. 1916 F 488, 113 N. E. 277.

Ohio. *Haldeman v. Hillsborough &*

C. Ry., 2 Handy 101, 12 Ohio Dec. 351.

Tennessee. *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209.

"A share of stock in a corporation * * * may be sold by parol, or pass by delivery of the certificate of stock, by which its ownership is evidenced." *Condit v. Galveston City Co.*, — Tex. Civ. App. —, 186 S. W. 395.

In *Treadwell v. Clark*, 190 N. Y. 51, 82 N. E. 505, aff'g 114 N. Y. App. Div. 493, 100 N. Y. Supp. 1, it is said that if a purchaser from an agent of a pledgee "had purchased in good faith, mere irregularities in the signatures of the previous holders and the want of former transfers might be disregarded and the intent to transfer by delivery might be found and would be given effect."

See also *Masury v. Arkansas Nat. Bank*, 93 Fed. 603, where it is said that some authorities hold that such a transfer is sufficient to pass the equitable title, though the charter or statute requires a transfer on the books.

"For the purposes of a pledge, an

case of gifts,²⁰ and in some states is now the rule by statute in respect to all transfers. So the Uniform Stock Transfer Act provides that the delivery of a certificate by the person appearing by the certificate to be the owner thereof without the indorsement requisite for the transfer of the certificate and the shares represented thereby, but with intent to transfer such certificate or shares shall impose an obligation, in the absence of an agreement to the contrary, upon the person so delivering to complete the transfer by making the necessary indorsement; that the transfer shall take effect as of the time when the indorsement is actually made; and that this obligation may be specifically enforced.²¹ In other jurisdictions, however, a contrary rule prevails, and certificates will not pass from hand to hand by mere delivery without an act of transfer.²²

§ 3787. Recording or filing in public office. Statutes in some states expressly require a certificate or statement of all stock transfers to be filed or recorded in some public office.²³ In Arkansas the statute

equitable title is passed to the pledgee by the simple delivery of the stock certificate." *Bank of Gunterville v. United States Fidelity & Guaranty Co.*, — Ala. —, 75 So. 168.

²⁰ See § 3947, *infra*.

²¹ *Mass. Acts 1910, § 9. Boston Safe Deposit & Trust Co. v. Adams*, 224 Mass. 442, L. R. A. 1916 F 488, 113 N. E. 277; *Herbert v. Simson*, 220 Mass. 480, L. R. A. 1915 D 733, 108 N. E. 65.

The rule set forth in this section is the rule which obtained at common law. *Boston Safe Deposit & Trust Co. v. Adams*, 224 Mass. 442, L. R. A. 1916 F 488, 113 N. E. 277.

This provision does not apply to a transfer of shares in a foreign corporation. *Boston Safe Deposit & Trust Co. v. Adams*, 224 Mass. 442, L. R. A. 1916 F 488, 113 N. E. 277; *Herbert v. Simson*, 220 Mass. 480, L. R. A. 1915 D 733, 108 N. E. 65.

The provision does not apply to a gift of stock made before its enactment. *Herbert v. Simson*, 220 Mass. 480, L. R. A. 1915 D 733, 108 N. E. 65.

This act has been adopted and is in force in Louisiana, Maryland, Massa-

chusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

²² *Sinnot v. Hibernia Nat. Bank*, 105 La. 705, 30 So. 233.

In *James v. James*, 81 Tex. 373, 16 S. W. 1087, the court says that, in the absence of a by-law authorizing a transfer by delivery, it is not prepared to hold that mere delivery of share of national bank stock will clothe the person to whom delivery is made with the rights of stockholders.

A written transfer is necessary to constitute a valid pledge of stock, either at the common law or under the Vermont statute. *French v. White*, 78 Vt. 89, 2 L. R. A. (N. S.) 804, 6 Ann. Cas. 479, 62 Atl. 35.

A transfer in writing is essential to a pledge of stock, unless the stock is expressly made assignable by delivery of the certificate. *State v. First Nat. Bank*, 89 Ind. 302.

See also § 3905, *infra*.

²³ *Kan. Gen. St. 1901, § 1283*, providing that as soon as a transfer of stock is shown upon the books of a corporation the president and secre-

provides that a certificate of the transfer shall be deposited for record with the county clerk, and that "no transfer of stock shall be valid as against any creditor of such stockholder until such certificate shall have been so deposited."²⁴

§ 3788. Necessity for complying with statutory provisions; waiver. Where a particular mode of transferring shares of stock is prescribed by the charter of the corporation or general law, or by its by-laws, compliance therewith may be necessary to render a transfer valid as against the corporation.²⁵ But the fact that a trans-

tary shall file with the secretary of state a statement of such change of ownership, and that no transfer of stock shall be legal or binding until such statement is so made, imposed upon those who at the time of its enactment owned corporate stock, and thereafter sold it, the duty, in order to relieve themselves from liability for the debts of the company, of procuring a record thereof to be made in the office of the secretary of state; and the seller remains liable where the statute is not complied with although he causes the transfer to be duly entered on the corporate books, thereby charging the corporate officers with the duty of causing the public record to be made, unless he takes some further steps to secure the performance of such duty. So interpreted the statute does not so impair the obligations of the stockholder's contract as to render it unconstitutional. *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, 173.

²⁴ Under this statute a transfer, when no certificate thereof has been deposited for record with the county clerk, is not good as against a purchaser at an execution sale upon a judgment against the transferrer, although, he may have actual notice of the transfer. *Fahrney v. Kelly*, 102 Fed. 403.

And the creditors of a stockholder will prevail over unregistered trans-

fers, though they have actual knowledge of them. *Scott v. Houpt*, 73 Ark. 78, 83 S. W. 1057.

A filing with the circuit clerk, instead of with the county clerk, is insufficient, where the two offices are separate. *Scott v. Houpt*, 73 Ark. 78, 83 S. W. 1057.

It has been held that the statute is not intended to apply to cases in which stock is pledged as security for a debt by simple indorsement and delivery of a stock certificate, but applies only where the stockholder parts with his entire legal and equitable title by an absolute sale,—the purpose of the statute being to afford a record for the benefit of the taxing authorities, or those interested in or dealing with the corporation, and who may be entitled to proceed against the stockholders in case of its insolvency, for which purposes a pledgee is not a stockholder. *Masury v. Arkansas Nat. Bank*, 93 Fed. 603, rev'g 87 Fed. 381; *Loeb v. German Nat. Bank*, 88 Ark. 108, 113 S. W. 1017; *Hudson v. Bank of Pine Bluff*, 75 Ark. 493, 87 S. W. 1177; *Scott v. Houpt*, 73 Ark. 78, 83 S. W. 1057; *Batesville Tel. Co. v. Myer-Schmidt Grocer Co.*, 68 Ark. 115, 56 S. W. 784.

Nor does the statute apply where stock is issued directly to stockholders by the corporation on payment of their subscriptions. *Scott v. Houpt*, 73 Ark. 78, 83 S. W. 1057.

²⁵ Where the statute requires stock

fer of shares is not made in the manner prescribed by the charter, general law, or by-laws of the corporation does not necessarily render it void as between the parties. Ordinarily a transfer which is not made in the prescribed mode, but which would be sufficient at common law, will convey at least an equitable title to the purchaser, and he will be protected therein by a court of equity.²⁶

A corporation may waive compliance with a by-law regulating the mode of transferring stock, and it does so if it habitually allows transfers without compliance therewith. Thus, where the charter of a corporation provided that its stock should be transferred in the manner prescribed by the directors, and a by-law provided for a transfer by an assignment on the company's books signed by the assignor, but the prescribed method was never followed, it was held that a transfer by an entry on the books not signed by the assignor, in accordance with the established usage of the company, was valid.²⁷ And where a bank cancels the original certificate, issues a new certificate in lieu thereof to defendant, pays dividends on the stock thereafter, and in general recognizes the defendant as the owner of the stock, it will be deemed to have waived provisions of its by-laws providing for submission of the name of a proposed transferee to the board of directors, and requiring transferees to sign the by-laws.²⁸ As we shall see in subsequent sections, a corporation may also waive provisions of its charter or by-laws or of a general law requiring registration of transfers on the corporate books, or estop itself from setting up a non-compliance therewith, in so far as its own rights are concerned.²⁹

A failure of the transferee to sign a transfer as required by the articles of association may be cured by his subsequently signing it.³⁰

§ 3789. Transfer on the books of the corporation—General principles. Registration of a transfer of shares on the books of the corporation is not necessary to the validity of the transfer, or the substitution of the transferee for the transferor as a stockholder, either as between the parties themselves, or as against the corporation or its

to be transferred in a particular manner, there must be at least a substantial compliance with its requirements. *Pueblo Sav. Bank v. Richardson*, 39 Colo. 319, 89 Pac. 799.

²⁶ *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461; *Gilbert v. Manchester Iron Mfg. Co.*, 11 Wend. (N. Y.) 627; *Rasmussen v. Sevier Valley Canal Co.*,

40 Utah 371, 121 Pac. 741.

²⁷ *Richmondville Mfg. Co. v. Prall*, 9 Conn. 487.

²⁸ *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858.

²⁹ See § 3808, *infra*.

³⁰ *Shaw v. Goebel Brewing Co., Ltd.*, 202 Fed. 408, 45 L. R. A. (N. S.) 1090.

creditors, or as against a subsequent attaching creditor of the transferor, unless such a formality is expressly required by or under the charter of the corporation or some general law, or by a valid by-law of the corporation.³¹ Frequently, however, the charter of a corporation or the general law under which it is formed expressly provides that its shares shall be transferable only on the books of the corporation;³² and similar provisions are often found in the corporate by-laws.³³

The purpose of such a requirement is to be taken into consideration in construing it, and in determining the effect of a failure to comply therewith.³⁴ All the courts agree that such a requirement is intended for the protection of the corporation, so that it may have the means of knowing at any time who are its stockholders, and as such entitled to receive dividends, vote at corporate meetings, and otherwise participate in the management of the corporation, and so that it may take advantage of charter or statutory provisions given a lien on shares for debts due to it from stockholders, or acquire such a lien by contract with stockholders.³⁵ And it follows that an unregistered

³¹ *Bates v. Androscooggin & K. R. Co.*, 49 Me. 491; *Boston Music Hall Ass'n v. Cory*, 129 Mass. 435; *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497.

“Where there is no statute expressly or impliedly forbidding a sale of stock without registration, it is generally, if not universally, held that the purchaser takes the legal title without a transfer of the stock on the books.” *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

³² *United States. Johnston v. Lafflin*, 103 U. S. 800, 26 L. Ed. 532, aff'g 5 Dill. 65, Fed. Cas. No. 7,393; *Hubbell v. Houghton*, 86 Fed. 547.

California. People's Home Sav. Bank v. Stadtmuller, 150 Cal. 106, 88 Pac. 280.

Colorado. Talcott v. Mastin, 20 Colo. App. 488, 79 Pac. 973.

Iowa. Dooley v. Gladiator Consol. Gold Mines & Milling Co., 134 Iowa 468, 13 Ann. Cas. 297, 109 N. W. 864.

Oklahoma. Haynes v. Brown, 18 Okla. 389, 89 Pac. 1124.

Texas. Milner v. Brewer-Monaghan Mercantile Co., — Tex. Civ. App. —, 188 S. W. 49.

See also the cases cited in the following notes in this and the following sections; and see the statutes of the various states.

³³ As to the power of a corporation to enact such by-laws and their effect, see § 514, *supra*.

³⁴ *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546; *Barnhouse v. Dewey*, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081; *Culp v. Mulvane*, 66 Kan. 143, 71 Pac. 273.

³⁵ *United States. Bridgewater Iron Co. v. Lissberger*, 116 U. S. 8, 29 L. Ed. 557; *Johnston v. Lafflin*, 103 U. S. 800, 26 L. Ed. 532, aff'g 5 Dill. 65, Fed. Cas. No. 7,393; *Eubank v. Bryan County State Bank of Caddo, Oklahoma*, 216 Fed. 833; *O'Neil v. Wolcott Min. Co.*, 174 Fed. 527, 27 L. R. A. (N. S.) 200; *Masury v. Arkansas Nat.*

transfer is of no effect whatever as against the corporation, at least

Bank, 93 Fed. 603, rev'g judgment 87 Fed. 381; Bank of Commerce v. Bank of Newport, 63 Fed. 898; Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. 369; Scott v. Pequonnoek Nat. Bank, 21 Blatchf. 203, 15 Fed. 494.

Alabama. Fisher v. Jones, 82 Ala. 117, 3 So. 13; Duke v. Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472.

Arkansas. Loeb v. German Nat. Bank, 88 Ark. 108, 113 S. W. 1017.

Delaware. Allen v. Stewart, 7 Del. Ch. 287, 44 Atl. 786.

District of Columbia. National Safe Deposit, Savings & Trust Co. v. Hibbs, 32 App. Cas. 459, aff'd 229 U. S. 391, 57 L. Ed. 1241.

Georgia. Sylvania & G. R. Co. v. Hoge, 129 Ga. 734, 59 S. E. 806; Bank of Culloden v. Bank of Forsyth, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226; Buena Vista Loan & Savings Bank v. Grier, 114 Ga. 398, 40 S. E. 284; Southwestern R. Co. v. Thomason, 40 Ga. 408.

Kentucky. First Nat. Bank of Lexington v. Bowman, 168 Ky. 433, 182 S. W. 195; Husband v. Linehan, 168 Ky. 304, Ann. Cas. 1917 D 954, 181 S. W. 1089; Thurber v. Crump, 86 Ky. 408, 6 S. W. 145.

Maryland. Merchants' Nat. Bank v. Williams, 110 Md. 334, 72 Atl. 1114; Bloede Co. v. Bloede, 84 Md. 129, 33 L. R. A. 107, 57 Am. St. Rep. 373, 34 Atl. 1127.

Michigan. Foster v. Row, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

Minnesota. Prince Inv. Co. v. St. Paul & S. C. Land Co., 68 Minn. 121, 70 N. W. 1079; Basting v. Northern Trust Co., 61 Minn. 307, 63 N. W. 721; Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 21 L. R. A. 174, 55 N. W. 547; Lund v. Wheaton Roller Mill Co., 50 Minn. 36, 36 Am. St. Rep. 623, 52 N. W. 268; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261, 276.

Missouri. Wilson v. St. Louis & S.

F. Ry. Co., 108 Mo. 588, 32 Am. St. Rep. 624, 18 S. W. 286; Crenshaw v. Columbian Min. Co., 110 Mo. App. 355, 86 S. W. 260.

Montana. Leyson v. Davis, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775, writ of error dismissed 170 U. S. 36, 42 L. Ed. 939.

Nebraska. Everitt v. Farmers & Merchants Bank, 82 Neb. 191, 20 L. R. A. (N. S.) 996, 117 N. W. 401; Herriek v. Humphrey Hardware Co., 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685.

New Jersey. Reilly v. Absecon Land Co., 75 N. J. Eq. 71, 71 Atl. 248; Mt. Holly, L. & M. Turnpike Co. v. Ferree, 17 N. J. Eq. 117; Broadway Bank v. McElrath, 13 N. J. Eq. 24.

New York. Chemical Nat. Bank of New York v. Colwell, 132 N. Y. 250, 30 N. E. 644; Robinson v. National Bank, 95 N. Y. 637; People v. Utah Gold & Copper Mines Co., 135 App. Div. 418, 119 N. Y. Supp. 852; Bank of Utica v. Smalley & Barnard, 2 Cow. 770, 778, 14 Am. Dec. 526; Smith v. American Coal Co., 7 Lans. 317.

Oregon. Gray v. Fankhauser, 58 Ore. 423, 115 Pac. 146.

Pennsylvania. Com. v. Watmough, 6 Whart. 117.

Rhode Island. Talbot v. Talbot, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535; Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291.

Tennessee. Parker v. Bethel Hotel Co., 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209; Smith v. Railroad, 91 Tenn. 221, 18 S. W. 546.

Texas. Seeligson & Co. v. Brown, 61 Tex. 114; Strange v. Houston & T. C. R. Co., 53 Tex. 162.

Washington. Whitfield v. Nonparel Consol. Copper Co., 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078; Van Horn v. New Western Shingle Co., 54 Wash. 117, 103 Pac. 42.

West Virginia. Lipscomb's Adm'r

unless it has notice thereof.³⁶ According to some courts³⁷ this is the

v. Condon, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

"This provision is for the protection and benefit of the corporation, so that it may know with whom to deal as stockholders, and who have a right to vote as such." *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 21 L. R. A. 174, 55 N. W. 547.

"The object of transfer upon the books of the corporation is to obtain further evidence of title for the purpose of transfer and to insure the payment of dividends to the actual owner." *People v. Utah Gold & Copper Mines Co.*, 135 N. Y. App. Div. 418, 119 N. Y. Supp. 852.

It "is for the protection of parties dealing with the bank and to know who are its stockholders entitled to vote at its meetings and to receive dividends when declared; in other words, it is intended to prescribe a method of transfer which shall be deemed effectual in all matters relating to the internal government and management of the corporation, rather than to prescribe a method of transfer which is to be observed between a stockholder and third parties." *Eubank v. Bryan County State Bank of Caddo, Oklahoma*, 216 Fed. 833.

The purpose of such a provision is, among other things, to protect the corporation from liability on account of fraudulently issued stock, and from the application of the rule whereby fraudulently or wrongfully issued stock may be binding upon it in the hands of an innocent purchaser for value. *Whitfield v. Nonpareil Consol. Copper Co.*, 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078.

³⁶ See § 3798, *infra*.

³⁷ *Delaware*. *Allen v. Stewart*, 7 Del. Ch. 287, 44 Atl. 786.

District of Columbia. *National Safe Deposit, Savings & Trust Co. v. Hibbs*, 32 App. Cas. 459, *aff'd* 229 U. S. 391, 57 L. Ed. 1241.

Georgia. *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806; *Buena Vista Loan & Savings Bank v. Grier*, 114 Ga. 398, 40 S. E. 284; *Ross v. Southwestern R. Co.*, 53 Ga. 514; *Southwestern R. Co. v. Thomason*, 40 Ga. 408.

Minnesota. *Prince Inv. Co. v. St. Paul & S. C. Land Co.*, 68 Minn. 121, 70 N. W. 1079; *Lund v. Wheaton Roller Mill Co.*, 50 Minn. 36, 36 Am. St. Rep. 623, 52 N. W. 268; *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261, 276. But see *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721.

Missouri. See *Wilson v. St. Louis & S. F. Ry. Co.*, 108 Mo. 588, 32 Am. St. Rep. 624, 18 S. W. 286.

Nebraska. *Everitt v. Farmers & Merchants Bank*, 82 Neb. 191, 20 L. R. A. (N. S.) 996, 117 N. W. 401.

New Jersey. *Mt. Holly, L. & M. Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24.

New York. *Chemical Nat. Bank of New York v. Colwell*, 132 N. Y. 250, 30 N. E. 644; *Robinson v. National Bank*, 95 N. Y. 637; *Bank of Utica v. Smalley & Barnard*, 2 Cow. 770, 778, 14 Am. Dec. 526; *Smith v. American Coal Co.*, 7 Lans. 317.

Oregon. *Gray v. Fankhauser*, 58 Ore. 423, 115 Pac. 146.

Rhode Island. *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

Tennessee. *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209; *Smith v. Railroad*, 91 Tenn. 221, 18 S. W. 546; *American Nat. Bank v. Nashville Warehouse & Elevator Co.* (Tenn. Ch. App.), 36 S. W. 960.

sole or chief or primary³⁸ purpose of adopting such a provision.

According to some courts, such a requirement is also intended, according to the weight of authority, for the benefit and protection of persons who may deal with the corporation and become its creditors, so that they may know who are stockholders, and as such liable to its creditors.³⁹ And where the requirement is construed as having this object, as well as the protection of the corporation, an unregistered transfer does not relieve the transferrer from liability to creditors.⁴⁰

According to some courts such a requirement is also intended for the benefit and protection of persons who may purchase or take a pledge of the shares of the corporation, so that they may have the means of ascertaining whether a person offering to sell or pledge shares is the owner of them.⁴¹ And where this is held to be true an

Texas. *Seeligson & Co. v. Brown*, 61 Tex. 114.

³⁸ *Bank of Commerce v. Bank of Newport*, 63 Fed. 898; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369; *Loeb v. German Nat. Bank*, 88 Ark. 108, 113 S. W. 1017; *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226; *Husband v. Linehan*, 168 Ky. 304, Ann. Cas. 1917 D 954, 181 S. W. 1089.

³⁹ **United States.** *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532; *Eubank v. Bryan County State Bank of Caddo, Oklahoma*, 216 Fed. 833; *Hubbell v. Houghton*, 86 Fed. 547; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369.

Alabama. *Fisher v. Jones*, 82 Ala. 117, 3 So. 13. But see *Duke v. Cahawba Nav. Co.*, 10 Ala. 82, 44 Am. Dec. 472.

Kansas. *Abilene State Bank v. Strachan*, 89 Kan. 577, 46 L. R. A. (N. S.) 668, 132 Pac. 200; *Pine v. Western Nat. Bank*, 63 Kan. 462, 65 Pac. 690; *Plumb v. Bank of Enterprise*, 48 Kan. 484, 29 Pac. 699.

Michigan. *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

Montana. *Leyson v. Davis*, 17

Mont. 220, 31 L. R. A. 429, 42 Pac. 775, writ of error dismissed 170 U. S. 36, 42 L. Ed. 939.

Washington. *Whitfield v. Nonpareil Consol. Copper Co.*, 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078; *Van Horn v. New Western Shingle Co.*, 54 Wash. 117, 103 Pac. 42.

“The entry of the transfer on the books of the company is required, not for the translation of the title, but for the protection of the parties and others dealing with the company; and to enable it to know who are its stockholders entitled to vote at meetings and to receive dividends when declared.” *Bloede Co. v. Bloede*, 84 Md. 129, 33 L. R. A. 107, 57 Am. St. Rep. 373, 34 Atl. 1127, quoted with approval in *Merchants' Nat. Bank v. Williams*, 110 Md. 334, 72 Atl. 1114.

⁴⁰ See § 3810, *infra*.

⁴¹ **United States.** *O'Neil v. Wolcott Min. Co.*, 174 Fed. 527, 27 L. R. A. (N. S.) 200; *Bank of Commerce v. Bank of Newport*, 63 Fed. 898; *Scott v. Pequonock Nat. Bank*, 21 Blatchf. 203, 15 Fed. 494.

Alabama. *Fisher v. Jones*, 82 Ala. 117, 3 So. 13.

Iowa. *Perkins v. Lyons*, 111 Iowa 192, 82 N. W. 486.

unregistered transfer is ineffectual as against a bona fide purchaser or pledgee from one who appears as owner on the books of the corporation, if he has no notice of the transfer.⁴³

Some courts also hold that an entry of the transaction on the corporate books is necessary to protect the purchaser or pledgee against the seller's or pledgor's creditors, while others hold to the contrary.⁴³

Such a provision is not intended to prevent the alienation of corporate stock,⁴⁴ or to prescribe an exclusive method whereby a stockholder may divest himself of his title or may assign it to a third party;⁴⁵ and hence a failure to comply with it does not affect the validity of a transfer as between the parties thereto.⁴⁶

§ 3790. — Recitals in stock certificates. Where the right to transfer stock is given by the statute, it cannot be curtailed by recitals in the stock certificates,⁴⁷ and for this reason it has been held that under such circumstances the validity of a transfer is not affected by a recital in the certificate that the same is transferable only on the books of the company and on surrender of the certificate.⁴⁸ Such a recital gives

Kentucky. First Nat. Bank Lexington v. Bowman, 168 Ky. 433, 182 S. W. 195; Thurber v. Crump, 86 Ky. 408, 6 S. W. 145.

Michigan. Foster v. Row, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

It is intended to preserve a record of the ownership of stock to which third parties may resort when they have occasion to purchase or otherwise deal in the stock of the corporation. Bank of Commerce v. Bank of Newport, 63 Fed. 898.

It is intended only to protect the corporation and those who claim under the certificates of stock. Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

Formerly in Massachusetts the requirement was considered as in the nature of a registry act regulating the transfer of the stock as to third persons. Bridgewater Iron Co. v. Lissberger, 116 U. S. 8, 29 L. Ed. 557.

⁴² See § 3815, *infra*.

⁴³ See § 3811, *infra*.

⁴⁴ Crenshaw v. Columbian Min. Co., 110 Mo. App. 355, 86 S. W. 260.

⁴⁵ O'Neil v. Wolcott Min. Co., 174 Fed. 527, 27 L. R. A. (N. S.) 200.

Such a provision in the charter, general laws, or by-laws, "is intended to prescribe a method of transfer which shall be effectual as between the corporation and its stockholders, in all matters relating to the internal government and management of the corporation, rather than to prescribe a method of transfer which must be observed as between a stockholder and third parties." Masury v. Arkansas Nat. Bank, 93 Fed. 603, rev'g 87 Fed. 381.

⁴⁶ See § 3811, *infra*.

⁴⁷ See § 3763, *supra*.

⁴⁸ National Bank of Pacific v. Western Pac. R. Co., 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676; Union Bank of Brooklyn v. United States Exch. Bank, 143 N. Y. App. Div. 128, 127 N. Y. Supp. 661; Brown v. Wright, 48 Utah 633, 161 Pac. 448.

notice of the rights of the corporation under the statute, with respect to transfers, but does not change the relative rights of the stockholder and third persons with respect to each other,⁴⁹ and does not preclude or restrict the right to otherwise sell, transfer or pledge the certificate by indorsement and delivery.⁵⁰

§ 3791. Mode of procuring transfer on books, and sufficiency of transfer—In general. A provision that shares shall be transferable only on the books of the corporation does not mean that the transferrer himself must make or sign the transfer on the books, but simply that the transfer shall be entered thereon, and the entry may and should be made by the officers of the corporation under express or implied authority from the transferrer.⁵¹ "The usual method of transferring stock is for the holder of the share to indorse thereon a written transfer or authority to transfer, and to deliver the certificate to the transferee, who in turn delivers it to the corporation, which, if satisfied of the genuineness of the holder and of the identity of the transferee, takes up the old certificate and issues a new one."⁵² The power of attorney need not be under seal,⁵³ and it may be executed and delivered in blank, in which case the transferee, or any person who becomes the owner of the certificate and power, may fill in the blank with his own or another's name.⁵⁴

If, by express provision of the charter, general law, or by-laws, shares are transferable on the books of the corporation in person or by attorney, the corporation may refuse to register a transfer unless the transferrer appears in person, or has given another a power of attorney to make the transfer.⁵⁵ But in the absence of such a provision, a power of attorney is not necessary, for authority to make a transfer

"There is no proof that the stock of defendant is made transferable only on its books, by either the charter or by-laws, and in the absence of such a provision in the charter or by-laws the provision in the certificate of stock could not have the effect of limiting the unconditional right of transferring it." *Union Bank of Brooklyn v. United States Exch. Bank*, 143 N. Y. App. Div. 128, 127 N. Y. Supp. 661.

⁴⁹ *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676.

⁵⁰ *Brown v. Wright*, 48 Utah 633, 161 Pac. 448.

⁵¹ *Northrop v. Curtis*, 5 Conn. 246; *Green Mount & S. L. Turnpike Co. v. Bulla*, 45 Ind. 1.

⁵² *Baker v. Atlantic Coast Line R. Co.*, — N. C. —, 92 S. E. 170. See also *Shirley Farmers' Grain & Coal Co. v. Douglas*, 130 Ill. App. 285.

⁵³ See § 3784, *supra*.

⁵⁴ See § 3784, *supra*.

⁵⁵ *Shirley Farmers' Grain & Coal Co. v. Douglas*, 130 Ill. App. 285; *Kjellman v. Scandia Fish Co.*, 128 Ill. App. 544; *Mechanics' Banking Ass'n v. Mariposa Co.*, 3 Rob. (N. Y.) 395.

on the books, either on the part of the transferrer or transferee, is to be implied from an assignment of the certificate of stock.⁵⁶

The request for a transfer may be oral.⁵⁷ And it need not necessarily be made by the person named as attorney in the power, and his neglect or refusal to make it does not deprive the transferee of his right to a transfer on the books.⁵⁸

In the absence of any express charter or statutory provision on the subject, it is not necessary that a corporation shall keep any special book for the registration of transfers; but the transfer may be entered in any book, so long as it is a part of the records of the corporation.⁵⁹ "All that is necessary * * * is that the facts should be appropriately recorded in some suitable register or stock list, or otherwise formally entered upon its books."⁶⁰ Thus it has been held that there is a transfer on the books of the corporation where proper entries are made in a stock ledger,⁶¹ or on the subscription list,⁶² or in a book adopted for the purpose, where the regular stock book is not accessi-

⁵⁶ *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532; *Webster v. Upton*, 91 U. S. 65, 71, 23 L. Ed. 384; *Johnson v. Laffin*, 5 Dill. 65, 79, Fed. Cas. No. 7,393.

"The equitable title to stock may be vested in the transferee upon delivery to and acceptance by him of the certificate of stock, with intent to transfer it to him, and with or without a power to transfer." *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323.

⁵⁷ *Hayes v. Shoemaker*, 39 Fed. 319.

⁵⁸ *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315.

⁵⁹ *United States. Cecil Nat. Bank of Port Deposit v. Watsontown Bank*, 105 U. S. 217, 26 L. Ed. 1039; *Bank of Commerce v. Bank of Newport*, 63 Fed. 898.

Alabama. Fisher v. Jones, 82 Ala. 117, 3 So. 13.

California. Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

Iowa. Moore v. Marshalltown Opera-House Co., 81 Iowa 45, 46 N. W. 750.

New York. In re Argus Co., 138 N. Y. 557, 34 N. E. 388.

Ohio. Harpold v. Stobart, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637.

Rhode Island. American Nat. Bank v. Oriental Mills, 17 R. I. 551, 23 Atl. 795.

In *Perkins v. Lyons*, 111 Iowa 192, 82 N. W. 486, it was held that the statute impliedly required the books of a domestic corporation to be kept at the principal place of business of the corporation within the state, and that a memorandum of transfer entered on a book kept in another state was not sufficient as against an attaching creditor of the transferrer.

⁶⁰ *Cecil Nat. Bank of Port Deposit v. Watsontown Bank*, 105 U. S. 217, 26 L. Ed. 1039.

⁶¹ *Cecil Nat. Bank of Port Deposit v. Watsontown Bank*, 105 U. S. 217, 26 L. Ed. 1039.

⁶² Where the by-laws require the transfer to be made on the stock ledger, but none is kept, an entry upon the subscription list in accordance with the custom of the corporation is sufficient as against it. *Stewart v. Walla Walla Ptg. & Pub. Co.*, 1 Wash. 521, 20 Pac. 605.

ble,⁶³ where the old certificate with the written assignment thereon is pasted in the certificate book,⁶⁴ or where a memorandum of the transfer is made therein, or in the stock book.⁶⁵ On the other hand, it has been held that an entry of credit on the books of the treasurer,⁶⁶ or pinning a letter from the transferee, giving notice of the transfer, in the transfer book,⁶⁷ is not sufficient. And when a particular book is selected and used for the purpose, it becomes the stock book, and transfers to be valid must be made upon it.⁶⁸

Of course a transfer on the books must be with the consent of the parties. A marginal note made by the secretary of a corporation on the stubs of stock certificates does not amount to a transfer on the books of the corporation, when no transfer is authorized by either of the parties thereto.⁶⁹ But a corporation which refuses to make a transfer because it has a lien on the stock will be justified in doing so without a further request where the lien is subsequently discharged, if the acts of the transferee amount to a continuing request to make it.⁷⁰

⁶³ *In re Argus Co.*, 138 N. Y. 557, 34 N. E. 388.

⁶⁴ *American Nat. Bank v. Oriental Mills*, 17 R. I. 551, 23 Atl. 795.

⁶⁵ *Horton v. Mercer*, 71 Fed. 153; *Bank of Commerce v. Bank of Newport*, 63 Fed. 898; *Fisher v. Jones*, 82 Ala. 117, 3 So. 13; *Plumb v. Bank of Enterprise*, 48 Kan. 484, 29 Pac. 699; *Iverson v. Bradrick*, 54 Wash. 633, 104 Pac. 130.

Under a statute requiring transfers of stock to be made on the books of the corporation, a memorandum made with a pencil on the stub of the stock book, showing the parties, the stock transferred, and the nature of the transfer, is sufficient, unless some other mode of registration is expressly required. *Perkins v. Lyons*, 111 Iowa 192, 82 N. W. 486.

In *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721, the entry was held to be sufficient though the books were not in such form as to constitute a strict and literal compliance with the statute, and though there was no one book which contained all that the statute required,

where the certificate book and the stock account in the ledger, taken together, contained substantially all that was necessary.

But where no stock book is kept, and the stock certificate book and stubs are made to take its place, there must be an entry on a stub showing a transfer by the person to whom the corresponding certificate was issued in order to relieve him from liability as a stockholder. *Herriek v. Wardwell*, 58 Ohio St. 294, 50 N. E. 903.

⁶⁶ *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579.

⁶⁷ *Newell v. Williston*, 138 Mass. 240.

⁶⁸ *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637.

⁶⁹ *McFall v. Buckeye Grangers' Warehouse Ass'n*, 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253.

⁷⁰ In *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721, the corporation refused to transfer stock to one who had purchased it at execution sale on the ground that it had a lien thereon for an unpaid call. The pur-

If the by-laws of a corporation require that transfers shall be registered in a particular mode, they are binding upon the stockholders, and upon transferees with notice, unless the requirement is such as to amount to an unreasonable restraint upon alienation. Thus, the courts have sustained by-laws requiring transfers by indorsement in writing, or by registration in the presence of witnesses, or of particular officers of the corporation,⁷¹ or requiring the certificate to be indorsed to the secretary of the corporation for cancellation.⁷² But a by-law cannot make registration dependent upon the consent of an officer of the corporation. Such a by-law is an unreasonable restraint upon the transfer of stock.⁷³ A provision in the by-laws reserving to the corporation a right to refuse to make transfer on the books until the instrument of transfer is signed by both the transferer and the transferee applies only to cases where both are living, and not to a case where an executor seeks a transfer to himself as executor of stock owned by his testator.⁷⁴

An entry on the books of a memorandum of an assignment showing from whom and to whom it was made satisfies a statutory requirement that an assignment of stock shall be entered on the corporate books and that the entry shall disclose from whom and to whom the stock passes.⁷⁵

Under a statute providing that where judgment is given for the delivery of personal property, the court may, by such judgment, pass the title to such property without any act to be done on the part of the defendant, it has been held that a decree directing a corpora-

chaser did not offer to pay the call but left with the corporation a notice to the effect that he was the owner of the stock and requiring it to transfer the same to him on its books, together with the stock certificate and the sheriff's certificate of sale. It was held that this amounted to a continuing request on his part to the corporation to make the transfer, and justified it in doing so without any further request when the delinquent call was paid by the judgment creditor.

⁷¹ *Planters' & Merchants' Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585; *Dane v. Young*, 61 Me. 160.

⁷² *Tyng v. United Mercantile Agency*, 184 Ill. App. 433.

⁷³ *Farmers' & Merchants' Bank v. Wasson*, 48 Iowa 336, 30 Am. Rep. 398; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306.

⁷⁴ *London, P. & A. Bank, Ltd. v. Aronstein*, 117 Fed. 601, certiorari denied 187 U. S. 641, 47 L. Ed. 345 (mem. dec.).

The corporation waives noncompliance with such formalities where it refuses to register the transfer solely on other grounds or fails to give its reasons for such refusal. *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546.

⁷⁵ *Equitable Securities Co. v. Johnson*, 36 Colo. 377, 85 Pac. 840.

tion to transfer stock on its books to a certain person vests the title to the stock in him at once without any act on the part of the corporation.⁷⁶

Where a certificate of stock recites on its face that it is valid only when signed by a transfer agent, one who takes it without such signature does so at his peril.⁷⁷

Neither a transferrer⁷⁸ nor a transferee⁷⁹ will be prejudiced because no entry is made on the books, or because the entry made is insufficient, where he has done all he could to procure a transfer, and the failure is solely the fault of the corporate officers. So a request or demand that a transfer be entered on the books of the corporation, if made upon a proper officer, will have the same effect as an actual registration as against the corporation, if the circumstances are such that it has no right to refuse to make the transfer.⁸⁰ And according to the weight of authority it will also relieve the transferrer from further liability to corporate creditors,⁸¹ and will protect the transferee against attaching creditors of the transferrer.⁸²

If the corporation wrongfully refuses to make a transfer at the request of the transferee, an assignee of the latter is not required to make another demand before suing the corporation for dividends.⁸³

It has been held that the mere fact that the corporation has failed to keep a proper book in which to enter transfers will not excuse an assignee from making a bona fide effort to have the stock transferred.⁸⁴

An entry of a transfer on the corporate books is not the execution of a written instrument within the meaning of a statute requiring a

⁷⁶ Carthage Nat. Bank v. Poole, 160 Mo. App. 133, 141 S. W. 729.

⁷⁷ Dollar Sav. Fund & Trust Co. v. Pittsburg Plate Glass Co., 213 Pa. 307, 5 Ann. Cas. 248, 62 Atl. 916. Under such circumstances he cannot claim that the corporation is estopped to deny the validity of the certificate, and bound to recognize the holder as a stockholder or pay him damages, if the certificate was fraudulently or improperly issued.

⁷⁸ Earle v. Carson, 188 U. S. 42, 47 L. Ed. 373.

⁷⁹ A written assignment of stock, although not on the stock certificates themselves, is binding on all persons where the assignment so made has been presented to the corporate sec-

retary by the transferee, accompanied with a request that necessary transfer be made on the corporate books, and the secretary, raising no objection to the absence of the certificates, certifies under the corporate seal on the assignment so made that he has made the proper transfer on the corporate books. Equitable Securities Co. v. Johnson, 36 Colo. 377, 85 Pac. 840. (See also Isbell v. Graybill, 19 Colo. App. 508, 76 Pac. 550.)

⁸⁰ See § 3809, *infra*.

⁸¹ See § 3810, *infra*.

⁸² See § 3812, *infra*.

⁸³ Robinson v. National Bank, 95 N. Y. 637.

⁸⁴ Central Sav. Bank v. Smith, 43 Colo. 90, 95 Pac. 307.

denial of the execution of a written instrument to be verified.⁸⁵

The corporation may waive compliance with formalities in the registration of transfers, whether the formalities are prescribed by the by-laws or by the charter of the corporation,⁸⁶ and does so where it registers a transfer without a compliance therewith,⁸⁷ or bases its refusal to make a transfer on other grounds without objecting to such noncompliance.⁸⁸

⁸⁵ *Pine v. Western Nat. Bank*, 63 Kan. 462, 65 Pac. 690.

⁸⁶ *United States*. *Upton v. Burnham*, 3 Biss. 431, Fed. Cas. No. 16,798.

Connecticut. *Richmondville Mfg. Co. v. Prall*, 9 Conn. 487.

Maryland. *Weber v. Fickey*, 52 Md. 500.

New York. *Cutting v. Damerel*, 88 N. Y. 410.

Pennsylvania. *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120.

Rhode Island. *American Nat. Bank v. Oriental Mills*, 17 R. I. 551, 23 Atl. 795.

England. *Ex parte Walton*, 26 L. J. Ch. 545; *Clowes v. Brettell*, 11 M. & W. 461.

Since a provision requiring a transfer on the books of the company and a surrender of the old certificate is intended primarily for the benefit of the corporation, it may waive a strict observance of the prescribed forms and to admit the vendee of stock in the corporation to full membership without a literal compliance with such regulations. *Bank of Commerce v. Bank of Newport*, 63 Fed. 898.

Provisions in by-laws as to the form and procedure for effecting transfers are for the benefit of the corporation, so that errors or irregularities in complying with such form will not avail persons in an attempt to deny stockholder's liability. See *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280.

The corporation cannot take advantage of the fact that the transfer was

entered on the subscription list in accordance with its custom instead of upon a stock ledger, as required by the by-laws, where it keeps no such ledger. *Stewart v. Walla Walla Ptg. & Pub. Co.*, 1 Wash. 521, 20 Pac. 605.

In an action for statutory penalty for refusal to transfer stock on the books, it was held that a contention that defendant's refusal was justified in that the demand was uncertain in failing to identify stock, was untenable where the defendant's answer admitted that plaintiff presented a certificate representing stock in controversy. *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

⁸⁷ The corporation waives a provision of its by-laws requiring a surrender of the original certificate by issuing a new certificate to a bona fide transferee without a compliance therewith. *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546.

⁸⁸ If the corporation, or its officer, limits the ground of a refusal to make a transfer to a certain specified objection, such refusal cannot thereafter be justified because of technical objections relating to the formalities of the assignment, which were not disclosed at the time and could have been remedied had they been so disclosed. So where it places its refusal on the ground that the person seeking the transfer is not the real owner of the stock, it cannot thereafter justify its refusal on the ground that the assignment to him was technically defective. *Spangenberg v.*

§ 3792. — Upon whom demand for registration should be made.

In order that notice of a transfer of stock and a demand for registration may be sufficient, it must be made, of course, upon some officer or employee of the corporation who has authority, or apparent authority, in the matter of transfers of stock. Generally it is sufficient to apply to the person in charge of the office of the corporation during its usual business hours, whether he is the president, secretary, treasurer, or manager, or a mere clerk.⁸⁹ In a New York case it was said by Chancellor Walworth, speaking of a transfer of shares in a bank: "A person desiring such a transfer is not bound to hunt up

Nesbitt, 22 Cal. App. 274, 134 Pac. 343.

The secretary cannot justify his refusal to make a transfer on the ground that the demand was not made at the office of the corporation where the books were at hand, where he made no such excuse at the time when the demand was made, and it appeared that his object was to obstruct the transfer until he could secure a levy on the stock for his own private purposes. *Schwab v. Smith*, 143 Wis. 427, 128 N. W. 78.

Where in response to a letter requesting a transfer the corporate officers peremptorily refuse to permit it to be made, it is not necessary to perform the useless ceremony of appearing at the office and there demanding a transfer, although the certificate provides that it is transferable in person or attorney at the office of the company on the surrender thereof. *State v. McIver*, 2 S. C. 25.

Where the demand for the transfer is made on the street in front of the manager's office, and the manager makes no objection to the time and manner of presentation, but absolutely refuses to make the transfer requested, he thereby waives a formal presentation and request inside the four walls of his office. *Dooley v. Gladiator Consol. Gold Mines & Milling Co.*, 134 Iowa 468, 13 Ann. Cas. 297, 109 N. W. 864.

Where the corporation refuses to recognize a transferee as a stockholder on the sole ground that the certificate under which he claims is void because it is an overissue, it cannot successfully defend a suit by a subsequent transferee to compel such recognition on the ground that the certificate and transfer had not been presented for registry. *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546.

⁸⁹ *Case v. Citizens' Bank of Louisiana*, 100 U. S. 446, 25 L. Ed. 695; *Green Mount & S. L. Turnpike Co. v. Bulla*, 45 Ind. 1; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; *Dunn v. Star Fire Ins. Co.*, 19 Wkly. Dig. (N. Y.) 531; *Goodwin v. Ottawa & P. Ry. Co.*, 13 C. P. (U. C.) 254; *McMurrich v. Bond Head Harbour Co.*, 9 Q. B. (U. C.) 333.

Where the duty to make transfers is imposed on the cashier of a bank, the demand may be made upon him. *Case v. Citizens' Bank*, 100 U. S. 446, 25 L. Ed. 695.

In *Com. v. Camp*, — Pa. —, 102 Atl. 205, a request to the president over the telephone to make the transfer was held to be sufficient. It was further held that such request was necessarily made to him in his official capacity, since he could not have issued new certificates in his individual capacity.

the directors, and have a person appointed to comply with his demand. It is sufficient for him to make his demand at the bank, during ordinary business hours, upon the officers in attendance there. In the absence of proof to the contrary, it may well be presumed that the principal officer or clerk at the bank during business hours is authorized to permit transfers of stock, that being a matter of common occurrence. If the officers in attendance have no such authority, they should either refer the party to the officer who has authority or procure his attendance. It is the duty of the directors of the bank to have an officer in attendance authorized to permit transfers to be made in the way in which the charter provides."⁹⁰

Ordinarily the secretary, acting alone, may make the transfer on the books, though both he and the president must join in issuing a new certificate to the transferee.⁹¹

§ 3793. Issue of certificate to transferee, and surrender of old certificate. A transferee of shares is entitled to a certificate of stock from the corporation as evidence of his ownership of the stock, and may compel the corporation to issue the same, or recover damages for its refusal.⁹² But since a certificate is merely evidence of the ownership of stock, and is not necessary to constitute one a stockholder,⁹³ issue of a new certificate is not necessary to a valid and complete transfer of stock, unless it is expressly required by statute.⁹⁴ The corporation, as we shall hereafter see, may require that the certificate of stock shall be surrendered, before allowing a transfer on its books, and issuing a new certificate.⁹⁵ But provisions requiring the production and surrender of the original certificate at the time of the transfer are for the benefit of the corporation,⁹⁶ and may be waived

⁹⁰ *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317.

⁹¹ Hence it is no excuse for a refusal of the secretary to make the transfer that the president is absent and that it is necessary for him to sign the new certificate. *Schwab v. Smith*, 143 Wis. 427, 128 N. W. 78.

⁹² See § 3816 et seq., *infra*.

⁹³ See §§ 3424-3427, *supra*.

⁹⁴ *United States. Cecil Nat. Bank of Port Deposit v. Watsonstown Bank*, 105 U. S. 217, 26 L. Ed. 1039; *Hawley v. Upton*, 102 U. S. 314, 26 L. Ed. 179.

Illinois. Colton v. Williams, 65 Ill. App. 466.

Iowa. First Nat. Bank of Davenport v. Gifford, 47 Iowa 575.

Maine. Agricultural Bank v. Burr, 24 Me. 256.

Missouri. White v. Salisbury, 33 Mo. 150; *Chouteau Spring Co. v. Harris*, 20 Mo. 382.

New York. New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30.

⁹⁵ See § 3829, *infra*.

⁹⁶ *First Nat. Bank v. Gifford*, 47 Iowa 575; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Bank of*

by it,⁹⁷ at its peril,⁹⁸ and if it does not insist, a surrender of the certificate is not necessary. Where the purchaser of stock does not insist, as a condition precedent, that the certificate be surrendered to the company for cancellation, and a transfer of the stock is made on the books of the company, the transfer passes the title to the stock without a surrender of the certificate.⁹⁹ And of course no such surrender is necessary where no certificates have been issued.¹

XXII. EFFECT OF UNREGISTERED TRANSFERS

§ 3794. Effect of unregistered transfers as between the parties—

General rule. Even where the charter or by-laws of a corporation, or the general law under which it is organized, provides that its stock shall be transferable only on the books, as between the parties,²

Kentucky v. Schuykill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

⁹⁷First Nat. Bank v. Gifford, 47 Iowa 575; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30.

The corporation waives the provision of its by-laws that transfers shall be made only upon surrender and cancellation of the old certificates by issuing and delivering a stock certificate to a bona fide transferee without such surrender and cancellation, the transferee having made a loan in reliance thereon. Richardson v. Longmont Supply Ditch Co., 19 Colo. App. 483, 76 Pac. 546.

⁹⁸See § 3832, *infra*.

⁹⁹Boatmen's Insurance & Trust Co. v. Able, 48 Mo. 136.

Where a man gave his second wife stock inherited from his first wife, who had the same name, and it was agreed between him and the corporation that it should stand on the books as hers without any transfer or issue of a new certificate, it was held that the title passed, although he retained possession of the original certificate, as a delivery of the certificate was not necessary to pass the title. Colton v. Williams, 65 Ill. App. 466.

"The nonproduction and surrender

of the certificate at the time of the transfer is not fatal to the title of the transferee." New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, quoted with approval in First Nat. Bank v. Gifford, 47 Iowa 575.

Where stock was sold and the certificate therefor was indorsed and delivered to the vendee, who notified the corporation of the sale, and the corporation noted the fact of the transfer on its stock certificate book, it was held that the vendee of the stock thereby became a member of the corporation, within the meaning of a statute giving the corporation a lien on the stock of its members for debts due from them to it, although the old certificate was never surrendered by the vendee and a new one issued to it, and though the certificate provided that it was transferable only on the books of the company on surrender of the certificate properly indorsed. Bank of Commerce v. Bank of Newport, 63 Fed. 898.

¹First Nat. Bank v. Gifford, 47 Iowa 575; Rasmussen v. Sevier Valley Canal Co., 40 Utah 371, 121 Pac. 741.

²United States. Johnston v. Lafflin, 103 U. S. 800, 26 L. Ed. 532, *aff'd*

an unregistered transfer is valid.

5 Dill. 65, Fed. Cas. No. 7,393; West v. Empire Life Ins. Co., 242 Fed. 605; Masury v. Arkansas Nat. Bank, 93 Fed. 603, rev'g 87 Fed. 381; Hubbell v. Houghton, 86 Fed. 547; Horton v. Mercer, 71 Fed. 153; Bank of Commerce v. Bank of Newport, 63 Fed. 898.

Alabama. Thompson v. Hudgins, 116 Ala. 93, 22 So. 632; Campbell v. Woodstock Iron Co., 83 Ala. 351, 3 So. 369; Duke v. Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472.

Arkansas. Loeb v. German Nat. Bank, 88 Ark. 108, 113 S. W. 1017.

California. Northwestern Portland Cement Co. v. Atlantic Portland Cement Co., 163 Pac. 47; Spreckels v. Nevada Bank of San Francisco, 113 Cal. 272, 33 L. R. A. 459, 54 Am. St. Rep. 348, 45 Pac. 329.

Colorado. Shires v. Allen, 47 Colo. 440, 107 Pac. 1072; Thompson v. Rowe, 27 Colo. App. 361, 149 Pac. 849; Richardson v. Longmont Supply Ditch Co., 19 Colo. App. 483, 76 Pac. 546.

Georgia. Bank of Culloden v. Bank of Forsyth, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226; Bates-Farley Sav. Bank v. Dismukes, 107 Ga. 212, 33 S. E. 175; Ross v. Southwestern R. Co., 53 Ga. 514; Southwestern R. Co. v. Thomason, 40 Ga. 408.

Illinois. McCarthy v. Crawford, 238 Ill. 38, 86 N. E. 750; Otis v. Gardner, 105 Ill. 436; Kellogg v. Stockwell, 75 Ill. 68.

Indiana. Boone v. Van Gorder, 164 Ind. 499, 108 Am. St. Rep. 314, 74 N. E. 4.

Iowa. Smith v. Meeker, 153 Iowa 655, 133 N. W. 1058; Larimer v. Beardsley, 130 Iowa 706, 107 N. W. 935.

Kansas. Atchison Sav. Bank v. Potter, 100 Kan. 407, 164 Pac. 149; Abilene State Bank v. Strachan, 89

The entry of the transfer on the Kan. 577, 46 L. R. A. (N. S.) 668, 132 Pac. 200; Star Mut. Tel. Co. v. Longfellow, 85 Kan. 353, 116 Pac. 506; Barnhouse v. Dewey, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081; Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273.

Kentucky. Husband v. Linehan, 168 Ky. 304, Ann. Cas. 1917 D 954, 181 S. W. 1089.

Louisiana. State v. New Orleans Cotton Exchange, 114 La. 324, 38 So. 204.

Maryland. Merchants' Nat. Bank v. Williams, 110 Md. 334, 72 Atl. 1114; Kerr v. Urie, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493, 37 Atl. 789; Bloede Co. v. Bloede, 84 Md. 129, 33 L. R. A. 107, 57 Am. St. Rep. 373, 34 Atl. 1127.

Massachusetts. Herbert v. Simson, 220 Mass. 480, L. R. A. 1915 D 733, 108 N. E. 65; Dickinson v. Central Nat. Bank, 129 Mass. 279, 37 Am. Rep. 351.

Michigan. Penfold v. Charlevoix Sav. Bank, 140 Mich. 126, 103 N. W. 572; Foster v. Row, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

Minnesota. Lund v. Wheaton Roller Mill Co., 50 Minn. 36, 36 Am. St. Rep. 623, 52 N. W. 268; Nicollet Nat. Bank v. City Bank, 38 Minn. 85, 8 Am. St. Rep. 643, 35 N. W. 577; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261, 276.

Missouri. Wilson v. St. Louis & S. F. Ry. Co., 108 Mo. 588, 32 Am. St. Rep. 624, 18 S. W. 286; Carthage Nat. Bank v. Poole, 160 Mo. App. 133, 141 S. W. 729; Dain Mfg. Co. v. Trumbull Seed Co., 95 Mo. App. 144, 68 S. W. 951; Butler v. Montgomery Grain Co., 85 Mo. App. 50; St. Louis Stoneware Co. v. Partridge, 8 Mo. App. 580.

Montana. Leyson v. Davis, 17 Mont. 220, 31 L. R. A. 429, 42 Pac.

books is not necessary for the translation of the title,³ or, in other
 775, writ of error dismissed 170 U. S.
 36, 42 L. Ed. 939.

New Hampshire. Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

Ohio. Davis Laundry & Cleaning Co. v. Whitmore, 92 Ohio St. 44, Ann. Cas. 1917 C 988, 110 N. E. 518.

Oregon. Gray v. Fankhauser, 58 Ore. 423, 115 Pac. 146.

Pennsylvania. Chambersburg Ins. Co. v. Smith, 11 Pa. St. 120.

Tennessee. Parker v. Bethel Hotel Co., 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209; Smith v. Railroad, 91 Tenn. 221, 18 S. W. 546.

Texas. Condit v. Galveston City Co., — Tex. Civ. App. —, 186 S. W. 395; Blooming Grove Cotton-Oil Co. v. First Nat. Bank of Blooming Grove (Tex. Civ. App.), 56 S. W. 552.

Utah. Brown v. Wright, 48 Utah 633, 161 Pac. 448; Rasmussen v. Sevier Valley Canal Co., 40 Utah 371, 121 Pac. 741.

Washington. See Sather v. Home Security Sav. Bank, 49 Wash. 672, 96 Pac. 229.

Wisconsin. In re Klaus, 67 Wis. 401, 29 N. W. 582.

This is held true as to transfer of national bank stock. Larimer v. Beardsley, 130 Iowa 706, 107 N. W. 935.

This is true though the statute provides that "no transfer of stock shall be valid for any purpose whatever except to render the person to whom it shall be transferred, liable for the debts of the company according to the provisions of this act, unless it shall have been entered therejn, as required by this section, within sixty days from the date of such transfer, by an entry showing to and from whom transferred." Shires v. Allen, 47 Colo. 440, 107 Pac. 1072; O'Neil v.

Wolecott Min. Co., 174 Fed. 527, 27 L. R. A. (N. S.) 200.

A tender or offer to deliver stock certificates properly indorsed by the owner, either in blank or to the vendee, is a sufficient compliance on the part of the vendor with a contract for the sale of stock. A transfer on the corporate books is not necessary. Davis Laundry & Cleaning Co. v. Whitmore, 92 Ohio St. 44, Ann. Cas. 1917 C 988, 110 N. E. 518.

"In such cases it is a matter of no concern to the assignor whether the assignee ever avails of the power of attorney embodied in the assignment to have the stock transferred to him on the books of the corporation, so that he may become the legal as well as the equitable owner. Equity will certainly give the assignor no relief against the bona fide sale of stock in that way, although the assignee may never choose to have the stock transferred to him under the by-laws of the corporation. * * * It is apprehended that, as between the assignor and assignee, it would be a binding contract against which the assignor would not be entitled to relief, any more than he would be in case of the sale of anything else made assignable by law, although imperfectly done." Otis v. Gardner, 105 Ill. 436.

See also the cases cited in the following notes and in § 3795, *infra*.

³ Johnston v. Laffin, 103 U. S. 800, 26 L. Ed. 532, aff'g 5 Dill. 65, Fed. Cas. No. 7,393; Hubbell v. Houghton, 86 Fed. 547; Merchants' Nat. Bank v. Williams, 110 Md. 334, 72 Atl. 1114; Bloede Co. v. Bloede, 84 Md. 129, 33 L. R. A. 107, 57 Am. St. Rep. 373, 34 Atl. 1127.

The law does not make it a necessary requisite to title that the stock be transferred on the books. Dain Mfg. Co. v. Trumbull Seed Co., 95 Mo. App. 144, 68 S. W. 951.

words, as between the parties, the title passes by contract and not by the record.⁴ The transferrer cannot impeach the transferee's title under such circumstances,⁵ and is estopped from claiming any further title to the stock as against subsequent bona fide purchasers for value,⁶ especially where he has clothed the assignee with the apparent title to the stock or apparent authority to transfer the same.⁷ "It seems too clear for argument," said the New Hampshire court, "that the ownership of the shares passes from the seller to the buyer by force of the contract of sale, and not by operation of law; and if that be so, the buyer's title, so far as the seller is concerned, attaches the moment this contract is fully consummated between them. This kind of property, being an intangible right, somewhat akin to the right to receive money due upon a bond or other chose in action, is incapable of actual manual delivery. All the seller can do, that corresponds at all to the delivery of personal chattels in other cases of sale, is, to hand over to the buyer his certificate, with a sufficient assignment by deed or otherwise to entitle him to a transfer of the shares on the books of the company. When the seller has done this, his power and duty in the matter are ended, and it is at the option of the purchaser whether the transfer shall be recorded or not. If the purchaser omits to have the record made, he can claim no rights as a member of the corporation; and he also incurs the further risk of having his title defeated by a subsequent attachment or sale to a bona fide purchaser. It is difficult to see any substantial difference between the position of this plaintiff after the sale and assignment of the shares to him by the owner and before a transfer was made on the books, and that of the grantee in a deed of land before his deed is recorded. In both cases the seller has parted with his title, and, as to him, the buyer has acquired it. It is only third persons in either case whose rights or interests are affected by the omission. In the case of an unrecorded deed, the grantor continues to be clothed with evidence of ownership after the conveyance, very similar to that which remains with the seller of shares before the transfer has been entered on the books. The record shows that he is still the owner of the land, when in fact

"Such an entry is not for the purpose of transferring the beneficial ownership of the stock in the absence of a statute so requiring." *Eubank v. Bryan County State Bank of Caddo, Oklahoma*, 216 Fed. 833.

⁴ *Scripture v. Francestown Soapstone Co.*, 50 N. H. 571.

⁵ *Richardson v. Longmont Supply*

Ditch Co., 19 Colo. App. 483, 76 Pac. 546; *Bates-Farley Sav. Bank v. Disimukes*, 107 Ga. 212, 33 S. E. 175.

⁶ *Masury v. Arkansas Nat. Bank*, 93 Fed. 603, rev'g 87 Fed. 381; *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546.

⁷ See § 3853, *infra*.

he is not; and, so far as any interest a creditor can have in the matter is concerned, the same is precisely true in the case of shares in a corporation sold but not transferred on the books. The statutes which we hold require the transfer of shares to be entered on the books of the corporation kept for that purpose, are certainly no more explicit and absolute than that which requires the recording of deeds. The object of the law, so far as creditors are concerned, is the same in both cases. As between the parties the title passes by contract and not by the record in both cases alike."⁸

An unregistered transfer is also good as against all persons standing in the shoes of the transferor, as, for example, his executor or administrator,⁹ or his heirs,¹⁰ or one to whom he subsequently makes an assignment for the benefit of his creditors, or an assignee in bankruptcy or insolvency proceedings subsequently appointed.¹¹

Statutes in some states expressly provide that except as against the claims of the corporation, a transfer of stock does not require a transfer on the books of the company,¹² or that stock may be transferred as between the parties by simple indorsement and delivery.¹³

⁸ *Scripture v. Francetown Soapstone Co.*, 50 N. H. 571, quoted in part with approval in *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546; *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971; *State Banking & Trust Co. v. Taylor*, 25 S. D. 577, 29 L. R. A. (N. S.) 523, 127 N. W. 590; *Lipsecomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

⁹ *Shires v. Allen*, 47 Colo. 440, 107 Pac. 1072.

¹⁰ Even though an unregistered transfer conveys merely an equitable title, the heirs of the transferor cannot maintain a suit against the corporation to compel it to recognize them as stockholders. *Condit v. Galveston City Co.*, — Tex. Civ. App. —, 186 S. W. 395.

¹¹ *Blouin v. Liquidators of Hart & Hebert*, 30 La. Ann. 714; *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 515; *Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351.

In California registration is not necessary to a valid transfer of the title as against the creditors of the transferor. Hence an unregistered transfer by way of gift is good as against the transferor's trustee in bankruptcy. *Stowe v. Harvey*, 241 U. S. 199, 60 L. Ed. 953, aff'g 219 Fed. 17.

¹² *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806; *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226; *Buena Vista Loan & Savings Bank v. Grier*, 114 Ga. 398, 40 S. E. 284; *Bates-Farley Sav. Bank v. Dismukes*, 107 Ga. 212, 33 S. E. 175.

¹³ *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, — Cal. —, 163 Pac. 47; *National Bank of the Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676; *Ash-ton v. Zeila Min. Co.*, 134 Cal. 408, 66 Pac. 494; *McLean v. Charles Wright Medicine Co.*, 96 Mich. 479, 56 N. W. 68; *Litchfield v. Henson Oil Co.*, — Okla. —, 157 Pac. 137.

§ 3795. — Nature of transferee's title. In most jurisdictions it is held that registration, or, at the least, a demand of registration and deposit of the transfer for such purpose, is absolutely essential to pass the legal title to the stock, even as between the parties. But it is well settled, even in these jurisdictions, that an unregistered transfer gives the transferee a perfect equitable title as between him and the transferrer, or any person standing in the shoes of the transferrer.¹⁴ The

See also § 3784, *supra*.

Where the statute provides that shares of stock may be transferred by indorsement and delivery, but that such transfer is not valid except as between the parties until it is entered upon the corporate books, the transferee under an unregistered transfer has a complete title as against everyone but the corporation and those who have a superior right to have the corporation make a transfer to them. *First Nat. Bank of Sulphur Springs v. Stribling*, 16 Okla. 41, 86 Pac. 512.

14 United States. *Leyson v. Davis*, 170 U. S. 36, 42 L. Ed. 939, dismissing writ of error to review 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775; *Black v. Zacharie*, 3 How. 483, 11 L. Ed. 690; *Union Bank of Georgetown v. Laird*, 2 Wheat. 390, 4 L. Ed. 269; *Eubank v. Bryan County State Bank of Caddo, Oklahoma*, 216 Fed. 833; *Masury v. Arkansas Nat. Bank*, 93 Fed. 603, rev'g 87 Fed. 381; *Hubbard v. Manhattan Trust Co.*, 87 Fed. 51; *Hotchkiss & Upson Co. v. Union Nat. Bank*, 68 Fed. 76; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369; *Brown v. Adams*, 5 Biss. 181, Fed. Cas. No. 1,986; *Scott v. Pequonnock Nat. Bank*, 21 Blatchf. 203, 15 Fed. 494; *Becher v. Wells Flouring-Mill Co.*, 1 McCrary 62, 1 Fed. 276.

Colorado. *Conway v. John*, 14 Colo. 30, 23 Pac. 170; *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546; *First Nat. Bank of Longmont v. Hastings*, 7 Colo. App. 129, 42 Pac. 691.

Connecticut. *De Nunzio v. De*

Nunzio, 90 Conn. 342, 97 Atl. 323; *Gray v. Graham*, 87 Conn. 601, 49 L. R. A. (N. S.) 1159, 89 Atl. 262; *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905; *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663; *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161; *Vansands v. Middlesex County Bank*, 26 Conn. 144.

Delaware. *Allen v. Stewart*, 7 Del. Ch. 287, 44 Atl. 786.

District of Columbia. *National Safe Deposit, Savings & Trust Co. v. Hibbs*, 32 App. Cas. 459; *Scanlan v. Snow*, 2 App. Cas. 137.

Georgia. *People's Bank of Talbotton v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269; *Bates-Farley Sav. Bank v. Dismukes*, 107 Ga. 212, 33 S. E. 175; *Guarantee Co. of North America v. East Rome Town Co.*, 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503.

Illinois. *People v. Lihme*, 269 Ill. 351, Ann. Cas. 1916 E 959, 109 N. E. 1051; *Otis v. Gardner*, 105 Ill. 436; *People's Bank of Bloomington v. Gridley*, 91 Ill. 457; *Kellogg v. Stockwell*, 75 Ill. 68.

Indiana. *Boone v. Van Gorder*, 164 Ind. 499, 108 Am. St. Rep. 314, 74 N. E. 4; *Burnsville Turnpike Co. v. State*, 119 Ind. 382, 3 L. R. A. 265, 20 N. E. 421; *State v. First Nat. Bank*, 89 Ind. 302; *Bruce v. Smith*, 44 Ind. 1; *Hill v. Kerstetter*, 43 Ind. App. 1, 86 N. E. 858; *Coleman v. Spencer*, 5 Blackf. 197.

Iowa. *Ft. Madison Lumber Co. v. Batavian Bank*, 71 Iowa 270, 60 Am. Rep. 789, 32 N. W. 336; *Farmers' &*

transferrer "is still the legal owner of the shares, since they stand in his name on the books of the corporation. As in the case of any other non-negotiable chose in action, this legal title can only pass by the recognition by the debtor of the transferee, i. e. by novation. The beneficial or equitable title, however, * * * may be assigned without novation, and will be enforced regardless of the requirement of registration on the books of the corporation. Such requirement is

Merchants' Bank v. Wasson, 48 Iowa 336, 30 Am. Rep. 398.

Kansas. *Faulkner v. Bank of Topeka*, 77 Kan. 385, 94 Pac. 153; *Plumb v. Bank of Enterprise*, 48 Kan. 484, 29 Pac. 699; *Topeka Mfg. Co. v. Hale*, 39 Kan. 23, 17 Pac. 601.

Maryland. *Merchants' Nat. Bank v. Williams*, 110 Md. 334, 72 Atl. 1114; *Kerr v. Urie*, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493, 37 Atl. 789; *Bloede Co. v. Bloede*, 84 Md. 129, 33 L. R. A. 107, 57 Am. St. Rep. 373, 34 Atl. 1127; *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032; *Noble v. Turner*, 69 Md. 519, 16 Atl. 124; *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336, 5 Atl. 534; *Baltimore Retort & Fire Brick Co. v. Mali*, 65 Md. 93, 57 Am. Rep. 304, 3 Atl. 286; *Baltimore City Passenger Ry. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402.

Massachusetts. *Baker v. Davie*, 211 Mass. 429, 37 L. R. A. (N. S.) 944, 97 N. E. 1094; *Fitchburg Sav. Bank v. Torrey*, 134 Mass. 239; *Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351; *Brown v. Smith*, 122 Mass. 589; *Fisher v. Essex Bank*, 5 Gray 373.

Minnesota. *Prince Inv. Co. v. St. Paul & S. C. Land Co.*, 68 Minn. 121, 70 N. W. 1079; *Nicollet Nat Bank v. City Bank*, 38 Minn. 85, 8 Am. St. Rep. 643, 35 N. W. 577.

Montana. *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775, writ of error dismissed 170 U. S. 36, 42 L. Ed. 939.

Nevada. *State v. Pettineli*, 10 Nev. 141; *Bereich v. Mayre*, 9 Nev. 312.

North Dakota. *In re Argus Printing Co.*, 1 N. D. 435, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

Ohio. *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637; *Haldeman v. Hillsborough & C. Ry.*, 2 Handy 101, 12 Ohio Dec. 351.

Pennsylvania. *Telford & F. Turnpike Co. v. Gerhab*, 13 Atl. 90; *Com. v. Watmough*, 6 Whart. 117.

Rhode Island. *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535; *Lippitt v. American Wood Paper Co.*, 15 R. I. 141, 2 Am. St. Rep. 886, 23 Atl. 111.

Texas. *Tomblor v. Palestine Ice Co.*, 17 Tex. Civ. App. 596, 43 S. W. 896. See also *Condit v. Galveston City Co.*, -- Tex. Civ. App. --, 186 S. W. 395. And see *Seeligson & Co. v. Brown*, 61 Tex. 114; *Strange v. Houston & T. C. R. Co.*, 53 Tex. 162, holding that he has the equitable, if not the legal, title.

Utah. See *Rasmussen v. Sevier Valley Canal Co.*, 40 Utah 371, 121 Pac. 741.

Vermont. *Cheever v. Meyer*, 52 Vt. 66; *Sabin v. Bank of Woodstock*, 21 Vt. 353.

Wisconsin. *In re Murphy*, 51 Wis. 519, 8 N. W. 419.

"A completed legal transfer of stock requires (1) an assignment and delivery of the certificate to the transferee; (2) a delivery of the stock to the corporation issuing it, a notation upon the books of the corporation of the transfer, and a delivery to the transferee of a new certificate of stock in place of the old." *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323.

solely for the benefit of the corporation and has nothing to do with the transfer of the equitable title. The transfer on the books is in reality nothing but a novation.”¹⁵

In some jurisdictions, however, it is held that an unregistered transfer of shares passes the legal title, and not merely an equitable title, as between the transferrer and transferee, although, as against the corporation and bona fide purchasers, it passes an equitable title only.¹⁶

“The equitable title to stock may be vested in the transferee upon delivery to and acceptance by him of the certificate of stock, with intent to transfer it to him, and with or without a power to transfer.” *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323.

“Whatever equitable rights may be derived from a sale of shares, accompanied by a delivery of the stock certificate with a power of attorney for their transfer, until that transfer is actually made, the legal title, and legal rights and liabilities of the stockholder of record, remain unchanged.” *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905.

“Even in those jurisdictions in which the statute declares that the stocks shall be transferable only on the books of the corporation it is held that an unregistered transfer or assignment gives the purchaser a perfect equitable title as between him and the assignor and any person claiming under the latter.” *Lipsecomb’s Adm’r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392, quoted in *Husband v. Linehan*, 168 Ky. 304, Ann. Cas. 1917 D 954, 181 S. W. 1089, on the question as to the law of West Virginia.

As against everybody but the corporation itself, and those who have a superior right to have the corporation make the transfer to them, the transferee is the real owner of the stock and is entitled to sue at law for its possession or for damages for its conversion. *Merchants’ Nat. Bank v. Williams*, 110 Md. 334, 72 Atl. 1114.

Although the vendor of stock is still the legal owner, where there has been no surrender of the certificate and transfer on the books of the company, he is not the equitable owner, and can have no standing in a court of equity to enforce equitable rights appurtenant only to the beneficial ownership of stock. *Scanlan v. Snow*, 2 App. Cas. (D. C.) 137.

¹⁵ *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

¹⁶ *United States. Hubbard v. Bank of United States*, 5 Hunt. Mer. Mag. 75, Fed. Cas. No. 6,815.

Alabama. *Johnson v. Hume*, 138 Ala. 564, 36 So. 421; *Winter v. Montgomery Gas-Light Co.*, 89 Ala. 544, 7 So. 773; *Campbell v. Woodstock Iron Co.*, 83 Ala. 351, 3 So. 369; *Planters’ & Merchants’ Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585, apparently holds to the contrary, but the question in that case was as to the rights of the transferee as against the corporation; *Duke v. Cahawba Nav. Co.*, 10 Ala. 82, 44 Am. Dec. 472.

California. Apparently this is the rule in California:

In *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, 163 Pac. 47, the court says: “Nor is it correct to say that a legal title or right is not vested under a sale or pledge of stock by a delivery of a certificate duly indorsed without entry in the corporate books.” The court then quotes the provision of the code to the effect that shares of stock may be transferred by indorsement and delivery of the certificate, but that such

§ 3796. — Rights and liabilities as between registered and actual owner—In general. Until the stock is transferred on the corporate

transfer is not valid except as to the parties thereto until the same is entered upon the books of the corporation, and says: "The effect of this provision * * * is analogous to that of the statutes with reference to the recording of instruments affecting real property. The delivery of the indorsed certificate passes title, but such title cannot be asserted against purchasers or incumbrancers who have no notice of the transfer." See also *Spreckels v. Nevada Bank of San Francisco*, 113 Cal. 272, 33 L. R. A. 459, 54 Am. St. Rep. 348, 45 Pac. 329; *Parrott v. Byers*, 40 Cal. 614; *People v. Elmore*, 35 Cal. 653. In *Ashton v. Zeila Min. Co.*, 134 Cal. 408, 66 Pac. 494, where it was held that executors had a right to recover dividends on stock which had been transferred on the books pursuant to a decree of distribution which was subsequently reversed, the court said: "In reaching this conclusion we have not thought it necessary to consider the supposed distinction between the legal and the equitable title, or to determine whether the title of the executors is the one or the other. The distinction belongs appropriately to the law of real estate; and though it has been extended to personalty, the application with regard thereto has been less extensive, and the distinction itself is less significant. For, in many cases,—as, for example, in the case of money received in trust or for the use of another,—courts of law recognize the equitable as the legal title; and even where the distinction obtains, the equitable owner is regarded as the true owner by courts of equity. Hence, in this state, where the courts exercise both jurisdictions, the question as to the nature of the title sued upon is generally immaterial; or, rather, it is

material only to the question of the nature of the action, whether legal or equitable, and to the question of parties." As against the corporation the assignee takes a mere equity. *Jennings v. Bank of California*, 79 Cal. 323, 5 L. R. A. 233, 12 Am. St. Rep. 145, 21 Pac. 852.

Kentucky. *First Nat. Bank of Lexington v. Bowman*, 168 Ky. 433, 182 S. W. 195; *Thurber v. Crump*, 86 Ky. 408, 6 S. W. 145. In *Bank of America v. McNeil*, 10 Bush 54, it is said that a stockholder cannot pass the complete legal title to his stock except by a transfer entered upon the books of the corporation, but the question here was as to the validity of the transfer as against the corporation.

Michigan. *McLean v. Charles Wright Medicine Co.*, 96 Mich. 479, 56 N. W. 68; *Mandelbaum v. North American Min. Co.*, 4 Mich. 465.

Mississippi. *Timberlake v. Shippers' Compress Co.*, 72 Miss. 323, 16 So. 530.

Missouri. *Butler v. Montgomery Grain Co.*, 85 Mo. App. 50. See also *Wilson v. St. Louis & S. F. Ry. Co.*, 108 Mo. 588, 32 Am. St. Rep. 624, 18 S. W. 286.

New Hampshire. *Meredith Village Sav. Bank v. Marshall*, 68 N. H. 417, 44 Atl. 526; *Buttrick v. Nashua & L. R. R.*, 62 N. H. 413, 13 Am. St. Rep. 578; *Scripture v. Francetown Soapstone Co.*, 50 N. H. 571.

New Jersey. *Delaware & A. R. Co. v. Irick*, 23 N. J. L. 321; *O'Connor v. International Silver Co.*, 68 N. J. Eq. 67, 59 Atl. 321, aff'd 68 N. J. Eq. 680, 62 Atl. 408; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24. But see *Lockward v. Evans*, — N. J. Eq. —, 102 Atl. 19.

New York. *Travis v. Knox Terpezone Co.*, 215 N. Y. 259, L. R. A. 1916

books, the transferrer remains the nominal owner of it, and may be treated as the owner by the corporation¹⁷ and its creditors.¹⁸ But until such transfer is made he is to be regarded as the trustee of the stock for the benefit of his transferee.¹⁹

A 542, Ann. Cas. 1917 A 387, 109 N. E. 250, aff'g 165 App. Div. 156, 150 N. Y. Supp. 621; Knox v. Eden Musee American Co., 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; Chemical Nat. Bank of New York v. Colwell, 132 N. Y. 250, 30 N. E. 644; Robinson v. National Bank, 95 N. Y. 637; Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Johnson v. Underhill, 52 N. Y. 203; Isham v. Buckingham, 49 N. Y. 216; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Leitch v. Wells, 48 N. Y. 585; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 80; Callanan v. Edwards, 32 N. Y. 483; Union Bank of Brooklyn v. United States Exch. Bank, 143 App. Div. 128, 127 N. Y. Supp. 661; Weller v. J. B. Pace Tobacco Co., 2 N. Y. Supp. 292; Bank of Utica v. Smalley & Barnard, 2 Cow. 770, 14 Am. Dec. 526; De Comeau v. Guild Farm Oil Co., 3 Daly 218; Smith v. American Coal Co., 7 Lans. 317; Commercial Bank v. Kortright, 22 Wend. 348, 34 Am. Dec. 317.

North Carolina. Havens v. Bank of Tarboro, 132 N. C. 214, 95 Am. St. Rep. 627, 43 S. E. 639.

Oregon. Gray v. Fankhauser, 58 Ore. 423, 115 Pac. 146.

South Carolina. Maxwell v. Foster, 67 S. C. 377, 45 S. E. 927.

Tennessee. Parker v. Bethel Hotel Co., 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209; Smith v. Railroad, 91 Tenn. 221, 18 S. W. 546.

"Where there is no statute expressly or impliedly forbidding a sale of stock without registration, it is gener-

ally, if not universally, held that the purchaser takes the legal title without a transfer of the stock on the books." Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392, quoted in Husband v. Linehan, 168 Ky. 304, Ann. Cas. 1917 D 954, 181 S. W. 1089, on the question as to the law of West Virginia.

"The transfer of the stock, without the transfer being entered upon the books of the company, limited the passage of the legal title strictly to the vendor and vendee as between the vendee and the company and a subsequent purchaser for value, without notice of the prior purchase at the time he had his transfer recorded on the books of the company; but as between such purchaser and the creditors of the stockholder, the purchaser acquires a perfect legal title." Thurber v. Crump, 86 Ky. 408, 6 S. W. 145, quoted with approval in First Nat. Bank of Lexington v. Bowman, 168 Ky. 433, 182 S. W. 195.

¹⁷ See § 3798, *infra*.

¹⁸ See § 3610, *infra*.

¹⁹ *Signa Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194; *Locke v. Farmers' Loan & Trust Co.*, 140 N. Y. 135, 35 N. E. 578; *Johnson v. Underhill*, 52 N. Y. 203; *Mahaney v. Walsh*, 16 N. Y. App. Div. 601, 44 N. Y. Supp. 969; *United States v. Vaughan*, 3 Binn. (Pa.) 394, 5 Am. Dec. 375. See also *Locke v. Farmers' Loan & Trust Co.*, 140 N. Y. 135, 35 N. E. 578.

It has been said that relation between the nominal or registered owner and the actual owner of stock which has been transferred with the transfer indorsed on the certificates in blank

Even prior to the transfer on the books, the transferee is entitled, as against the transferor, to all the benefits attached to or growing out of the shares, and is responsible for all the burdens and liabilities growing out of their ownership.²⁰

This trust relation applies to each actual owner of the stock so long, and only so long, as he remains such owner, and ceases as soon as he parts with the stock.²¹

Either the transferor²² or the transferee²³ may request and compel a transfer on the books. According to the weight of authority, it is as much the right and duty of the transferor to procure the proper transfer to be made as it is the right and duty of the transferee.²⁴ And where this rule obtains, it is held that the purchaser of certificates of stock indorsed in blank owes no special duty to the vendor to see that it is registered in his name,²⁵ or in the name of his

is one solely of trust, implied by law, whereby the nominal owner is the trustee and the actual owner is the cestui que trust. *Richards v. Robin*, 175 N. Y. App. Div. 296, 162 N. Y. Supp. 12, 86 N. Y. Misc. 528, 148 N. Y. Supp. 822.

In states where an unregistered transfer passes the equitable title only (see § 3795, *supra*), the transferor holds the legal title in trust for the benefit of the transferee. *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663; *Kellogg v. Stockwell*, 75 Ill. 68.

²⁰ See § 3797, *infra*.

²¹ *Richards v. Robin*, 175 N. Y. App. Div. 296, 162 N. Y. Supp. 12, 86 N. Y. Misc. 528, 148 N. Y. Supp. 822.

That after he parts with the stock he is no longer under any obligation to indemnify the nominal owner against calls or assessments, see § 3797, *infra*.

²² *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532, aff'g 5 Dill. 65, Fed. Cas. No. 7,393; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384.

The purchase is in itself authority to the vendor to make the transfer. *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Johnson v. Laffin*, 5 Dill. 65, Fed. Cas. No. 7,393, aff'd 103

U. S. 800, 26 L. Ed. 532; *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721.

²³ *Johnson v. Laffin*, 103 U. S. 800, 26 L. Ed. 532, aff'g 5 Dill. 65, Fed. Cas. No. 7,393.

In *Sather v. Home Security Sav. Bank*, 49 Wash. 672, 96 Pac. 229, it was held that where the owner of stock authorized a bank with which it had been deposited to turn it over to a purchaser as soon as the latter paid the purchase price, the purchaser could not contend that the purchase was never consummated because the bank did not procure a transfer of the stock to him on the books.

²⁴ *Richards v. Robin*, 175 N. Y. App. Div. 296, 162 N. Y. Supp. 12, 86 N. Y. Misc. 528, 148 N. Y. Supp. 822; *Lockwood v. United States Steel Corporation*, 153 N. Y. App. Div. 655, 138 N. Y. Supp. 725, rev'd on other grounds 209 N. Y. 375, L. R. A. 1915 C 471, 103 N. E. 697.

It is the vendor's duty to make the transfer to the vendee on the books. *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384.

²⁵ *Richards v. Robin*, 175 N. Y. App. Div. 296, 162 N. Y. Supp. 12, 86 N. Y. Misc. 528, 148 N. Y. Supp. 822.

subsequent vendee.²⁶ It has been held, however, that a court of equity will compel a transferee to record the transfer.²⁷

If the corporation refuses to make the transfer it can be compelled to do so at the instance of either party,²⁸ or either may maintain an action against it for damages.²⁹

If the transfer is good as between the parties, the death of the transferor before the transfer is recorded has no effect upon the property rights of the transferee,³⁰ and does not deprive him of his right to have the transfer recorded and to have a new certificate issued to him.³¹

§ 3797. — As to dividends, calls and assessments. Since an unregistered transfer is good as between the parties, whether it be regarded as passing the legal title to the shares, or merely an equitable title, as between them, the transferee, in the absence of agreement to the contrary, is entitled to all dividends declared after the transfer, even though the transfer is not registered.³² If the corporation has notice of the transfer, and afterwards pays dividends to the transferor, the transferee may hold it liable. If it does so without notice of the transfer, it incurs no liability,³³ but the transferee, of course, may recover the same from the transferor in an action for money had and received.³⁴

²⁶ *Richards v. Robin*, 175 N. Y. App. Div. 296, 162 N. Y. Supp. 12, 86 N. Y. Misc. 528, 148 N. Y. Supp. 822.

²⁷ *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Wynne v. Price*, 3 De G. & Sm. 310, 13 Jur. 295.

²⁸ *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532. See also *Lacaff v. Dutch Miller Mining & Smelting Co.*, 31 Wash. 566, 72 Pac. 112.

And see § 3817, *infra*.

²⁹ See § 3819, *infra*.

³⁰ *Rasmussen v. Sevier Valley Canal Co.*, 40 Utah 371, 121 Pac. 741.

³¹ *Culp v. Mulvane*, 66 Kan. 143, 71 Pac. 273.

³² *Indiana*. *Hill v. Kerstetter*, 43 Ind. App. 1, 86 N. E. 858.

Maryland. *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032.

Mississippi. *Timberlake v. Shippers' Compress Co.*, 72 Miss. 323, 16 So. 530.

Missouri. *Gaty v. Holliday*, 8 Mo. App. 118.

Nebraska. *Farmers' & Merchants' Nat. Bank of Galva*, Illinois v. Mosher, 63 Neb. 130, 88 N. W. 552.

New Hampshire. *Meredith Village Sav. Bank v. Marshall*, 68 N. H. 417, 44 Atl. 526.

New York. *Tepfer v. Ideal Gas & Electric Fixtures Co.*, 58 Misc. 396, 109 N. Y. Supp. 664.

Pennsylvania. *Corgan v. George F. Lee Coal Co.*, 218 Pa. 386, 120 Am. St. Rep. 891, 11 Ann. Cas. 838, 67 Atl. 655.

South Carolina. *Maxwell v. National Bank of Greenville*, 70 S. C. 532, 3 Ann. Cas. 723, 50 S. E. 195.

Tennessee. *American Nat. Bank v. Nashville Warehouse & Elevator Co.* (Tenn. Ch. App.), 36 S. W. 960.

Utah. *Barse Live-Stock Co. v. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. 630.

³³ See § 3802, *infra*.

³⁴ *Richards v. Robin*, 175 N. Y. App. Div. 296, 162 N. Y. Supp. 12; *American Nat. Bank v. Nashville Ware-*

If the transferrer is held liable to the corporation or its creditors for calls or under a statute imposing individual liability to creditors, because of the transfer being unregistered, he may maintain an action against the transferee to recover the amount paid, for as between them the liability is the transferee's.³⁵ According to the weight of authority this obligation on the part of the transferee continues only so long as he remains the owner of the stock and ceases as soon as he parts with it to a succeeding purchaser,³⁶ or, in other words, the obligation

house & Elevator Co. (Tenn. Ch. App.), 36 S. W. 960.

³⁵ **United States.** Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384.

California. People's Home Sav. Bank v. Stadtmuller, 150 Cal. 106, 88 Pac. 280.

Illinois. Kellogg v. Stockwell, 75 Ill. 68.

Kansas. See Topeka Mfg. Co. v. Hale, 39 Kan. 23, 17 Pac. 601.

Louisiana. Gordon v. Parker, 10 La. 56; Liquidator of Clinton & P. H. R. Co. v. Eason, 14 La. Ann. 816.

Maryland. Brinkley v. Hambleton, 67 Md. 169, 8 Atl. 904; Lord v. Hutzler, 64 Md. 534, 3 Atl. 891.

Minnesota. Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069; Basting v. Northern Trust Co., 61 Minn. 307, 63 N. W. 721.

New York. Johnson v. Underhill, 52 N. Y. 203; Richards v. Robin, 175 App. Div. 296, 162 N. Y. Supp. 12, 86 Misc. 528, 148 N. Y. Supp. 822. See also Sigua Iron Co. v. Brown, 171 N. Y. 488, 64 N. E. 194.

Ohio. Harpold v. Stobart, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637; Brown v. Hitchcock, 36 Ohio St. 667.

Pennsylvania. Rogers v. Toland, 43 Pa. Super. Ct. 248.

England. Walker v. Bartlett, 18 C. B. 845, 2 Jur. (N. S.) 643; Wynne v. Price, 3 De G. & Sm. 310, 13 Jur. 295; Kellock v. Enthoven, L. R. 9 Q. B. 241; Bowring v. Shepherd, L. R. 6 Q. B. 309; Joseph v. Holroyd, 22 Wkly. Rep. 614.

Since the vendee of stock takes the shares subject to all the burdens and liabilities growing out of them, "the law will imply a duty, obligation, or promise from him to the vendor that those burdens and obligations shall not come upon the latter." Johnson v. Underhill, 52 N. Y. 203.

A court of equity will compel the transferee to pay all calls or assessments after the transfer. Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Wynne v. Price, 3 De G. & Sm. 310, 13 Jur. 295; Evans v. Wood, L. R. 5 Eq. 9.

It may be otherwise, of course, under a special agreement between the parties. Treadway v. Johnson, 33 Mo. App. 122.

³⁶ **Lesassier & Binder v. Kennedy**, 36 La. Ann. 539, appeal to the United States Supreme Court dismissed on the ground that no federal question was involved, 123 U. S. 521, 31 L. Ed. 262; Richards v. Robin, 175 N. Y. App. Div. 296, 162 N. Y. Supp. 12, 86 N. Y. Misc. 528, 148 N. Y. Supp. 822; Rogers v. Toland, 43 Pa. Super. Ct. 248.

The transferrer must look for reimbursement to the person who actually owns the stock when the call or assessment in question is made. Lesassier & Binder v. Kennedy, 36 La. Ann. 539, appeal dismissed 123 U. S. 521, 31 L. Ed. 262; Rogers v. Toland, 43 Pa. Super. Ct. 248.

to indemnify "has its root in the fact of ownership and ends when ownership ceases."³⁷

§ 3798. Effect of unregistered transfers as against the corporation—General rule. When there is a valid provision in the charter, general law, or by-laws of a corporation that its shares shall be transferable only on the books, a transfer must be registered, or, at the least, notice thereof given to the corporation for the purpose of registration, in the absence of a waiver or estoppel, before the transferee can acquire any rights as against the corporation other than the right to have the transfer registered, or incur any liability, and before the transferrer can be relieved from liability to the corporation. This is true in all jurisdictions, whether it is held that an unregistered transfer passes the legal title, or merely an equitable title, as between the transferrer and transferee.³⁸ In all matters relating to the internal

³⁷ *Rogers v. Toland*, 43 Pa. Super. Ct. 248.

³⁸ **United States.** *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Union Bank of Georgetown v. Laird*, 2 Wheat. 390, 4 L. Ed. 269; *Becher v. Wells Flouring-Mill Co.*, 1 McCrary 62, 1 Fed. 276.

California. *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280; *People v. Robinson*, 64 Cal. 373, 1 Pac. 156.

Connecticut. *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905; *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579.

Illinois. *Shirley Farmers' Grain & Coal Co. v. Douglas*, 130 Ill. App. 285. See also *Healy v. Smith*, 160 Ill. App. 627.

Kansas. *Star Mut. Tel. Co. v. Longfellow*, 85 Kan. 353, 116 Pac. 506.

Maine. *Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922; *Dane v. Young*, 61 Me. 160.

Montana. *Barker v. Montana Gold, Silver, Platinum & Tellurium Min. Co.*, 35 Mont. 351, 89 Pac. 66.

Nevada. *Bercich v. Marye*, 9 Nev. 312.

New Hampshire. *Westminster Nat. Bank v. New England Electrical*

Works, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

New York. *Brisbane v. Delaware, L. & W. R. Co.*, 94 N. Y. 204; *Shelling-ton v. Howland*, 53 N. Y. 371; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 80.

Oklahoma. *First Nat. Bank of Sulphur Springs v. Stribling*, 16 Okla. 41, 86 Pac. 512.

Texas. *Strange v. Houston & T. C. R. Co.*, 53 Tex. 162.

Washington. See *Eureka Mining, Smelting & Power Co. v. Lively*, 59 Wash. 550, 110 Pac. 425.

Wisconsin. *Farmers' Mercantile & Supply Co. v. Laun*, 146 Wis. 252, 131 N. W. 366.

England. *London & Brighton Ry. Co. v. Fairclough*, 2 M. & G. 674; *Midland Great Western Ry. Co. v. Gordon*, 16 M. & W. 804; *Humble v. Langston*, 7 M. & W. 517.

The person who appears on the corporate books as the stockholder is the stockholder as between himself and the corporation. *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036.

Mere ownership of the stock does not constitute the transferee a stock-

management of the corporation, it is entitled to treat those persons whose names appear on its books as shareholders,³⁹ and all transfers of stock are invalid and of no effect as against it until they have been entered on its books.⁴⁰ Until such entry there is no privity of contract existing between the transferee and the corporation which can be enforced by one against the other,⁴¹ and the transferee cannot compel the corporation to issue certificates to him until the entry is made.⁴²

It has also been held that a certificate of stock fair on its face but

holder, but a transfer of the stock to him on the books is necessary for that purpose. *Boone v. Van Gorder*, 164 Ind. 499, 108 Am. St. Rep. 314, 74 N. E. 4; *Helm v. Swiggett*, 12 Ind. 194.

³⁹ *United States*. *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036; *Giesen v. London & N. W. American Mortg. Co., Ltd.*, 102 Fed. 584.

Georgia. *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806; *People's Bank of Talbotton v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269.

Illinois. *People v. Lihme*, 269 Ill. 351, Ann. Cas. 1916 E 959, 109 N. E. 1051.

Massachusetts. *Baker v. Davie*, 211 Mass. 429, 37 L. R. A. (N. S.) 944, 97 N. E. 1094.

Pennsylvania. *Com. v. Watmough*, 6 Whart. 117.

⁴⁰ *Arkansas*. *Loeb v. German Nat. Bank*, 88 Ark. 108, 113 S. W. 1017.

Colorado. *Central Sav. Bank v. Smith*, 43 Colo. 90, 95 Pac. 307.

Kansas. *Faulkner v. Bank of Topeka*, 77 Kan. 385, 94 Pac. 153; *Culp v. Mulvane*, 66 Kan. 143, 71 Pac. 273.

Minnesota. *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 21 L. R. A. 174, 55 N. W. 547.

Washington. *Whitfield v. Nonparel Consol. Copper Co.*, 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078; *Lacaff v. Dutch Miller Mining & Smelting Co.*, 31 Wash. 566, 72 Pac. 112.

The effect of a statute providing that no transfer shall be valid except as between the parties until entered upon the corporate books is to relieve the corporation from any liability whatever on account of the transfer until it is entered upon the books. "It, in effect, declares that all transfers of stock of the corporation are invalid, as between the company and the transferee, until the transfer shall have been entered upon the books of the company." *Lacaff v. Dutch Miller Mining & Smelting Co.*, 31 Wash. 566, 72 Pac. 112, quoted with approval in *Whitfield v. Nonparel Consol. Copper Co.*, 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078.

⁴¹ *Whitfield v. Nonparel Consol. Copper Co.*, 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078; *Lacaff v. Dutch Miller Mining & Smelting Co.*, 31 Wash. 566, 72 Pac. 112.

⁴² *Shirley Farmers' Grain & Coal Co. v. Douglas*, 130 Ill. App. 285; *Seeligson & Co. v. Brown*, 61 Tex. 114; *Whitfield v. Nonparel Consol. Copper Co.*, 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078; *Lacaff v. Dutch Miller Mining & Smelting Co.*, 31 Wash. 566, 72 Pac. 112. See also *Gamble v. Dawson*, 67 Wash. 72, Ann. Cas. 1913 D 501, 120 Pac. 1060.

A purchaser cannot insist upon certificates without applying to have a transfer made in accordance with the provisions of the by-laws. *Sargent v. Essex Marine Ry. Corporation*, 9 Pick. (Mass.) 202.

which has been wrongfully and fraudulently issued by officers of the company, is not valid or binding on the corporation in the hands of an innocent purchaser until it has been entered on the corporate books.⁴³

But the statute providing for registration of transfers "contemplates only the protection of subsequent purchasers without notice of prior equities, and when such equities have been created by transfer, hypothecation, mortgage, or lien, the corporation is bound to regard them from the time it receives notice of their existence."⁴⁴

§ 3799. — Right to vote. Registration of transfers, when required, or demand for registration, is also necessary to entitle the transferees to vote at corporate meetings, and to deprive the transferrers of their right to vote.⁴⁵ And "a person who has purchased stock, and who

⁴³ *Whitfield v. Nonpareil Consol. Copper Co.*, 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078.

⁴⁴ *Bank of Florida v. American Nat. Bank of Pensacola*, — Ala. —, 75 So. 310.

Where the charter of a bank provides that it shall regard registered owners of stock as the owners in fact, it is justified by the law in treating registered owners as the true owners in the absence of notice of a transfer. The rule is otherwise, however, after the bank has received notice of a transfer, although no effort has been made to secure registry thereof on the corporate books. *People's Bank of Talbotton v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269.

⁴⁵ *United States. Becher v. Wells Flouring-Mill Co.*, 1 Fed. 276. See *Masury v. Arkansas Nat. Bank*, 93 Fed. 603.

California. People v. Robinson, 64 Cal. 373, 1 Pac. 156. See *Ramage v. Gould*, 169 Pac. 670; *Middleton v. Arasterville Min. Co.*, 146 Cal. 219, 79 Pac. 889.

Connecticut. State v. Ferris, 42 Conn. 560.

Georgia. Sylvania & G. R. Co. v. Hoge, 129 Ga. 734, 59 S. E. 806.

Louisiana. Monsseaux v. Urquhart, 19 La. Ann. 482.

Maine. Dennett v. Acme Mfg. Co., 106 Me. 476, 76 Atl. 922.

Minnesota. Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 21 L. R. A. 174, 55 N. W. 547. See also *Prince Inv. Co. v. St. Paul & S. C. Land Co.*, 68 Minn. 121, 70 N. W. 1079.

Nebraska. Herrick v. Humphrey Hardware Co., 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685; *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997; *Reynolds v. Bridenthal*, 57 Neb. 280, 77 N. W. 658.

New Jersey. In re Leslie, 58 N. J. L. 609, 33 Atl. 954; *Canadian Improvement Co. v. Lea*, 74 N. J. Eq. 234, 69 Atl. 455. See also *In re Delaware River & A. R. Co.*, 76 N. J. L. 163, 68 Atl. 1104; *O'Connor v. International Silver Co.*, 68 N. J. Eq. 67, 59 Atl. 321, aff'd 68 N. J. Eq. 680, 62 Atl. 408.

New York. People v. Tibbetts, 4 Cow. 358; *Smith v. American Coal Co.*, 7 Lans. 317. See also *In re Election of Directors of Long Island R. Co.*, 19 Wend. 37, 32 Am. Dec. 429.

North Dakota. In re Argus Printing Co., 1 N. D. 434, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

desires to be recognized as a stockholder, for the purpose of voting, must secure such a standing by having the transfer recorded upon the books."⁴⁶ But where neither the charter, statute, nor by-laws require a book transfer, the assignee of the certificate of stock may vote therein, although the stock stands on the books of the company in the name of the assignor.⁴⁷

§ 3800. — Qualification for office. Registration is necessary to entitle the transferee to hold office as a director or other officer of the corporation,⁴⁸ or to deprive the transferrer of that right, where status

Ohio. *Cleveland & M. R. Co. v. Robbins*, 35 Ohio St. 483.

Rhode Island. *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291.

South Dakota. *Amidon v. Florence Farmers' Elevator Co.*, 28 S. D. 24, 132 N. W. 166.

Tennessee. See *American Nat. Bank v. Nashville Warehouse & Elevator Co.* (Tenn. Ch. App.), 36 S. W. 960.

Texas. See *Seeligson & Co. v. Brown*, 61 Tex. 114.

"The general and better rule is that the person in whose name stock stands on the books is entitled to vote it; that the books of the company are conclusive upon the inspectors as to who are entitled to vote; and that neither inspectors nor stockholders can successfully dispute the right of any one to vote who appears by the company's books to be the holder of stock legally issued. Upon any other rule it would never be known who were entitled to vote until the courts had settled the dispute." *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 21 L. R. A. 174, 55 N. W. 547.

A pledgee to whom the stock has been transferred on the books of the company has the right to vote it. *Canadian Improvement Co. v. Lea*, 74 N. J. Eq. 234, 69 Atl. 455.

"Ordinarily the officers of the company, in conducting the elections,

* * * will not look behind the books to ascertain who are the real owners of the stock." *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685.

The corporation will be protected in admitting the registered owner to vote. *Smith v. American Coal Co.*, 7 Lans. (N. Y.) 317.

The Uniform Stock Transfer Act (§ 3) provides that "Nothing in this act shall be construed as forbidding a corporation to recognize the exclusive right of a person registered on its books as the owner of shares * * * to vote as such owner." This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

See also § 1665, *supra*.

⁴⁶ *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 21 L. R. A. 174, 55 N. W. 547.

⁴⁷ *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806.

⁴⁸ *People v. Lihme*, 269 Ill. 351, Ann. Cas. 1916 E 959, 109 N. E. 1051; *In re Argus Printing Co.*, 1 N. D. 435, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

That stock is registered in the name of a person is prima facie evidence that he is qualified for the office of director, and his right to be a director

as a stockholder is made necessary to the qualification of officers.⁴⁹ But the transferrer ceases to be liable as a director although the transfer is not registered if he has done all that he can to procure a transfer on the books, and the corporation has failed or refused to make it.⁵⁰

§ 3801. — Liability for calls or assessments. A transfer on the book of the corporation is also necessary to relieve the transferrer from liability for calls or assessments upon the stock, or to render the transferee liable,⁵¹ unless the requirement of registration is waived,

can be impeached only by showing that the title of the stock was put in him colorably with a view to qualify him for the office for some dishonest purpose. In re Leslie, 58 N. J. L. 609, 33 Atl. 954.

⁴⁹State v. Ferris, 42 Conn. 560.

The registered owner may continue to act as a director although he has parted with the equitable title to the stock by delivery of the certificate, with a blank assignment and power of attorney thereon signed by him, where no transfer has been made on the books of the company. People v. Lihme, 269 Ill. 351, Ann. Cas. 1916 E 959, 109 N. E. 1051.

⁵⁰Chemical Nat. Bank of New York v. Colwell, 132 N. Y. 250, 30 N. E. 644.

⁵¹United States. Hawkins v. Glenn, 131 U. S. 319, 33 L. Ed. 184; Brown v. Allebach, 166 Fed. 488.

California. People's Home Sav. Bank v. Stadtmuller, 150 Cal. 106, 88 Pac. 280; Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10.

Connecticut. Russell v. Easterbrook, 71 Conn. 50, 40 Atl. 905, Marlborough Mfg. Co. v. Smith, 2 Conn. 579.

Kansas. Wichita Union Terminal R.Co. v. Kansas City, M. & O. R. Co., 100 Kan. 83, 163 Pac. 1067.

Maine. Dane v. Young, 61 Me. 160.

Minnesota. Basting v. Northern Trust Co., 61 Minn. 307, 63 N. W. 721.

New York. Shellington v. Howland, 53 N. Y. 371; Worrall v. Judson, 5 Barb. 210.

Pennsylvania. McCord's Appeal, 212 Pa. 177, 61 Atl. 804.

Texas. See Cole v. Adams, 19 Tex. Civ. App. 507, 49 S. W. 1052.

England. London & B. Ry. Co. v. Fairclough, 2 M. & G. 674; Midland Great Western Ry. Co. v. Gordon, 16 M. & W. 804; Humble v. Langston, 7 M. & W. 517.

"For the purpose of ascertaining those who are liable to it for the amount of the assessment, the corporation can look only to the list of stockholders as their names are registered upon its books." Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10, quoted with approval in People's Home Sav. Bank v. Stadtmuller, 150 Cal. 106, 88 Pac. 280.

An agent of the undisclosed owner of stock who registers it in the name of a dummy is not liable for assessments made while he had possession of the certificates, where he held them merely as agent and the stock was never registered in his name. American Alkali Co. v. Kurtz, 138 Fed. 392, aff'g 134 Fed. 663.

The Uniform Stock Transfer Act (§ 3) provides that "Nothing in this act shall be construed as forbidding a corporation * * * to hold liable for calls and assessments a person registered on its books as the owner of

as it may be,⁵² or until the transferee "in some other way equivalent in the eye of the law, establishes the relationship of stockholder between himself and the company, and is thus accepted by the company as a substitute stockholder for the original holder."⁵³

If the transferrer is compelled to pay such a call or assessment, he has a right of recovery over against his transferee.⁵⁴

§ 3802. — Payment of dividends. A transferee of shares cannot maintain an action for a dividend until he has applied for a transfer on the books of the corporation.⁵⁵

The corporation is not bound to look beyond its books to determine who is entitled to dividends, but may safely pay them to the registered shareholders, and will be protected in such payment notwithstanding transfers made before the dividend was declared, but which were not entered on its books and of which it had no notice.⁵⁶ It is

shares." This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁵² See § 3808, *infra*.

⁵³ *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280.

The seller is released and the buyer becomes liable even though there has been no transfer on the books, if the buyer and the corporation recognize him as having become a stockholder, by some unequivocal act, such as the payment and acceptance of a dividend. *Wichita Union Terminal R. Co. v. Kansas City, M. & O. R. Co.*, 100 Kan. 83, 163 Pac. 1067.

⁵⁴ See § 3797, *supra*.

⁵⁵ *Sargent v. Essex Marine Ry. Corporation*, 9 Pick. (Mass.) 202.

⁵⁶ *California*. *Ashton v. Zeila Min. Co.*, 134 Cal. 408, 66 Pac. 494.

Connecticut. *Northrop v. Newtown & B. Turnpike Co.*, 3 Conn. 544.

Georgia. *Guarantee Co. of North America v. East Rome Town Co.*, 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503.

Louisiana. Act No. 180, p. 370, of

1904. See *State v. Bank of Baton Rouge*, 125 La. 138, 136 Am. St. Rep. 332, 51 So. 95, quoting the statute.

Maine. *Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922; *Bath Sav. Institution v. Sagadahoc Nat. Bank*, 89 Me. 500, 36 Atl. 996.

Maryland. *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032.

Minnesota. See *Prince Inv. Co. v. St. Paul & S. C. Land Co.*, 68 Minn. 121, 70 N. W. 1079.

Nebraska. *Herriek v. Humphrey Hardware Co.*, 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685; *Farmers' & Merchants' Nat. Bank of Galva, Illinois v. Mosher*, 63 Neb. 130, 88 N. W. 552.

New Hampshire. *Fourth Nat. Bank v. Manchester Real Estate & Manufacturing Co.*, 93 Atl. 661; *Meredith Village Sav. Bank v. Marshall*, 68 N. H. 417, 44 Atl. 526.

New Jersey. *Campbell v. Perth Amboy Mut. Loan, Homestead & Building Ass'n*, 76 N. J. Eq. 347, 74 Atl. 144.

New York. *Brisbane v. Delaware, L. & W. R. Co.*, 94 N. Y. 204, *aff'g* 25 Hun 438; *Jones v. Terre Haute &*

otherwise, however, if the corporation has notice of the transfer. In such a case, if it pays the dividend to the person appearing on its books as owner, it remains liable to the transferee, whether the transfer was absolute or merely as collateral, notwithstanding his omission to have his transfer registered.⁵⁷

R. R. Co., 29 Barb. 353, 57 N. Y. 196;
Smith v. American Coal Co., 7 Lans. 317.

Ohio. **Cleveland & M. R. Co. v. Robbins**, 35 Ohio St. 483.

Oregon. **Steel v. Island Milling Co.**, 47 Ore. 293, 83 Pac. 783.

Pennsylvania. **Bank of Commerce's Appeal**, 73 Pa. St. 59.

South Dakota. **Amidon v. Florence Farmers' Elevator Co.**, 28 S. D. 24, 132 N. W. 166.

Tennessee. **American Nat. Bank v. Nashville Warehouse & Elevator Co.** (Tenn. Ch. App.), 36 S. W. 960.

Texas. See **Seeligson & Co. v. Brown**, 61 Tex. 114.

Utah. **Kimball v. Success Min. Co.**, 38 Utah 78, 110 Pac. 872.

West Virginia. **Donnally v. Hearn-don**, 41 W. Va. 519, 23 S. E. 646.

The Utah statute provides that for the purpose of receiving dividends the holder of record, as shown by the stockholder's books, shall be considered and treated as the holder in fact, and that the transferee shall have no rights or claims as against the corporation until the transfer is made upon the books or a new certificate is issued to him. **Kimball v. Success Min. Co.**, 38 Utah 78, 110 Pac. 872.

The Uniform Stock Transfer Act (§ 3) provides that "Nothing in this act shall be construed as forbidding a corporation to recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends." This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁵⁷ **Georgia.** **Armour v. East Rome**

Town Co., 98 Ga. 458, 25 S. E. 504;
Guarantee Co. of North America v. East Rome Town Co., 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503.

Maine. **Bates v. Androscoggin & K. R. Co.**, 49 Me. 491.

Maryland. **Gemmell v. Davis**, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032.

Mississippi. **Timberlake v. Shippers' Compress Co.**, 72 Miss. 323, 16 So. 530.

Missouri. **Hill v. Atoka Coal & Mining Co.**, 21 S. W. 508.

Nebraska. **Central Nebraska Nat. Bank v. Wilder**, 32 Neb. 454, 49 N. W. 369.

New York. **Robinson v. New Berne Nat. Bank**, 95 N. Y. 637; **Jones v. Terre Haute & R. R. Co.**, 57 N. Y. 196.

Oregon. **Steel v. Island Milling Co.**, 47 Ore. 293, 83 Pac. 783.

Pennsylvania. **Boyd v. Conshohocken Worsted Mills**, 149 Pa. St. 363, 24 Atl. 287.

West Virginia. **Donnally v. Hearn-don**, 41 W. Va. 519, 23 S. E. 646.

"The main reason for entering such transfers on the books is to afford notice as to the ownership of the stock; and where the proper officers of the company have notice independently of the books, their knowledge is notice to the company." **Guarantee Co. of North America v. East Rome Town Co.**, 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503.

This is true where pledged stock stands on the books in the name of the pledgor, but the certificate is issued to the pledgee as such. **Hunt v. Laconia & L. St. Ry.**, 68 N. H. 561, 39 Atl. 437.

As in other cases, payment consists in the delivery of money or something which is accepted by the creditor as equivalent thereto, and the mere fact that the amount of the dividend is credited on the books of the company to the person appearing on its books as the owner does not amount to a payment, and will not relieve the corporation from liability where it has notice of the transfer before payment is actually made.⁵⁸

In paying dividends to a person who appears on the books as the owner of shares, the corporation is not bound to require him to produce his certificate of stock, and his failure to produce it is not sufficient to put the corporation on inquiry, and constitute constructive notice of a transfer of the stock by him.⁵⁹ Nor is the corporation put upon inquiry by the fact that the person appearing on the books as owner has represented that his certificate has been lost or destroyed, given a bond of indemnity, and received a new certificate.⁶⁰

Knowledge of the transfer on the part of the corporate officers may be notice to the corporation.⁶¹ But the contrary is true where the knowledge is obtained by the officer while acting for his individual benefit and not in behalf of the corporation,⁶² or where he is himself the transferrer and withholds knowledge of the transfer from the corporation so as fraudulently to obtain payment of the dividends to himself.⁶³ But the company can derive no advantage from the fact that it has wrongfully transferred the stock on its books, and hence the fact that, pending an appeal from a decree of distribution, which operates to suspend the efficacy of the decree and of an indorsement

In the absence of a charter or statutory provision to the contrary, the right of a transferee of shares to a dividend declared after the transfer is not affected by the fact that the transfer books are closed before the dividend is declared, if he gives the corporation notice of the transfer. *Jones v. Terre Haute & R. R. Co.*, 57 N. Y. 196. But see *Burroughs & Springs v. North Carolina R. Co.*, 67 N. C. 376, 12 Am. Rep. 611.

⁵⁸ *Steel v. Island Milling Co.*, 47 Ore. 293, 83 Pac. 783.

⁵⁹ *Brisbane v. Delaware, L. & W. R. Co.*, 94 N. Y. 204; *Cleveland & M. R. Co. v. Robbins*, 35 Ohio St. 483.

⁶⁰ *Brisbane v. Delaware, L. & W. R. Co.*, 94 N. Y. 204.

⁶¹ Knowledge of the president, sec-

retary, and treasurer, when the pledge is made and the dividends declared is notice to the corporation and it is bound thereby. *Guarantee Co. of North America v. East Rome Town Co.*, 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503.

⁶² *Fourth Nat. Bank v. Manchester Real Estate & Manufacturing Co.*, — N. H. —, 93 Atl. 661; *Donnelly v. Hearndon*, 41 W. Va. 519, 23 S. E. 646. See also *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032.

⁶³ As where the president of a corporation pledges stock belonging to himself. *Fourth Nat. Bank v. Manchester Real Estate & Manufacturing Co.*, — N. H. —, 93 Atl. 661.

and transfer of stock by an executor to a distributee pursuant thereto, it transfers the stock on its books to the distributee and his assignees will not relieve it from liability to the executor for dividends which it pays to such assignees after the reversal of the decree and with notice of such reversal.⁶⁴

§ 3803. — Right of corporation to set off dividend against debt of transferrer. Generally the right of a corporation to apply a dividend in satisfaction of a debt due it from a stockholder exists only where the debtor owns the stock at the time the dividend is declared, and it has no such right of set-off where he has transferred it before that time.⁶⁵ This is true even though the transfer has not been registered on the corporate books where the corporation has notice of the transfer before the dividend is declared,⁶⁶ and it has been held to be true although it has no such notice, on the ground that the right of set-off is not necessary to the protection of the company under such circumstances.⁶⁷ But there is authority to the effect that the corporation has a right to set off a dividend against a debt due it from the registered owner of the stock notwithstanding a previous unregistered transfer of which it had no notice at the time when the dividend was declared, even though the debt was contracted after the transfer.⁶⁸

§ 3804. — Distribution of assets. The rules previously stated as to the payment of dividends to the registered owner,⁶⁹ are generally applied in the distribution of assets upon a dissolution of the corporation. So, as a rule, the corporation will be protected in making payment to the registered owner, notwithstanding previous unregistered

⁶⁴ *Ashton v. Zeila Min. Co.*, 134 Cal. 408, 66 Pac. 494.

⁶⁵ See § 3697, *supra*.

⁶⁶ *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032; *Bates v. New York Ins. Co.*, 3 Johns. (N. Y.) 238. See also *American Nat. Bank v. Nashville Warehouse & Elevator Co.* (Tenn. Ch. App.), 36 S. W. 960.

⁶⁷ *American Nat. Bank v. Nashville Warehouse & Elevator Co.* (Tenn. Ch. App.), 36 S. W. 960.

⁶⁸ *Bates v. New York Ins. Co.*, 3 Johns. (N. Y.) 238; *Donnelly v. Hearndon*, 41 W. Va. 519, 23 S. E. 646.

In *Gemmell v. Davis*, 75 Md. 546,

32 Am. St. Rep. 412, 23 Atl. 1032, it is said that the transferee would not in equity be allowed to claim the dividend in prejudice of the company's right of set-off under such circumstances, because to permit it to do so would work a fraud and an injustice upon the company. But it was held that since the corporation had notice of the transfer before the dividend was declared, it had no right of set-off. See criticism of the reasoning in this case in *American Nat. Bank v. Nashville Warehouse & Elevator Co.* (Tenn. Ch. App.), 36 S. W. 960.

⁶⁹ See § 3802, *supra*.

transfers of which it has no notice.⁷⁰ But payment to the stockholder of record is at the risk of the corporation where it has notice of a previous unrecorded assignment.⁷¹ It has also been held that, in the absence of such notice, payment to the shareholder of record without requiring production of the certificate is not negligence on the part of the corporation.⁷² But, on the other hand, there is authority to the effect that where shares of a national bank are transferable only upon the books of the bank and on surrender of the certificate, the bank acts at its peril in paying liquidation dividends to the record owner of stock without a surrender of the certificate, and cannot thereby relieve itself from liability therefor to a previous bona fide transferee of the stock, though it has no notice of the transfer.⁷³

§ 3805. — Suit by transferee to set aside ultra vires transactions, or redress injuries to corporation. The fact that the transfer is not registered does not preclude the transferee from maintaining a suit in equity, as a stockholder, to set aside or enjoin an ultra vires transaction in violation of the rights of stockholders, or to obtain redress for fraud or misapplication of assets,⁷⁴ where such right of action would otherwise exist,⁷⁵ especially where the corporation has wrongfully refused to register the transfer.⁷⁶ And it has been held that the transferrer has no right to maintain such a suit.⁷⁷

⁷⁰ Merchants' & Mechanics' Bank v. Boyd Co., 143 Ga. 755, 85 S. E. 914; Campbell v. Perth Amboy Mut. Loan, Homestead & Building Ass'n, 76 N. J. Eq. 347, 74 Atl. 144; In re Bank of Commerce's Appeal, 73 Pa. St. 59.

⁷¹ Campbell v. Perth Amboy Mut. Loan, Homestead & Building Ass'n, 76 N. J. Eq. 347, 74 Atl. 144.

⁷² Campbell v. Perth Amboy Mut. Loan, Homestead & Building Ass'n, 76 N. J. Eq. 347, 74 Atl. 144; In re Bank of Commerce's Appeal, 73 Pa. St. 59.

⁷³ Bath Sav. Institution v. Sagadahoc Nat. Bank, 89 Me. 500, 36 Atl. 996.

⁷⁴ Parrott v. Byers, 40 Cal. 614; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261, 276. See also Ervin v. Oregon Ry. & Nav. Co., 28 Hun (N. Y.) 269; Great Western Ry. Co. v.

Rushout, 5 De G. & Sm. 290; Bogshaw v. Eastern Union Ry. Co., 7 Hare 114.

⁷⁵ See § 4061 et seq., infra.

⁷⁶ The corporation cannot prevent the transferee from demanding the cancellation of an ultra vires contract by wrongfully refusing to transfer the stock on its books. Carson v. Iowa City Gas-Light Co., 80 Iowa 638, 45 N. W. 1068.

⁷⁷ Although the vendor of stock is to be regarded as the owner and holder thereof for certain purposes until the transfer is entered on the corporate books, "yet he is only the legal and not the equitable owner; and not being the equitable owner, he can have no standing in a court of equity to enforce equitable rights appurtenant only to the beneficial ownership of the stock." Scanlan v. Snow, 2 App. Cas. (D. C.) 137.

A transferee of shares may sue to enjoin the voting of stock belonging to the corporation itself, in violation of the statute, though the stock has never been transferred to him on the corporate books.⁷⁸

§ 3806. — Lien of corporation; rights as a creditor. Registration of a transfer, or, at the least, notice of the transfer, is necessary to prevent the corporation from acquiring a lien on the shares for debts of the transferor, when a lien is given by the charter or general law, or to prevent it from acquiring such a lien by contract with the transferor.⁷⁹ But if the corporation has notice of the transfer, it cannot afterwards lend money to the transferor, or otherwise allow him to contract a debt, and then claim a lien on the ground that the debt was contracted before the transfer was registered.⁸⁰

Where a corporation has no lien on its shares for debts due from its stockholders, an unregistered transfer, even where it conveys an equitable title only, is good as against any supposed equitable right of the corporation to subject the shares to the satisfaction of a debt due to it from the transferor.⁸¹ In the absence of a lien, the rights of a corporation as a creditor of its stockholders are the same as those of any other creditor, and no greater. If it attaches the shares of a stockholder for a debt due from him after he has transferred the same, but before the transfer has been registered, the attachment is good as against the transfer if it would prevail if made by any other creditor, but not otherwise.⁸²

§ 3807. — Liability of corporation for registering fraudulent or unauthorized transfer. If a corporation has no notice of an unregistered transfer, and transfers are required to be made on the books of the corporation, it will incur no liability to the transferee by recognizing and registering a subsequent transfer by the transferor to another. It is otherwise, however, if it has notice of the prior unregistered transfer, for it then becomes a party to the fraud.⁸³

§ 3808. — Waiver or estoppel. A charter or statutory requirement that stock shall be transferable only on the books of the corpo-

⁷⁸ O'Connor v. International Silver Co., 68 N. J. Eq. 67, 59 Atl. 321, aff'd 68 N. J. Eq. 680, 62 Atl. 408.

⁷⁹ See § 3600 et seq., supra.

⁸⁰ See § 3607 et seq., supra.

⁸¹ Farmers' & Merchants' Bank v. Wasson, 48 Iowa 336, 30 Am. Rep. 398.

⁸² National Bank of Pacific v. Western Pac. R. Co., 157 Cal. 573, 27 L. R.

A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Buttrick v. Nashua & L. R. R., 62 N. H. 413, 13 Am. St. Rep. 578.

As to the effect of an unregistered transfer as against creditors of the apparent owner, see § 3811, infra.

⁸³ See § 3844, infra.

ration clearly cannot be waived by the corporation so as to affect the rights of bona fide purchasers without notice from persons appearing on the books as stockholders.⁸⁴ But there may be a waiver of registration so far as the rights of the corporation itself or its creditors are concerned, or the corporation may be estopped to set up want of registration.⁸⁵ Thus it has been held that there is a waiver or estoppel where it wrongfully refuses to register a transfer,⁸⁶ or where it recognizes a transfer by paying dividends to the transferee,⁸⁷ or issuing a certificate to him,⁸⁸ or electing him as a director,⁸⁹ or otherwise recognizes him as a stockholder.⁹⁰ And it has also been held that there is a waiver or estoppel where a corporation fails to keep any book for the registration of transfers;⁹¹ although there is authority

⁸⁴ See § 3815, *infra*.

⁸⁵ **United States.** *Upton v. Burnham*, 3 Biss. 431, Fed. Cas. No. 16, 798.

Louisiana. *Union Bank of Louisiana v. Desban*, 2 Rob. 486.

Massachusetts. *Bond v. Mt. Hope Iron Co.*, 99 Mass. 505, 97 Am. Dec. 4^o.

Minnesota. *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721.

New York. *Chemical Nat. Bank of New York v. Colwell*, 132 N. Y. 250, 30 N. E. 644; *Robinson v. National Bank*, 95 N. Y. 637; *Cutting v. Damerel*, 88 N. Y. 410; *Isham v. Buckingham*, 49 N. Y. 216.

Oregon. *Gray v. Fankhauser*, 58 Ore. 423, 115 Pac. 146.

Pennsylvania. *Chambersburg Ins. Co. v. Smith*, 11 Pa. 120.

Rhode Island. *American Nat. Bank v. Oriental Mills*, 17 R. I. 551, 23 Atl. 795.

Washington. *Van Horn v. New Western Shingle Co.*, 54 Wash. 117, 103 Pac. 42.

Where a corporation denies the validity of a certificate in the hands of a legal owner and refuses to recognize any rights under it on the sole ground that it is void because an excess issue, it cannot successfully defend an action to compel it to recognize the certificate as valid on the ground that such owner and his as-

signor have never demanded a transfer of the stock to them on the books. *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546.

⁸⁶ See § 3809, *infra*.

⁸⁷ *Wichita Union Terminal R. Co. v. Kansas City, M. & O. R. Co.*, 100 Kan. 83, 163 Pac. 1067; *Cutting v. Damerel*, 88 N. Y. 410.

⁸⁸ *Laing v. Burley*, 101 Ill. 591.

⁸⁹ *Van Horn v. New Western Shingle Co.*, 54 Wash. 117, 103 Pac. 42.

⁹⁰ *Van Horn v. New Western Shingle Co.*, 54 Wash. 117, 103 Pac. 42. See also *Colton v. Williams*, 65 Ill. App. 466.

⁹¹ **Kansas.** *Plumb v. Bank of Enterprise*, 48 Kan. 484, 29 Pac. 699.

Kentucky. See *Bracken v. Nicol*, 124 Ky. 628, 11 L. R. A. (N. S.) 818, 14 Ann. Cas. 896, 99 S. W. 920.

New York. *Chemical Nat. Bank of New York v. Colwell*, 132 N. Y. 250, 30 N. E. 644; *Isham v. Buckingham*, 49 N. Y. 216.

Rhode Island. *American Nat. Bank v. Oriental Mills*, 17 R. I. 551, 23 Atl. 795.

Washington. *Stewart v. Walla Walla Prtg. & Pub. Co.*, 1 Wash. St. 521, 20 Pac. 605.

Canada. *Crawford v. Provincial Ins. Co.*, 8 C. P. (U. C.) 263.

to the effect that such a failure will not excuse a transferee from making a bona fide effort to procure a transfer on the books.⁹²

Where, at the request of a purchaser of stock, the corporation waives a provision of its by-laws requiring transfers to be registered on its books, the purchaser becomes a stockholder and liable for future assessments, notwithstanding the fact that his transfer is not registered.⁹³

A corporation may waive compliance with formalities in the registration of transfers, whether the formalities are prescribed by its charter or the general law, or by its by-laws.⁹⁴

§ 3809. — Refusal to register transfer. When a stockholder has made a valid transfer of his shares, and requested the corporation to register the same, or the transferee has made such request, he has done all that he can be required to do to render the transfer effectual, and if the corporation wrongfully fails or refuses to register the same, it waives the requirement of registration, and can take no advantage of such failure or refusal.⁹⁵ So it cannot hold the transferrer liable for future calls in those jurisdictions in which a stockholder is not liable for calls after a valid transfer of his shares.⁹⁶ Nor can it after-

⁹² *Central Sav. Bank v. Smith*, 43 Colo. 90, 95 Pac. 307.

⁹³ *Upton v. Burnham*, 3 Biss. 431, Fed. Cas. No. 16,798. And see *Union Bank of Louisiana v. Desban*, 2 Rob. (La.) 486.

⁹⁴ See § 3791, *supra*.

⁹⁵ *United States. Whitney v. Butler*, 118 U. S. 655, 30 L. Ed. 266; *Giesen v. London & N. W. American Mortg. Co., Ltd.*, 102 Fed. 584; *Snyder v. Foster*, 73 Fed. 136; *Young v. McKay*, 50 Fed. 394; *Hayes v. Shoemaker*, 39 Fed. 319. But see *Brown v. Adams*, 6 Biss. 181, Fed. Cas. No. 1,986.

Colorado. Central Sav. Bank v. Smith, 43 Colo. 90, 95 Pac. 307.

Connecticut. Russell v. Easterbrook, 71 Conn. 50, 40 Atl. 905

Maryland. Real Estate Trust Co. v. Bird, 90 Md. 229, 44 Atl. 1048.

Massachusetts. Sargent v. Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306.

Michigan. Foster v. Row, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

Minnesota. Hunt v. Seeger, 91 Minn. 264, 98 N. W. 91. See also *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721.

Missouri. Chouteau Spring Co. v. Harris, 20 Mo. 382.

New York. Chemical Nat. Bank of New York v. Colwell, 132 N. Y. 250, 30 N. E. 644; *Robinson v. National Bank*, 95 N. Y. 637.

Tennessee. Cox v. Elmendorf, 97 Tenn. 518, 37 S. W. 387; *Cornick v. Richards*, 3 Lea 1.

Texas. Blooming Grove Cotton-Oil Co. v. First Nat. Bank of Blooming Grove (Tex. Civ. App.), 56 S. W. 552.

Corporate officers cannot justify their action in forcibly ejecting a transferee of stock from a stockholder's meeting on the ground that the stock has not been transferred to him on the books, where he had done all he could to obtain such a transfer. *Noller v. Wright*, 138 Mich. 416, 101 N. W. 553.

⁹⁶ *Chouteau Spring Co. v. Harris*, 20 Mo. 382.

wards attach the shares for a debt due to it from the transferrer, where it has no lien on the shares⁹⁷ And the transferee may recover from the corporation dividends subsequently declared,⁹⁸ and may sue as a stockholder to set aside or enjoin ultra vires transactions in violation of the rights of stockholders, or to obtain redress for fraud or misapplication of assets.⁹⁹ Nor, under such circumstances, is the transferrer liable to corporate creditors as a stockholder solely by reason of the fact that the transfer was not registered.¹

But to render this rule applicable there must be a delivery of the certificate to the corporation together with a power of attorney authorizing its transfer, and with a request to transfer it made at the time of the transaction. A delivery to an officer of the corporation as a vendee and not as such officer is insufficient,² especially when he himself has no authority to make the transfer or, by virtue of his office, to direct it to be made.³ The notice of sale and request to transfer may be oral, however.⁴ It has been held that the transferee must have exhausted all reasonable means to have the transfer recorded.⁵ The

Since a corporation cannot profit by its wrongful refusal to transfer stock on its books at the request of a transferee, the stock will be considered as having been transferred at the time of the request, in a subsequent action by the transferee to recover a share of an increase of stock to which stockholders were entitled. *Real Estate Trust Co. v. Bird*, 90 Md. 229, 44 Atl. 1048.

⁹⁷ *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306; *Robinson v. National Bank*, 95 N. Y. 637.

⁹⁸ *Hill v. Atoka Coal & Mining Co.* (Mo.); 21 S. W. 508; *Crenshaw v. Columbian Min. Co.*, 110 Mo. App. 355, 86 S. W. 260; *Travis v. Knox Terpezone Co.*, 215 N. Y. 259, L. R. A. 1916 A 542, Ann. Cas. 1917 A 387, 109 N. E. 250, aff'g 165 N. Y. App. Div. 156, 150 N. Y. Supp. 621; *Robinson v. National Bank*, 95 N. Y. 637; *Bloomington Grove Cotton-Oil Co. v. First Nat. Bank of Bloomington Grove* (Tex. Civ. App.), 56 S. W. 552. But see *Brown v. Adams*, 5 Biss. 181, Fed. Cas. No. 1,986.

His right to maintain an action for dividends under such circumstances is not defeated because he has a remedy by a suit in equity to compel a transfer, or by an action at law for damages. *Hill v. Atoka Coal & Mining Co.* (Mo.), 21 S. W. 508; *Robinson v. National Bank* 95 N. Y. 637.

⁹⁹ See § 3805, *supra*.

¹ See § 3810, *infra*.

² *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864; *Freeman v. Jackson*, 146 Ga. 55, 90 S. E. 467; *Jackson v. Freeman*, — Ga. App. —, 93 S. E. 284; *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320. See also *Earle v. Coyle*, 97 Fed. 410, aff'g 95 Fed. 99; *Snyder v. Foster*, 73 Fed. 136; *Young v. McKay*, 50 Fed. 394.

³ *Schofield v. Twining*, 127 Fed. 486.

⁴ "The notice of sale and request to transfer being conceded, it is wholly unimportant whether these communications are oral, in writing, or by signs." *Hayes v. Shoemaker*, 39 Fed. 319.

⁵ *Perkins v. Lyons*, 111 Iowa 192, 82 N. W. 486.

refusal to make the transfer must also be wrongful.⁶ And hence the rule does not apply where the stock has never been delivered as between the parties to a contract for its sale and the purchaser notifies the corporation not to transfer it.⁷ Nor does it apply where the books are closed when the corporation is requested to register the transfer, and the by-laws provide that no transfer shall be made while they are closed.⁸ Nor where the statute requires the recording of a written assignment, and no such assignment is presented for record and no request to record any written instrument is made.⁹

Registration of a transfer is clearly not necessary to entitle the transferee to maintain an action against the corporation to compel it to register the same, and issue a new certificate to the transferee, or to recover damages for its refusal to do so.¹⁰

§ 3810. Effect of unregistered transfer as against corporate creditors. In most jurisdictions, provisions that shares of stock shall be transferable only on the books of the corporation are regarded as intended, not only for the protection of the corporation, but also for the protection of persons dealing with the corporation, so that they may know who are stockholders; and it is very generally held, therefore, that a transfer which is not registered or deposited for registration does not relieve the transferrer from liability to or for the benefit of creditors of the corporation for any balance that may remain unpaid on the shares, or from liability under a statute imposing a liability upon stockholders over and above the par value of their shares.¹¹ It

⁶ The rule does not apply where the transfer fee required by the by-laws was not paid and the assignment was not stamped as required by the laws of England where the corporation was incorporated. *Giesen v. London & N. W. American Mortg. Co., Ltd.*, 102 Fed. 584.

⁷ *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905.

⁸ Under such circumstances the transferrer remains liable to corporate creditors. *McCord's Appeal*, 212 Pa. 177, 61 Atl. 804.

⁹ A mere request to transfer the stock on the books is insufficient under such circumstances. *Newell v. Williston*, 138 Mass. 240.

¹⁰ *Maryland. Baltimore City Passenger Ry. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402.

Massachusetts. Sargent v. Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306.

Minnesota. Nicollet Nat. Bank v. City Bank, 38 Minn. 85, 8 Am. St. Rep. 643, 35 N. W. 577.

Missouri. Crenshaw v. Columbian Min. Co., 110 Mo. App. 355, 86 S. W. 260.

New York. Bank of Utica v. Smalley & Barnard, 2 Cow. 770, 14 Am. Dec. 526, aff'd 8 Cow. 398; *Commercial Bank v. Kortright*, 22 Wend. 348, 34 Am. Dec. 317; *Kortright v. Buffalo Commercial Bank*, 20 Wend. 91, aff'd 22 Wend. 348, 34 Am. Dec. 317.

And see § 3816 et seq., *infra*.

¹¹ *United States. Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536; *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, aff'g 73 Minn.

is sufficient to relieve the transferrer from liability under this rule,

170, 75 N. W. 1041; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864; *Whitney v. Butler*, 118 U. S. 655, 30 L. Ed. 266; *Knickerbocker Trust Co. v. Myers*, 133 Fed. 764; *Schofield v. Twining*, 127 Fed. 486; *Giesen v. London & N. W. American Mortg. Co., Ltd.*, 102 Fed. 584. See also *Masury v. Arkansas Nat. Bank*, 93 Fed. 603.

Connecticut. *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905. See also *Davis v. First Bapt. Soc. of Essex*, 44 Conn. 582.

Illinois. *Sherwood v. Illinois Trust & Savings Bank*, 195 Ill. 112, 88 Am. St. Rep. 183, 62 N. E. 835.

Kansas. *Abilene State Bank v. Strachan*, 89 Kan. 577, 46 L. R. A. (N. S.) 668, 132 Pac. 200; *Faulkner v. Bank of Topeka*, 77 Kan. 385, 94 Pac. 153; *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, 173; *Pine v. Western Nat. Bank*, 63 Kan. 462, 65 Pac. 690; *Plumb v. Bank of Enterprise*, 48 Kan. 484, 29 Pac. 699; *Topeka Mfg. Co. v. Hale*, 39 Kan. 23, 17 Pac. 601.

Kentucky. *Bracken v. Nichol*, 124 Ky. 628, 11 L. R. A. (N. S.) 818, 14 Ann. Cas. 896, 99 S. W. 920.

Maine. *Barron v. Burrill*, 86 Me. 72, 29 Atl. 938; *Dane v. Young*, 61 Me. 160; *Fowler v. Ludwig*, 34 Me. 455.

Maryland. *Magruder v. Colston*, 44 Md. 349, 22 Am. Rep. 47. See also *Kerr v. Urie*, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493, 37 Atl. 789.

Massachusetts. *Johnson v. Somerville Dyeing & Bleaching Co.*, 15 Gray 216.

Minnesota. *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069. See also *Hunt v. Seeger*, 91 Minn. 264, 98 N. W. 91; *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721.

Mississippi. *Kruger v. Hanover Nat. Bank*, 72 Miss. 462, 16 So. 351.

New York. *Shellington v. Howland*, 53 N. Y. 371; *Johnson v. Underhill*, 52 N. Y. 203; *Richards v. Robin*, 175 App. Div. 296, 162 N. Y. Supp. 12; *Cutting v. Damerel*, 23 Hun 339, rev'd 88 N. Y. 410.

Ohio. *Herrick v. Wardwell*, 58 Ohio St. 294, 50 N. E. 903; *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637.

Oregon. *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320.

Pennsylvania. *McCord's Appeal*, 212 Pa. 177, 61 Atl. 804; *Bell's Appeal*, 115 Pa. St. 88, 2 Am. St. Rep. 532, 8 Atl. 177; *Knickerbocker Trust Co. v. Myers*, 133 Fed. 764. See also *Burt v. Real Estate Exchange*, 175 Pa. St. 619, 52 Am. St. Rep. 858, 34 Atl. 923.

South Carolina. *White v. Commercial & Farmers' Bank*, 66 S. C. 491, 97 Am. St. Rep. 803, 45 S. E. 94; *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

This is equally true in the case of bank stock although the transfer is to the bank itself. *Abilene State Bank v. Strachan*, 89 Kan. 577, 46 L. R. A. (N. S.) 668, 132 Pac. 200.

The transferrer remains liable where the transfer is not registered because the books are closed, and the by-laws provide that no transfer shall be registered while the books are closed. *McCord's Appeal*, 212 Pa. 177, 61 Atl. 804.

In *Dain Mfg. Co. v. Trumbull Seed Co.*, 95 Mo. App. 144, 68 S. W. 951, and *Standard Rope & Twine Co. v. Trumbull Seed Co.*, 95 Mo. App. 147, 68 S. W. 1115, it was held that the transferrer was not liable although there had been no transfer on the books on the ground that the statute did not make a transfer on the books a necessary requisite to title. But see dictum to the contrary in *McClaren v. Franciscus*, 43 Mo. 452.

however, if he has done everything which the law requires him to do in order to secure the transfer on the books, although the transfer has not in fact been registered because of the neglect or refusal of the proper corporate officers to register it.¹² And the transferee may be held liable although the provisions as to registration have not been com-

12 United States. Earle v. Carson, 188 U. S. 42, 47 L. Ed. 373, aff'g 107 Fed. 639, 60 L. R. A. 266; Matteson v. Dent, 176 U. S. 521, 44 L. Ed. 571, aff'g 73 Minn. 170, 75 N. W. 1041, 70 Minn. 519; 73 N. W. 416; Richmond v. Irons, 121 U. S. 27, 30 L. Ed. 864; Whitney v. Butler, 118 U. S. 655, 30 L. Ed. 266; Earle v. Coyle, 97 Fed. 410, aff'g 95 Fed. 99; Snyder v. Foster, 73 Fed. 136; Young v. McKay, 50 Fed. 394; Hayes v. Shoemaker, 39 Fed. 319. See also McDonald v. Dewey, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419, rev'g judgment 134 Fed. 528.

Connecticut. See Russell v. Easterbrook, 71 Conn. 50, 40 Atl. 905.

Georgia. Jackson v. Freeman, — Ga. App. —, 93 S. E. 284. See also Freeman v. Jackson, 146 Ga. 55, 90 S. E. 467.

Kansas. See Henley v. Myers, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, 173; Pine v. Western Nat. Bank, 63 Kan. 462, 65 Pac. 690; Plumb v. Bank of Enterprise, 48 Kan. 484, 29 Pac. 699.

Kentucky. Bracken v. Nicol, 124 Ky. 628, 11 L. R. A. (N. S.) 818, 14 Ann. Cas. 896, 99 S. W. 920.

Michigan. Foster v. Row, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

Minnesota. Hunt v. Seeger, 91 Minn. 264, 98 N. W. 91. See also Basting v. Northern Trust Co., 61 Minn. 307, 63 N. W. 721.

New York. Chemical Nat. Bank of New York v. Colwell, 132 N. Y. 250, 30 N. E. 644.

Oregon. See Hawkins v. Citizens' Inv. Co., 38 Ore. 544, 64 Pac. 320.

Tennessee. Cox v. Elmendorf, 97 Tenn. 518, 37 S. W. 387.

Where a stockholder in good faith sells his stock, does all that he believes is necessary to effect a transfer, and requests the corporate officers having charge of the books to do all that is necessary to that end, and they inform him that there is nothing more to be done, he is relieved from the statutory double liability to creditors although the corporation did not keep a stock book as required by statute and hence the transfer was not recorded therein. Bracken v. Nicol, 124 Ky. 628, 11 L. R. A. (N. S.) 818, 14 Ann. Cas. 896, 99 S. W. 920.

Where the statute requires directors to be stockholders throughout their terms of office, a director who sells his stock and does all that he can to procure a transfer on the books, ceases to be a director, and cannot be held liable as a director for a corporate debt because of a subsequent failure to file an annual report. Chemical Nat. Bank of New York v. Colwell, 132 N. Y. 250, 30 N. E. 644.

In Hayes v. Shoemaker, 39 Fed. 319, it is said that the decision in Whitney v. Butler, supra, was "based upon the broad, rational doctrine that the duty of the stockholder was done when he had sold the stock, notified the bank of the sale, requested the proper entries to be made and clothed the bank officials with full authority to make them."

In Harpold v. Stobart, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637, the transferrer was held liable where the transfer was entered in a small book at the corporate office, and it was then understood that the secretary would make it in the stock

plied with, where a certificate has been issued to and accepted by him.¹³

This subject will be further considered in subsequent sections in connection with the liability of stockholders to corporate creditors.¹⁴

§ 3811. Effect of unregistered transfer as against creditors of apparent owner—General rules. There is considerable conflict of authority as to the effect of an unregistered transfer as against a subsequent attaching or execution creditor of the transferrer,¹⁵ which, it has been said, "is attributable, for the most part, to the peculiar terms of the statutes of the various states, bearing upon the question, and to differences in construction of like and similar statutes by the courts of different states."¹⁶ Some of the courts hold that, until a transfer is registered, or deposited with the corporation for registration, the shares are subject to execution or attachment by the creditors of the transferrer, at least if they have no notice of the transfer. This rule obtains in Colorado,¹⁷ Indiana,¹⁸ Iowa,¹⁹ New Mexico,²⁰ Ver-

book, which was at his house, but he neglected to do so.

As to the effect of a failure or refusal to register transfers generally, see § 3809, *supra*.

¹³ Laing v. Burley, 101 Ill. 591.

¹⁴ See subd. xxxiv, *infra*.

¹⁵ For a valuable discussion of the various rules and decisions on this subject see Lipscomb's *Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

¹⁶ Lipscomb's *Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392. And see to the same effect, *Everitt v. Farmers & Merchants Bank*, 82 Neb. 191, 20 L. R. A. (N. S.) 996, 117 N. W. 401.

¹⁷ *Weber v. Bullock*, 19 Colo. 214, 35 Pac. 183; *Conway v. John*, 14 Colo. 30, 23 Pac. 170; *Isbell v. Graybill*, 19 Colo. App. 508, 76 Pac. 550; *First Nat. Bank of Longmont v. Hastings*, 7 Colo. App. 129, 42 Pac. 691.

This is true even though the attaching creditor has notice of the previous transfer. *First Nat. Bank of Longmont v. Hastings*, 7 Colo. App. 129, 42 Pac. 691.

The Colorado statute provides that

no transfer of stock shall be valid for any purpose, except to render the person to whom it is made liable for the debts of the company, unless it is entered in the proper book of the company within 60 days from the date of the transfer.

¹⁸ *State v. First Nat. Bank*, 89 Ind. 302; *Coleman v. Spencer*, 5 Blackf. (Ind.) 197. See also *Boone v. Van Gorder*, 164 Ind. 499, 108 Am. St. Rep. 314, 74 N. E. 4.

¹⁹ The statutory provision that a transfer shall not be valid, except as between the parties, until it is registered, has been construed as rendering an unregistered transfer ineffectual as against subsequent execution or attaching creditors of the transferrer, although they may have actual notice of the transfer. *Perkins v. Lyons*, 111 Iowa 192, 82 N. W. 486; *Ottumwa Screen Co. v. Stodghill*, 103 Iowa 437, 72 N. W. 669; *Ryan v. Campbell*, 71 Iowa 760, 32 N. W. 340; *Ft. Madison Lumber Co. v. Batavian Bank*, 71 Iowa 270, 60 Am. Rep. 789, 32 N. W. 336; *Hair v. Burnell*, 106 Fed. 280 (under the Iowa statute).

²⁰ *Lyndonville Nat. Bank v. Fol-*

mont,²¹ and apparently likewise in Arizona,²² Connecticut,²³ Flori-

som, 7 N. M. 611, 38 Pac. 253. In this case one in whose name stock stood on the books of the company made a general assignment of all of his property, including said stock, for the benefit of his creditors. The transfer of the stock to the assignee was not registered, and the certificates were in the possession of a third person to whom they had been hypothecated as security. After the execution and filing of the deed of assignment, but before the assignee had qualified by giving bond, a creditor of the assignor sued out a writ of attachment which he had levied upon the stock. It was held that no title to the stock passed to the assignee, and that whatever interest the assignor had in the stock was subject to the attachment.

The statute provides that no transfer shall be valid, except as between the parties, until it is entered upon the corporate books.

²¹ The rights of the creditor are superior where he has no notice of the transfer. *French v. White*, 78 Vt. 89, 2 L. R. A. (N. S.) 804, 6 Ann. Cas. 479, 62 Atl. 35.

But the rights of the transferee are superior where the attaching creditor has notice of the transfer. *Cheever v. Meyer*, 52 Vt. 66. See also *Sabin v. Bank of Woodstock*, 21 Vt. 353.

²² In *Dean Rapid Tel. Co. v. Howell*, 162 Mo. App. 100, 144 S. W. 135, it is held that under the statute of Arizona, which provides that transfers shall not be valid except as between the parties until entered on the corporate books, the rights of an attaching creditor having no notice are superior to those of the transferee.

²³ The earlier Connecticut cases held that the right of the attaching creditor was superior. See, for example, *Shipman v. Ætna Ins. Co.*, 29 Conn. 245; *Oxford Turnpike Co. v.*

Bunnel, 6 Conn. 552; *Northrop v. Newton & B. Turnpike Co.*, 3 Conn. 544. See also *Williams v. Mechanics' Bank*, 5 Blatchf. 59, Fed. Cas. No. 17,727.

In *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161, the court, after citing some of the earlier cases to this effect, said, "These cases, and others to the same effect, being actions at law, conversant only with what at the time was considered the strict legal title to corporate stock, have necessarily no controlling force in a case depending upon equitable instead of legal principles." It also held that in equity the vendee's title ought to prevail where he purchased in good faith and for a valuable consideration, and has done all the law requires of him and all that it was possible for him to do in taking such possession as the nature of the property was susceptible of. In this case the vendor did all that he could to procure a transfer on the books, but the secretary refused to permit a transfer. The attaching creditors also knew of the prior assignment.

In *Gray v. Graham*, 87 Conn. 601, 49 L. R. A. (N. S.) 1159, 89 Atl. 262, it is said: "Our earlier cases seem to hold * * * that the right of an attaching creditor of the legal title on the books of the company is superior to that of the beneficial owner of the stock untransferred on the books of the company. These decisions have been limited and explained as being actions at law conversant with the strict legal title, and having 'no controlling force in a case depending upon equitable instead of legal principles.' *Colt v. Ives*, 31 Conn. 25; *Reed v. Copeland*, 50 Conn. 472." After referring to and commenting on certain cases in which an equitable title had been protected against a technical legal title, the court further said: "In the absence

da,²⁴ North Carolina²⁵ and South Carolina,²⁶ and it is the rule by express statutory provision in Alabama.²⁷

of statutory prohibition, the equitable title will be supported ahead of the holder of the legal title unless the beneficial owner is estopped from pressing his ownership against a creditor who has been injured by reliance upon possession of the legal title, or unless a general rule of law based on public policy forbids." In this case stock was transferred on the books without consideration and without intending to give the transferee the beneficial interest, but merely to enable him to act as a director, and the certificate was never delivered to him, and it was held that the right of the transferor to the stock was superior to that of an attaching creditor of the transferee who did not know when he extended the credit that the stock in question stood in his name and hence did not extend the credit on the faith of his apparent ownership.

Pub. Acts 1903, c. 194, § 20, provides that shares of stock may be pledged by delivering the certificate to the pledgee with power of attorney for its transfer; "but no such pledge shall be effectual to hold such stock against any person other than the pledgor, his executor, or administrator, unless there shall be an actual transfer of the same upon the books of the corporation, or unless a copy of such power of attorney shall be filed with the corporation."

In *Hotchkiss & Upson Co. v. Union Nat. Bank*, 68 Fed. 76, the court, construing an earlier statute to the same effect, held that the purpose of the provision requiring a transfer on the books or the filing of a power of attorney was to give notice of the pledge, and that actual notice would take the place of such registration or filing. In this case the question

was one of priority as between an unregistered pledge and a lien claimed by the corporation. *Id.* § 21, provides that stock "shall be transferable only on the books in such manner as the by-laws shall prescribe." See also *New York Commercial Co. v. Francis*, 83 Fed. 769, which refers to the Connecticut decisions on this subject.

Under a statute providing that directors shall be stockholders, it is intended that such directors be actually and not nominally stockholders, but the violation of such a statute would not affect the beneficial ownership of stock. And the fact that a person transfers stock without consideration and solely for the purpose of qualifying the transferee to serve as a director will not preclude the transferee from asserting title to such stock as against an attaching creditor of the transferor. *Gray v. Graham*, 87 Conn. 601, 49 L. R. A. (N. S.) 1159, 89 Atl. 262.

²⁴ In *State v. Suwannee*, 21 Fla. 1, it is said by way of dictum that "if an assignee of stock in an incorporated company chooses to permit it to remain registered in the name of the assignor, it may as a matter of law become liable to be seized for the debts of the registered owner."

²⁵ In *Morehead v. Western North Carolina R. Co.*, 96 N. C. 362, 2 S. E. 247, it is intimated, but not decided, that a purchaser at an attachment sale would get a title superior to that of a previous transferee whose transfer had not been registered.

²⁶ See *Fraser & Dill v. Charleston*, 11 S. C. 486, 503, where it is said by way of dictum that "perhaps" title would not pass by an unregistered assignment as against an attaching creditor without notice.

²⁷ *Marbury Lumber Co. v. Hunter*,

On the other hand, the view is taken by other courts that an unregistered transfer will prevail as against attaching or execution creditors of the transferrer, even when there is an express provision that shares shall be transferable only on the books of the corporation, and in some states this is held to be true even though the creditor may have no notice of the transfer. Reasons given in support of this rule are that it is in accordance with the general rule that an attaching creditor only obtains a lien upon the title or interest which the defendant has in the property at the time of the levy, and if all title and interest has passed from the debtor to a third person the attaching creditor gets nothing by the levy;²⁸ and also that the provision requiring

169 Ala. 503, 53 So. 1028; *Dithey v. First Nat. Bank*, 112 Ala. 391, 20 So. 476; *Abels v. Planters' & Merchants' Ins. Co.*, 92 Ala. 382, 9 So. 423; *White v. Rankin*, 90 Ala. 541, 8 So. 118; *Berney Nat. Bank v. Pinckard*, 87 Ala. 577, 6 So. 364.

The registered owner is regarded as the true owner for purposes of attachment, execution and sale. *Wetumpka Bridge Co. v. Kidd*, 124 Ala. 242, 27 So. 431.

Under the statute, stock is subject to sale on execution against the registered owner although it was purchased by him for a third person who paid the purchase price, and though the certificates were delivered to such third person who did not observe that they were not issued in her name. *Marbury Lumber Co. v. Hunter*, 169 Ala. 503, 53 So. 1028.

But an unregistered assignment by way of pledge is good as against a purchaser at an execution sale where both he and the judgment creditor had actual knowledge of the transfer at the time of the issuance and levy of the execution. *Selma Bridge Co. v. Harris*, 132 Ala. 179, 31 So. 508. See also *Dithey v. First Nat. Bank*, 112 Ala. 391, 20 So. 476.

²⁸ *United States. Masury v. Arkansas Nat. Bank*, 93 Fed. 603, rev'g 87 Fed. 381; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369.

California. *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676.

Louisiana. *Kern v. Day*, 45 La. Ann. 71, 12 So. 6.

Nebraska. *Everitt v. Farmers & Merchants Bank*, 82 Neb. 191, 20 L. R. A. (N. S.) 996, 117 N. W. 401.

New Jersey. *Reilly v. Absecon Land Co.*, 75 N. J. Eq. 71, 71 Atl. 248.

New York. *Smith v. American Coal Co.*, 7 Lans. 317.

South Dakota. *State Banking & Trust Co. v. Taylor*, 25 S. D. 577, 29 L. R. A. (N. S.) 523, 127 N. W. 590.

Washington. *Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co.*, 6 Wash. 597, 34 Pac. 155.

West Virginia. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

"A transfer by an assignment of the certificate leaves nothing in the assignor which can be reached by subsequent attachment or levy of execution, although the stock remains in his name upon the books of the company; and * * * it is immaterial that the by-laws or rules of the corporation require the transfer to be made upon its books." *Everitt v. Farmers & Merchants Bank*, 82 Neb. 191, 20 L. R. A. (N. S.) 996, 117 N. W. 401.

transfers to be made on the books does not operate as a recording or registration law in the interest and for the protection of creditors of the stockholders, especially where they are not open to their inspection.²⁹ This rule obtains in California.³⁰ Other jurisdictions which

29 United States. *Stowe v. Harvey*, 241 U. S. 199, 60 L. Ed. 953, aff'g 219 Fed. 17; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369.

California. *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676.

Delaware. *Allen v. Stewart*, 7 Del. Ch. 287, 44 Atl. 786.

Idaho. *Mapleton Bank v. Standrod*, 8 Idaho 740, 67 L. R. A. 656, 71 Pac. 119.

Kentucky. *First Nat. Bank of Lexington v. Bowman*, 168 Ky. 433, 182 S. W. 195; *Thurber v. Crump*, 86 Ky. 408, 6 S. W. 145.

Mississippi. *Clark v. German Security Bank*, 61 Miss. 611.

New Jersey. *Reilly v. Absecon Land Co.*, 75 N. J. Eq. 71, 71 Atl. 248.

North Dakota. *Doty v. First Nat. Bank of Larimore*, 3 N. D. 9, 17 L. R. A. 259, 53 N. W. 77, construing the National Banking Act.

Pennsylvania. *Com. v. Watmough*, 6 Whart. 117.

South Dakota. *State Banking & Trust Co. v. Taylor*, 25 S. D. 577, 29 L. R. A. (N. S.) 523, 127 N. W. 590.

Washington. *Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co.*, 6 Wash. 597, 84 Pac. 155.

West Virginia. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

"It is manifest that such provisions cannot be easily considered as intended to have the effect of recording statutes for the protection of creditors of stockholders, for the public at large is not entitled to access to the books of our corporations."

Reilly v. Absecon Land Co., 75 N. J. Eq. 71, 71 Atl. 248.

30 An unregistered transfer is valid as against the lien of a subsequent attachment by a creditor of the transferor, whether such creditor has notice of the transfer or not. *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676, reviewing the California cases on this subject.

This is true though the statute provides that a transfer by indorsement and delivery of the certificate "is not valid, except as to the parties thereto," until the same is entered upon the corporate books. This provision is so construed as to make unregistered transfers valid as to all the world except subsequent purchasers in good faith without notice. Nor is the rule affected by the fact that the stock certificate recites that it is transferable only on the books of the company and on surrender of the certificate. *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676.

The rule applies to a subsequent attachment by the corporation itself. *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676.

A purchaser at an execution sale of the stock as the property of the registered owner acquires no title as against a prior unregistered transfer of which he has notice. *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676; *Blakeman v. Puget Sound Iron Co.*,

apply it are Delaware,³¹ Idaho,³² Kentucky,³³ Louisiana,³⁴ Michi-

72 Cal. 321, 13 Pac. 872; *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600; *Winter v. Belmont Min. Co.*, 53 Cal. 428; *People v. Elmore*, 35 Cal. 653; *Weston v. Bear River & A. Water & Mining Co.*, 6 Cal. 425.

But such a purchaser acquires no title as against a prior unregistered title of which he has notice. *West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622; *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600; *Winter v. Belmont Min. Co.*, 53 Cal. 428; *Naglee v. Pacific Wharf Co.*, 20 Cal. 529.

³¹ The rights of a pledgee under an unregistered transfer are superior to those of an attaching creditor, where neither the charter nor a general law negatives all other modes of transfer except a transfer on the books. *Allen v. Stewart*, 7 Del. Ch. 287, 44 Atl. 786. In this case a sale of stock on execution was enjoined. The question of notice was not referred to, and it does not appear whether the creditor had notice or not.

In *Trimble v. Vandegrift*, 7 Houst. (Del.) 451, 32 Atl. 632, the court ordered a sale of stock under an attachment *fi. fa.*, although the return stated that the corporation had notice of a sale of the stock prior to the attachment, where it did not say how or from whom it received such notice, or to whom such sale was made.

³² *Mapleton Bank v. Standrod*, 8 Idaho 740, 67 L. R. A. 656, 71 Pac. 119. In this case it was held that an unregistered pledge was good as against an attachment. Apparently there had been no sale under the attachment, and it does not appear whether the attaching creditor had notice. But the court states the question for decision to be whether the lien acquired by the attachment is superior to the lien of a prior pledge, of which the attaching creditor has no-

tice prior to the execution sale.

³³ In *First Nat. Bank of Lexington v. Bowman*, 168 Ky. 433, 182 S. W. 195, it is held, under Ky. St. § 545, providing merely that shares shall be transferred on the books in such manner as the by-laws may direct, and that each person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of prior stockholder, that a bona fide purchaser is protected, in the absence of fraud, against subsequent attachment or execution against his vendor, although he failed to have the assignment recorded on the corporate books. Nothing is said as to whether the attaching creditor had notice.

"The validity of the sale and transfer in good faith of stock in a corporation cannot be attacked by a creditor, by virtue of an attachment levied after such transfer was made, on the ground that the transfer of the stock was not made on the books of the corporation." *Husband v. Linehan*, 168 Ky. 304, Ann. Cas. 1917 D 954, 181 S. W. 1089. In this case it appeared that the attaching creditor knew of the transfer before the levy. The provision as to a transfer on the books was in the stock certificates.

Under a former statute providing that transfers of stock should not be valid except as between the parties until entered upon the books of the company it was held that a transfer by separate writing to a bona fide purchaser for value without notice was valid as to creditors of the stockholder. *Thurber v. Crump*, 86 Ky. 408, 6 S. W. 145.

³⁴ *Kern v. Day*, 45 La. Ann. 71, 12 So. 6; *Orescent City Seltz & Mineral Water Mfg. Co. v. Deblieux*, 40 La. Ann. 155, 3 So. 726; *Pitot v. Johnson*, 33 La. Ann. 1286; *Smith v. Crescent City Live-Stock Landing &*

gan,³⁵ Minnesota,³⁶ Mississippi,³⁷ Missouri,³⁸ Nebraska.³⁹ Still other Slaughter-House Co., 30 La. Ann. 1378. In these cases the question of notice is not considered or referred to, and apparently is not regarded as important.

In *Black v. Zacharie*, 3 How. (U. S.) 483, 11 L. Ed. 690, it was held that under the laws of Louisiana the rights of an assignee under an unrecorded assignment were superior to those of a subsequent assignee with notice.

The Uniform Stock Transfer Act has been adopted in this state since the foregoing decisions. 1 Marrs Ann. Rev. St. p. 471.

³⁵ A pledge of stock will be upheld as against one who, with notice of the transfer, purchases the stock at a sale under execution levied upon it as the property of the pledgor, although the transfer to the pledgee is not recorded on the corporate books. *May v. Cleland*, 117 Mich. 45, 44 L. R. A. 163, 75 N. W. 129; *Newberry v. Detroit & L. S. Iron Mfg. Co.*, 17 Mich. 141.

The Uniform Stock Transfer Act has been adopted in this state since the foregoing decisions.

³⁶ An unregistered transfer is effectual to pass the property as against subsequent attaching creditors of the vendor. *Lund v. Wheaton Roller Mill Co.*, 50 Minn. 36, 36 Am. St. Rep. 623, 52 N. W. 268. In this case the controversy was between a transferee and a purchaser at execution sale who had notice of the transfer.

In *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85, 8 Am. St. Rep. 643, 35 N. W. 577, it was held that the rights of a prior assignee were superior to those of an attaching creditor with notice.

³⁷ The rights of execution or attaching creditors of the transferor are inferior to those of previous transferees whose transfers have not been recorded. *Goyer Cold Storage Co. v.*

Wildberger, 71 Miss. 438, 15 So. 235; *Clark v. German Security Bank*, 61 Miss. 611. In these cases the question of notice was not referred to, and it does not appear whether the creditors had notice or not.

In *Goyer Cold Storage Co. v. Wildberger*, supra, it was held that § 844 of the Code of 1892, which provided that "the legal title to the stock and the beneficial interest therein shall remain in the person appearing to be the owner by the books of the corporation, as to creditors, until after a bona fide transfer has been made on the books of the corporation," did not apply to transactions which took place before that Code took effect. The Code of 1906 apparently contains no such provision. The corresponding section (§ 909) merely provides that: "The stock in all corporations shall be transferable by indorsement and delivery of the stock certificate and the registry of such transfer in the books of the company."

³⁸ The rule that the rights of creditors of the assignor are inferior even though they have no notice of the unrecorded transfer was apparently approved in *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454, aff'd 74 Mo. 77, but it is to be noted in this case that, while the attaching creditor had no notice of the prior transfer at the time of the levy, the controversy was between the transferee and a purchaser at a sale under the attachment who took with such notice, and that the transferee had requested the corporation to make the transfer on its books.

³⁹ "In the absence of a controlling statute, a purchaser for a valuable consideration is protected against subsequent attachment or execution against his grantor, although he failed to have his assignment recorded upon the books of the corporation."

states in which it obtains are New Jersey,⁴⁰ New York,⁴¹

Everitt v. Farmers & Merchants Bank, 82 Neb. 191, 20 L. R. A. (N. S.) 996, 117 N. W. 401. In this case it was held that the rights of an assignee were superior to those of an execution creditor, and the execution sale was enjoined. The creditor and the corporation had notice of the assignment before the levy.

In *Farmers' & Merchants' Nat. Bank of Galva v. Mosher*, 68 Neb. 713, 724, 100 N. W. 133, 94 N. W. 1003, 63 Neb. 130, 88 N. W. 552, it is held that persons to whom the stock has been sold or pledged in good faith as collateral security prior to garnishment proceedings are entitled to the stock and the proceeds thereof as against the attaching creditors, even though it stands on the books in the name of the debtor. In this case the question of notice is not referred to, and it does not appear whether the creditors had notice or not.

⁴⁰ A sale of stock accompanied by the delivery of the certificate and usual power of attorney is valid as against creditors of the assignor, and gives the assignee a precedence over subsequent judgments, executions and attachments procured by such creditors, though notice thereof is not given to the company and the stock is not transferred on the corporate books, and though the attaching creditor has no notice of the transfer. *Reilly v. Absecon Land Co.*, 75 N. J. Eq. 71, 71 Atl. 248. In this case it was held that the rights of the assignee were superior to those of a purchaser at an attachment sale though the latter had no notice of the assignment.

In *Flostroy v. William B. Corby Coal Co.*, 80 N. J. Eq. 547, 85 Atl. 578, it was held that one to whom stock was assigned in satisfaction of a debt was entitled to priority over a sub-

sequent attaching creditor who purchased the stock at the sale under the attachment, although the assignee did not give notice of the assignment or request a transfer on the books until after such sale.

In *Broadway Bank v. McElrath*, 13 N. J. Eq. 24, the title of a pledgee was held to be superior to the rights of an attaching creditor without notice.

In *Rogers, Ketchum & Grosvenor v. New Jersey Ins. Co.*, 8 N. J. Eq. 167, the rights of a pledgee were held to be superior to those of a purchaser at a subsequent execution sale who took with notice.

Where there is no statutory authority for a direction given by the officer holding the writ in proceedings to attach stock requesting the corporation to issue a new certificate to the purchaser at the attachment sale, that direction and the corporation's compliance therewith affords no obstacle to the enforcement of the right of a previous purchaser from the debtor, claiming under an unrecorded assignment, to have the stock transferred to him. *Reilly v. Absecon Land Co.*, 75 N. J. Eq. 71, 71 Atl. 248.

Where the assignee failed to present the stock for transfer for a long period of time, and in the meantime the stock had been sold in attachment proceedings against the vendor, it was held that the court would require the assignee to indemnify the company against loss as a condition to a decree requiring a transfer to him on the books. *Reilly v. Absecon Land Co.*, 75 N. J. Eq. 71, 71 Atl. 248.

The Uniform Stock Transfer Act has been adopted in this state since the foregoing decisions.

⁴¹ *Weller v. J. B. Pace Tobacco Co.*, 2 N. Y. Supp. 292; *De Comeau v. Guild Farm Oil Co.*, 3 Daly (N. Y.) 218; *Smith v. American Coal Co.*, 7 Lans.

Ohio,⁴² Pennsylvania,⁴³ South Dakota,⁴⁴ Tennessee,⁴⁵ Texas,⁴⁶ (N. Y.) 317. These three cases were all actions against the corporation for failure to transfer the stock to the transferee. The question of notice to the transferee was not referred to in any of them.

In *Robinson v. National Bank*, 95 N. Y. 637, the registered owner transferred his stock and the corporation refused to register the transfer. Thereafter the corporation attached the stock and sold it as the property of the assignor. It was held that the assignee or his assignee might recover from the corporation dividends declared on the stock.

In New York the legal title passes although the transfer is not recorded. (See § 3795, supra.)

The Uniform Stock Transfer Act has been adopted in this state since the foregoing decisions.

⁴² The rights of one claiming under a previous unregistered transfer are superior to those of an attaching creditor without notice. *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348; *Haldeman v. Hillsborough & C. Ry.*, 2 Handy 101, 12 Ohio Dec. 351.

The Uniform Stock Transfer Act has been adopted in this state since the foregoing decisions.

⁴³ *Telford & F. Turnpike Co. v. Gerhab* (Pa.), 13 Atl. 90; *Eby v. Guest*, 94 Pa. St. 160; *In re Finney's Appeal*, 59 Pa. St. 398; *United States v. Vaughan*, 3 Binney (Pa.) 394, 5 Am. Dec. 375; *Com. v. Watmough*, 6 Whart. (Pa.) 117. In the above cases the question of notice is not referred to and apparently is not regarded as important.

The Uniform Stock Transfer Act has been adopted in this state since the foregoing decisions.

⁴⁴ The rights of a pledgee are superior to those of an attaching creditor whether the latter has notice of the transfer or not. *State Banking &*

Trust Co. v. Taylor, 25 S. D. 577, 29 L. R. A. (N. S.) 523, 127 N. W. 590.

The rights of the transferee or pledgee are superior where the attaching creditor has notice. *Van Cise v. Merchants' Nat. Bank*, 4 Dak. 485, 33 N. W. 897.

⁴⁵ The rights of the transferee are superior although the corporation has no notice of the transfer and apparently though the creditor has no such notice. *McClung v. Colwell*, 107 Tenn. 592, 89 Am. St. Rep. 961, 64 S. W. 890; *Cornick v. Richards*, 3 Lea (Tenn.) 1.

In *Cates v. Baxter*, 97 Tenn. 443, 37 S. W. 219, a subscriber to stock, to whom no certificate had been issued, transferred the stock by a deed of trust as security. The deed was recorded, but no notice was given to the corporation. It was held that the transfer was not completed, and hence that the shares remained subject to attachment by the creditors of the subscriber.

In *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100, it was held that the assignee's right was superior, where the corporation was notified of the assignment prior to the attachment.

In *State Ins. Co. v. Sax*, 2 Tenn. Ch. 507, it was held that the right of an execution creditor was superior, where the corporation had no notice of the assignment.

See also *McQuade v. Williams*, 101 Tenn. 334, 47 S. W. 427.

⁴⁶ The rights of the transferee are superior although the attaching or execution creditor has no notice of the transfer. *Seeligson & Co. v. Brown*, 61 Tex. 114; *South Texas Nat. Bank v. Texas & L. Lumber Co.*, 30 Tex. Civ. App. 412, 70 S. W. 768; *Hamilton v. San Antonio Foundry Co.* (Tex. Civ. App.), 51 S. W. 1104; *Tomblor v. Palestine Ice Co.*, 17 Tex. Civ. App. 596, 43 S. W. 896. See also

Washington,⁴⁷ and in the federal courts in respect to the stock of national banks.⁴⁸

The rule has been adopted by statutory provision in Illinois,⁴⁹

Strange v. Houston & T. C. R. Co., 53 Tex. 162.

⁴⁷In Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co., 6 Wash. 597, 34 Pac. 155, it is said that "an unrecorded transfer is good as against a purchaser at execution sale against the owner of record, even although such purchaser has no notice whatever of such transfer." It appeared, however, that the purchaser had notice before the sale. See also Dearborn v. Washington Sav. Bank, 18 Wash. 8, 50 Pac. 575.

⁴⁸The rights of a pledgee are superior to those of a purchaser at an execution sale who has notice of the pledge. Masury v. Arkansas Nat. Bank, 93 Fed. 603, rev'g 87 Fed. 381.

In Hazard v. National Exch. Bank of Newport, 26 Fed. 94, the rights of the transferee were held to be superior to those of a purchaser at an execution sale pursuant to an attachment although the latter had no notice of the transfer.

In Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. 369, the rights of the transferee were held to be superior to those of an attaching creditor without notice. This holding was followed in Doty v. First Nat. Bank of Larimore, 3 N. D. 9, 17 L. R. A. 259, 53 N. W. 77, and in Bateman v. Gits, 16 N. M. 441, 120 Pac. 307, which were cases involving stock in national banks.

In Scott v. Pequonnock Nat. Bank, 21 Blatchf. 203, 15 Fed. 494, the rights of the transferee were held to be superior, but the question of notice was not referred to.

See also Johnston v. Lafin, 103 U. S. 800, 26 L. Ed. 532; Bath Sav. Institution v. Sagadahoc Nat. Bank, 89

Me. 500, 36 Atl. 996; Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515.

⁴⁹The statute provides that the share or interest of a stockholder in any corporation may be taken on execution and sold; "but in all cases, where such share or interest has been sold or pledged in good faith for a valuable consideration, and the certificate thereof has been delivered upon such sale or pledge, such share or interest shall not be liable to be taken on execution against the vendor or pledgor, except for the excess of the value thereof over and above the sum for which the same may have been pledged and the certificate thereof delivered." J. & A. Ann. St. ¶ 6799.

"The intention of the statute * * * was to give more commercial freedom to transfers of stock, and to make them as nearly negotiable as possible." Campbell & Zell Co. v. Ross, 86 Ill. App. 356, aff'd 187 Ill. 553, 58 N. E. 596. And see, to the same effect, Rice v. Gilbert, 173 Ill. 348, 50 N. E. 1087, aff'g 72 Ill. App. 649; Alderton v. Conger, 78 Ill. App. 533.

Under its provisions, "a delivery of the certificates of stock to one who in good faith advances money on the security thereof, is sufficient to protect the holder as against executions or attachments against the pledgor, to the extent of the debt such stock is given to secure, even though there be no transfer in writing or upon the books of the corporation." Rice v. Gilbert, 72 Ill. App. 649, aff'd 173 Ill. 348, 50 N. E. 1087. In affirming the judgment of the appellate court the supreme court said that the words "sold or pledged" in the statute were not to be confined to absolute

as well as in the states of Maryland,⁵⁰ Montana,⁵¹ Utah,⁵² Vir-

sales and technical pledges, but were to be given a broader significance. And it also holds that independently of the statute the decree of the lower court was correct because the execution creditor had actual or constructive notice of the pledge.

A pledge of stock by delivery of the certificate, with notice to the corporation, passes title to the pledgee as against an execution subsequently levied upon it by a creditor of the pledgor. *Alberton v. Conger*, 78 Ill. App. 533.

A delivery of a certificate of stock by a husband, in good faith, to his wife, as a gift in consideration of marriage, in accordance with a promise made her before her marriage, gives her good title as against a subsequent attachment by a creditor of her husband, although the stock has not been transferred on the corporate books, where she has attempted to procure a transfer and the fact that it was not made was due to the delay or neglect of the company, and the creditor knew of her claim as owner before bringing suit. *Campbell & Zell Co. v. Ross*, 86 Ill. App. 356, aff'd 187 Ill. 553, 58 N. E. 596.

Stock belonging to a married woman but standing on the corporate books in the name of her husband cannot be taken under execution by the husband's creditors, where there was no intent to defraud them and they were not misled to their prejudice by her act in permitting the stock to stand in his name. *Magerstadt v. Schaefer*, 213 Ill. 351, 72 N. E. 1063.

The burden of proof of a bona fide transfer by the husband to the wife may rest upon the wife, under such circumstances. The question of good faith is one of fact. *Magerstadt v. Schaefer*, 213 Ill. 351, 72 N. E. 1063.

Before the enactment of the statute a judgment creditor of a pledgor of

stock, without notice of the pledge, was entitled to preference over the pledgee, where there was no transfer on the books. *People's Bank of Bloomington v. Gridley*, 91 Ill. 457.

⁵⁰ Act 1886, c. 287, contained such a provision. *Morton v. Grafflin*, 68 Md. 545, 15 Atl. 298, 13 Atl. 341.

Prior to the passage of this act the title of a purchaser without notice at a sale under an attachment was superior to that of a previous pledgee. *Noble v. Turner*, 69 Md. 519, 16 Atl. 124.

1 Ann. Code, 1911, art. 23, § 71, p. 564, provided for the protection of bona fide purchasers or pledgees for value without notice.

Act 1886, c. 287, containing a similar provision was construed and applied in *Morton v. Grafflin*, 68 Md. 545, 15 Atl. 298, 13 Atl. 341.

The Uniform Stock Transfer Act has since been adopted in this state. *Laws 1910*, c. 73, § 37, p. 67.

⁵¹ Rev. Codes 1907, § 3855, provides that the delivery of a stock certificate to a bona fide purchaser or pledgee for value, together with a written transfer of the same, or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against the creditors of the transferrer and subsequent purchasers.

⁵² The statute provides that the delivery of the certificate, together with a written transfer of the same, signed by the owner, to a bona fide purchaser for value, shall be deemed a sufficient transfer of the title as against any creditor of the transferrer and all other persons whosoever. *Comp. Laws 1907*, § 330.

In *Barse Live-Stock Co. v. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. 630, it was held that an unregistered transfer was good as against a judg-

ginia,⁵³ West Virginia,⁵⁴ Wyoming⁵⁵ and the District of Columbia.⁵⁶

It was also held to be the rule in Massachusetts⁵⁷ in construing

ment creditor who purchased at execution sale, where he had full knowledge of the transfer.

⁵³ Code 1904, § 1105e (59).

⁵⁴ Ann. Code 1913, § 2870 (Acts 1882, c. 96). *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. E. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

The statute was cited in *Donnally v. Hearndon*, 41 W. Va. 519, 23 S. E. 646.

⁵⁵ Comp. St. 1910, § 4754, provides that where shares have been pledged in good faith and the certificates delivered to the pledgee, they shall not be liable to be taken on execution against the pledgor, except for the excess of value over and above the sum for which they were pledged.

⁵⁶ Ann. Code 1910, § 629, provides that if the person in whose name the stock stands on the books shall in good faith sell, pledge or otherwise dispose of his stock to another, and deliver to him the certificates with written authority to transfer the same on the corporate books, the title shall vest in the latter as against the creditors of the former.

⁵⁷ St. 1903, c. 423, § 1, provided that the delivery of a certificate of stock by the person named as the stockholder in such certificate or by a person intrusted by him with its possession for any purpose to a bona fide purchaser or pledgee for value, with a written transfer thereof, or a written power of attorney to sell, assign or transfer the same, signed by the person named as stockholder in such certificate, shall be a sufficient delivery to transfer title as against all persons.

The same provision in respect to the transfer of stock in business corporations is found in St. 1903, c. 437, § 28, in respect to the transfer of

stock in railroad companies in St. 1906, c. 463, part II, § 41; and in respect to the transfer of stock in street railway companies in St. 1906, c. 463, part III, § 22.

"The object of this statute was merely to protect stock so transferred against attachments or other accruing claims against the apparent owner of record. It was not intended and cannot operate to raise the title of a pledgee into an absolute ownership." *Chase v. Boston*, 193 Mass. 522, 79 N. E. 736.

St. 1884, c. 229; R. L. c. 109, § 37, which was repealed by c. 423, § 2, provided that the delivery of a stock certificate to a bona fide purchaser or pledgee, for value, together with a written transfer of the same, or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties. *Athol Sav. Bank v. Bennett*, 203 Mass. 480, 89 N. E. 632; *Clews v. Friedman*, 182 Mass. 555, 66 N. E. 201; *Andrews v. Worcester, N. & R. R. Co.*, 159 Mass. 64, 33 N. E. 1109.

Under these provisions a bona fide purchaser or pledgee took a good title as against a subsequent attachment or attempted sale on execution by a creditor of the transferrer, though the transfer was not recorded on the corporate books. *Parkhurst v. Almy*, 222 Mass. 27, 109 N. E. 733; *Athol Sav. Bank v. Bennett*, 203 Mass. 480, 89 N. E. 632; *Clews v. Friedman*, 182 Mass. 555, 66 N. E. 201; *Andrews v. Worcester, N. & R. R. Co.*, 159 Mass. 64, 33 N. E. 1109.

Where a father lent shares of stock to his son, executing a transfer of the certificate to him, and the son took out a new certificate which he deliv-

a statute providing that the delivery of the stock certificate withered to his father with a power of attorney signed by him in blank on the back thereof, it was held that the father was a bona fide purchaser for value within the meaning of the statute. *Andrews v. Worcester, N. & R. R. Co.*, 159 Mass. 64, 33 N. E. 1109.

St. 1881, c. 302; Pub. Stats. c. 105, § 24, provided that no transfer of stock should affect the title or rights of an attaching creditor until it was recorded upon the books of the corporation or a new certificate was issued to the transferee; but that no such transfer should defeat the title or affect the rights of the vendee if the record was made or a new certificate was issued within ten days after the transfer was made. *Athol Sav. Bank v. Bennett*, 203 Mass. 480, 89 N. E. 632; *Clews v. Friedman*, 182 Mass. 555, 66 N. E. 201; *Andrews v. Worcester, N. & R. R. Co.*, 159 Mass. 64, 33 N. E. 1109.

“Previously to the St. 1881, c. 302, transfers of shares of railroad and manufacturing corporations and of many others, could not be made effectual against the rights of subsequent attaching creditors unless recorded on the books of the corporation. *Blanchard v. Dedham Gaslight Co.*, 12 Gray (Mass.) 213; *Fisher v. Essex Bank*, 5 Gray (Mass.) 373, Pub. Stats. c. 112, § 56. Except in reference to the small number of corporations in which there was no provision of statute or of the charter requiring a transfer to be made on the books of the corporation (see *Boston Music Hall Ass’n v. Cory*, 129 Mass. 435) a creditor, by examining the books, could be certain to obtain a valid attachment against the owner of record. No purchaser of stock could be sure that his title was good against possible attachments without an examination of the books of the corporation, nor could he be protected against attachments that

might be made subsequently, unless he recorded his transfer immediately.” *Clews v. Friedman*, 182 Mass. 555, 66 N. E. 201.

Prior to that time it was held that the statutes requiring registration of transfers, “taken in connection with the contemporaneous statutes * * *, authorizing and facilitating the attachment of such shares by creditors of the owner, are not to be construed as intended merely for the convenience and benefit of the corporation, and the regulation of its relations to the stockholders, but are to be considered as in the nature of a registry act, regulating the transfer of the stock as to third persons, and therefore preventing an unrecorded transfer from taking effect against a creditor afterwards attaching the shares without notice of the transfer. *Fisher v. Essex Bank*, 5 Gray 373; *Blanchard v. Dedham Gaslight Co.*, 12 Gray 213; *Sibley v. Quinsigamond Bank*, 133 Mass. 515, 521; *Central National Bank v. Williston*, 138 Mass. 244.” *Bridgewater Iron Co. v. Lissberger*, 116 U. S. 8, 29 L. Ed. 557.

But even then a transfer for a valuable consideration was valid against a subsequent attachment by a creditor having knowledge or notice of the transfer. *Bridgewater Iron Co. v. Lissberger*, 116 U. S. 8, 29 L. Ed. 557.

In *Fisher v. Essex Bank*, 5 Gray (Mass.) 373, it seems to have been held that an unregistered transfer which passes an equitable title only will not prevail against a subsequent execution or attachment by a creditor of the transferrer, even though the creditor may have notice of the transfer before levy of the execution or attachment.

In *Boston Music Hall Ass’n v. Cory*, 129 Mass. 435, it was held that an unregistered transfer was valid as against a subsequent attaching credi-

a written transfer of, or power of attorney to transfer, the same, shall be a sufficient delivery to transfer the title as against all persons. Such a statute was so construed in Wisconsin.⁵⁸

The same will doubtless be held to be true under similar statutes now in force in Maine,⁵⁹ New Hampshire⁶⁰ and Rhode Is-

tor, in the absence of an express provision of the charter or statute requiring a transfer on the books.

In *Sargent v. Essex Marine Ry. Corporation*, 9 Pick. (Mass.) 202, and *Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351, it was held that a by-law requiring transfers of stock to be made upon the books of the corporation, where there is no express authority therefor in the charter or general law, is to be construed as intended merely for the protection of the corporation, and does not render an unregistered transfer ineffectual as against subsequent attaching or execution creditors of the transferrer.

The Uniform Stock Transfer Act is now in force in this state.

⁵⁸ St. 1898, § 1751, provided that the delivery of a stock certificate to a bona fide purchaser for value, together with a written transfer of the same signed by the owner of the certificate, his attorney or legal representative, should be a sufficient delivery to transfer the title as against all persons.

Under this provision it was held that an assignee whose assignment had not been recorded took title superior to the claim of a creditor of the assignor under a subsequent attachment. *Schwab v. Smith*, 143 Wis. 427, 128 N. W. 78.

Prior to the enactment of this statute it was held that the title of an execution or attaching creditor was superior. In *re Murphy*, 51 Wis. 519, 8 N. W. 419.

The Uniform Stock Transfer Act is now in force in this state. St. 1915, § 1751n.

⁵⁹ The present statute provides that the delivery of a certificate of stock to a bona fide purchaser or pledgee for value, together with a written transfer of the same or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title against all parties. Rev. St. 1903, c. 47, § 34, p. 440.

Under earlier statutes it was held that no transfer of stock would secure it from attachment until it was entered on the corporate books. *Skowhegan Bank v. Cutler*, 49 Me. 315; *Fiske v. Carr*, 20 Me. 301.

⁶⁰ Pub. St. 1901, c. 149, § 14, p. 477, provides that the delivery of a stock certificate to a bona fide purchaser or pledgee for value, together with a written transfer or a deed of the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties except the corporation.

Prior to the enactment of this statute it was held that an unrecorded transfer of stock in a dividend paying corporation was ineffectual to pass the title as against attaching creditors without notice. *Buttrick v. Nashua & L. R. R.*, 62 N. H. 413, 13 Am. St. Rep. 578; *Scripture v. Francestown Soapstone Co.*, 50 N. H. 571.

But the rights of a transferee under an unrecorded transfer were held to be superior to those of an attaching creditor with notice. *Scripture v. Francestown Soapstone Co.*, 50 N. H. 571.

Knowledge of the president of the attaching company of a sale of his own stock was held to be notice to the

land,⁶¹ although there are, apparently, no decisions on the subject in those states since the adoption of the statute, and in some of them the contrary rule obtained before the statute was enacted.

It will also doubtless be held to be true under the provisions of the Uniform Stock Transfer Act, which has been adopted in a number of states, including some of those previously mentioned.⁶²

Under a statute providing that no transfer shall be valid, except as between the parties, until it is entered upon the corporate books, it has been held that such an entry is necessary in the case of an assignment for the benefit of creditors in order to pass the title as against creditors of the assignor.⁶³

In Connecticut it has been held that the fact that stock held in

company in *Scripture v. Francetown Soapstone Co.*, 50 N. H. 571.

But knowledge of a director of an attaching corporate creditor was held not to be notice to the corporation where he took no part in causing the attachment to be made, and it did not appear that he knew of it, or of the indebtedness on which it was based. *Buttrick v. Nashua & L. R. R.*, 62 N. H. 413, 13 Am. St. Rep. 578.

⁶¹ Gen. Laws 1909, c. 213, § 20, p. 714; Gen. Laws 1896, c. 177, § 20.

In *Lippitt v. American Wood Paper Co.*, 15 R. I. 141, 2 Am. St. Rep. 886, 23 Atl. 111, and *Beckwith v. Burroughs*, 13 R. I. 294, the question of priority was referred to but was not decided.

This provision merely provides what shall be a sufficient delivery to transfer title; and "is not to be construed as defining, varying or enlarging agreements or relations which may have been entered into between owners of stock and others." It has no bearing on the question whether a given transaction is an absolute transfer or a pledge. *United Nat. Bank v. Tappan*, 33 R. I. 1, 79 Atl. 946.

The Uniform Stock Transfer Act has been adopted in this state since the foregoing decisions.

⁶² Section 1 of the act provides that

title to a certificate and to the shares represented thereby shall be transferred only by delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or by delivery of the certificate and a separate document containing a written assignment of the certificate, or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby, and that such assignment or power of attorney may be either in blank or to a specified person. It further provides that its provisions shall be applicable although the charter, articles of incorporation or by-laws of the corporation, and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent.

This act has been adopted in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁶³ *Lyndonville Nat. Bank v. Folsom*, 7 N. M. 611, 38 Pac. 253.

trust stands on the books of the corporation in the name of the trustee individually will not render it liable to attachment by his creditors as against the cestui que trust, at least where they have not been misled or deceived by the fact that the stock is registered in the name of the trustee, or where they have knowledge of the true state of the title.⁶⁴

§ 3812. — Where failure to register is fault of corporation. As a rule, even in those jurisdictions in which it is held that an unregistered transfer does not prevent a subsequent attachment of the shares by a creditor of the transferrer with notice of the transfer, an unregistered transfer will prevail as against a subsequent attachment by the corporation for a debt due to it from the transferrer, where the parties have done all in their power to procure a transfer on the books, and the failure to secure registration was solely the fault of the corporation or its officers or agents.⁶⁵ And this is particularly true

⁶⁴ *Mowry v. Hawkins*, 57 Conn. 453, 18 Atl. 784. See also *New York Commercial Co. v. Francis*, 83 Fed. 769, a Connecticut case, where the contest was between attaching creditors of the trustee and attaching creditors of the cestui que trust.

⁶⁵ *Weber v. Bullock*, 19 Colo. 214, 35 Pac. 183; *First Nat. Bank of Longmont v. Hastings*, 7 Colo. App. 129, 42 Pac. 691; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454, aff'd 74 Mo. 77. See also *New York Commercial Co. v. Francis*, 83 Fed. 769.

And see § 3809, *supra*.

A court of equity will protect the assignee where he has done all in his power to comply with the statute and is prevented from obtaining a transfer on the books by the fault of others. *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161. This case in effect overrules *Northrop v. Newton & B. Turnpike Co.*, 3 Conn. 544.

A deposit for registration is clearly sufficient as against a subsequent attachment or execution, if by the charter or statute it is sufficient to pass the legal title. *Oxford Turnpike Co. v. Bunnell*, 6 Conn. 552.

"Shares in the stock of a corporation are the subjects of sale, mort-

gage or pledge, and are liable to attachment and execution like other personal property. And when the question is between a vendee and an attaching creditor of the vendor, as to which of them has the better title, and it appears, as it does here, that the instrument of transfer or assignment was executed prior in point of time to the service of the attachment, then, if the vendee's purchase was made in good faith and for a valuable consideration, * * * it would seem that in equity his title ought to prevail, provided he has done all that the law requires of him, and all that it was possible for him to do, in taking such possession as the nature of the property is susceptible of." *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161.

Under a statute making the validity of a transfer of stock dependent upon the entry on the corporate books within sixty days after transfer, a transfer must be entered on the corporate books in order to be deemed binding as against execution creditors of the transferrer, or it is at least incumbent upon the transferee to show that he had done all possible to conform to the statute and that failure to secure record on the corporate

where the corporation itself is the attaching creditor,⁶⁶ since, by wrongfully refusing to register the transfer when requested it waives the requirement of registration, and will not be permitted to derive any advantage from its own wrong.⁶⁷

§ 3813. — Failure to register transfer as a badge of fraud. A sale of shares of stock may, like a sale of any other personal property, be void as to attaching or execution creditors of the vendor on the ground of fraud, and retention of possession of the shares may, as in the case of other property, be evidence of fraud. Upon a sale of chattels, there must be a substantial change of possession accompanying and following the sale, or it will, unexplained, be conclusive evidence of a fraudulent secret trust for the benefit of the vendor, which will render the sale void as to creditors. Possession being the usual indication of ownership of personal property, the law looks upon the purchaser's neglect to take and hold possession of the property purchased as evidence that the sale was fictitious, and therefore, as to the vendor's creditors, treats the property as still his, notwithstanding the sale. This principle has been applied to sales of stock in corporations. So it has been held that there must be such a change of

books was due to the fault of the corporation. *Isbell v. Graybill*, 19 Colo. App. 508, 76 Pac. 550.

Where, at the time of an unregistered pledge of stock, a statute provides that transfers shall not be valid, except as between the parties, unless registered on the books of the corporation, the invalidity of the pledge as against the pledgor's creditors is not affected by a subsequent amendment of the statute providing that transfers as collateral security shall be valid after notice to the secretary of the corporation, as the amendment is not retroactive. *Perkins v. Lyons*, 111 Iowa 192, 82 N. W. 486.

The assignee must have exhausted all reasonable means to have the transfer recorded, however. A mere request to make the transfer has been held to be insufficient, where it was made in the corporation's office where the books were kept, and the secretary was willing to make the transfer and the assignee could have procured it

to be made while he was present. *Perkins v. Lyons*, 111 Iowa 192, 82 N. W. 486.

A mere request to transfer the stock on the books is insufficient, where the statute provides that shares may be transferred by an instrument in writing which shall be recorded, and no such instrument is presented for record, and no request made to record such an instrument. *Newell v. Williston*, 138 Mass. 240.

As to what must have been done towards procuring a transfer in order to render this rule applicable, see also § 3809, *supra*.

⁶⁶ *Robinson v. National Bank*, 95 N. Y. 637.

If the corporation itself attaches the stock after it has been requested to make the transfer, it cannot defeat the right of the assignee since it has notice of his title. *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306.

⁶⁷ See § 3809, *supra*.

possession as the stock is susceptible of, and that if a statute requires a transfer on the books of the corporation, failure of the purchaser to take steps to procure such a transfer is a failure to take such an open possession of the stock as the nature of the property requires, and such failure, if unexplained, is evidence of a secret trust which renders the sale fraudulent and void as against an attaching or execution creditor of the vendor.⁶⁸ Other courts, however, have held that the rule regarding retention of possession by the vendor relates to tangible personal property whose ownership is indicated by physical possession, and not to stock;⁶⁹ that there is no presumption of fraud from the mere continuance of the title to stock on the books of the company when the beneficial title is elsewhere,⁷⁰ and that an actual

⁶⁸ *McFall v. Buckeye Grangers' Warehouse Ass'n*, 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253; *Pinkerton v. Manchester & L. R. R.*, 42 N. H. 424.

"In the absence of explanation, a secret trust will be presumed." *Scripture v. Francestown Soapstone Co.*, 50 N. H. 571.

⁶⁹ *Gray v. Graham*, 87 Conn. 601, 49 L. R. A. (N. S.) 1159, 89 Atl. 262. See also *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

"The actual possession and use of goods is a matter which is open and visible to all the world, and being also considered prima facie evidence of ownership, it has therefore not only in law, but likewise in the common estimation of mankind, been supposed to be sufficient to give such possessor a credit in his dealings and intercourse with the world equal to the value of the goods so held and used; and for this reason it has been held that a private purchaser of goods, even for a valuable consideration, who leaves them in the possession of the vendor, no matter from what motive, whether innocent or fraudulent, shall not be permitted afterwards to withdraw them from the execution-creditor of the vendor. But as to the stock, it, from its very nature is in-

capable of such possession as to make it known or notorious who has the use or benefit of it, and thus raise a general belief in regard to the ownership thereof: even its existence may be unknown, excepting comparatively to but few persons. The only evidence of it that can be safely trusted as to this, is the books of the bank or the corporation; but they being of a private nature are not open to public inspection. Hence it is, that the ownership of such stock though held by the owner in his own name on the books of the corporation, is not supposed to have given him a general credit with the world. And for the same reason, if held by another in trust for him, the trustee is never supposed, by reason of its standing in his name on the books of the corporation, to have obtained a general credit on account of it. It is not, therefore, to appraise the world and prevent it from giving a false credit to the apparent owner of the stock that the transfer thereof is required to be made on the books of the bank in the presence of one of its officers." *Com. v. Watmough*, 6 Whart. (Pa.) 117.

⁷⁰ *Gray v. Graham*, 87 Conn. 601, 49 L. R. A. (N. S.) 1159, 89 Atl. 262.

"The failure to record the conveyance is not evidence of such a con-

transfer by indorsement and delivery of the stock with retention of the possession thereof by the transferee is sufficient as against creditors of the transferor even though the stock is not transferred on the books.⁷¹ In support of this rule it has been said that the registration of stock on the books is not a physical transfer, and that the public have no knowledge of such registration, although under certain conditions stockholders and creditors may have.⁷² If the title to the shares passes by indorsement and delivery, the fact that they remain in the name of the vendor on the corporate books is not a sufficient reason for extending credit to him on the faith of his ownership of them.⁷³

destructive fraud as sometimes arises from the possession of chattels after the property has been parted with." *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369.

"The shares are not in the possession of the assignor merely because they stand in his name on the books of the corporation, and a bona fide transfer of the certificates of stock cannot be said to imply a secret trust." *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454, aff'd 74 Mo. 77.

"Public policy may have required the presumption of fraud to arise from the mere physical possession of chattels; it does not require such a presumption from the mere continuance of the title to stock on the books of the company when the beneficial title is elsewhere." *Gray v. Graham*, 87 Conn. 601, 49 L. R. A. (N. S.) 1159, 89 Atl. 262.

Colt v. Ives, 31 Conn. 25, 81 Am. Dec. 161, apparently lays down a contrary rule, but, if it does, it is mere dictum, since it was there held that a failure to procure a transfer on the books was excused by the effort of the parties to procure it and the effort of the vendor to make the assignment as notorious as possible.

⁷¹ Shares of stock are not tangible property. The only tangible evidence of the property represented by them is the certificate, and when this is

delivered the statute has no application. *State Banking & Trust Co. v. Taylor*, 25 S. D. 577, 29 L. R. A. (N. S.) 523, 127 N. W. 590.

A gift of stock by the holder thereof to his wife was held to be valid under such circumstances as against the husband's trustee in bankruptcy, who sought to have it set aside as in fraud of creditors, though the statute provided that transfers of personal property should be conclusively presumed to be fraudulent if not accompanied by an immediate delivery and followed by an actual and continued change of possession of the thing transferred. *Harvey v. Stowe*, 219 Fed. 17, aff'd 241 U. S. 199, 60 L. Ed. 953. In this case it was further held that the donee's continuity of possession was not broken, within the meaning of the statute, and her title was not affected, by the fact that she twice redelivered the stock to the donor to enable him to vote it, etc., after which it was retransferred to her.

⁷² *Gray v. Graham*, 87 Conn. 601, 49 L. R. A. (N. S.) 1159, 89 Atl. 262.

The only feature of a stock transfer that resembles a physical possession is the possession of the stock certificate. *Gray v. Graham*, 87 Conn. 601, 49 L. R. A. (N. S.) 1159, 89 Atl. 262.

⁷³ *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454, aff'd 74 Mo. 77.

In any event a failure to have a transfer registered does not render it fraudulent as to the creditors of the transferrer under all circumstances. The neglect may be explained, and the presumption of a secret trust rebutted. If a good reason for such failure is shown, it will be excused, as in the case of a sale of other personal property and choses in action. "The ground on which stock sold but not legally transferred is open to attachment by the creditors of the vendor, is * * * the same upon which personal chattels sold but retained in the possession of the vendor are liable to attachment by the vendor's creditors. The principle in such case is, that the retention of possession is a badge of fraud—that is, is evidence of a fraudulent secret trust. * * * But it is well settled that this retention of possession in every case is only a badge, that is, is evidence of fraud, to be regarded as conclusive when the retention of possession is voluntary and unnecessary."⁷⁴ It follows from this that, where a transferrer of stock has made diligent effort to have his transfer made upon the books of the corporation, and on failure to accomplish this has used due diligence in making the transfer as notorious as possible, his retention of possession is excused, and the transferee's equitable title is good as against subsequent attaching creditors of the transferrer.⁷⁵

§ 3814. — Unregistered pledge of shares. If shares have not been transferred absolutely, but merely pledged as security for a debt, and

⁷⁴ *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161. And see, to the same effect, *Weber v. Bullock*, 19 Colo. 214, 35 Pac. 183; *First Nat. Bank of Longmont v. Hastings*, 7 Colo. App. 129, 42 Pac. 691.

"The circumstances of such retention of possession may be explained. It is true that, in the absence of explanation, a secret trust will be presumed; but when an explanation is offered, it is for the jury to say, under proper instructions, whether the explanation is sufficient; and the fact that possession was so retained, is for them to weigh in connection with all other evidence bearing upon the actual character and complexion of the transaction between the parties." *Scripture v. Francestown Soapstone Co.*, 50 N. H. 571.

⁷⁵ *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161. See also *United States v. Vaughan*, 3 Binney (Pa.) 394, 5 Am. Dec. 375.

And see § 3812, *supra*.

"Upon the same principle that the retention of the possession of chattels by a vendor may be explained by showing that a delivery was impossible, thereby rebutting any inference of fraud, the failure to have the transfer made upon the books of the company may be shown to be without fault on the vendee's part, and that such failure occurred notwithstanding his honest but ineffectual effort to comply with the requirements of the statute." *Weber v. Bullock*, 19 Colo. 214, 35 Pac. 183.

the transfer has not been registered, the rights of execution or attaching creditors of the pledgor as against the pledgee are the same as if the transfer had been an absolute one, as explained in the preceding sections.⁷⁶ The attachment or execution, however, will reach any surplus after satisfaction of the debt for which the shares are pledged, for it belongs to the pledgor,⁷⁷ unless in the particular jurisdiction the unregistered transfer vests the legal title in the pledgee,⁷⁸ and the equitable interest or right of the pledgor is not subject to attachment or execution.⁷⁹

§ 3815. Effect of unregistered transfers as against purchasers or pledgees from apparent owners. A number of courts have held that a provision that shares of stock shall be transferable only on the books of the corporation is intended for the protection of purchasers and pledgees of shares, as well as for the protection of the corporation and persons dealing with it, and that a bona fide purchaser or pledgee taking from one who appears on the books of the corporation as the owner of shares acquires a good title as against a prior transferee who has failed to have his transfer registered.⁸⁰ So under this rule, a bona fide purchaser of shares at a sale under an execution against one who appears as owner on the books of the corporation acquires a good title as against a prior unregistered transfer of which he has no notice.⁸¹

⁷⁶ See § 3811 et seq., supra.

⁷⁷ *Van Cise v. Merchants' Nat. Bank*, 4 Dak. 485, 33 N. W. 897; *Mapleton Bank v. Standrod*, 8 Idaho 740, 67 L. R. A. 656, 71 Pac. 119; *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348; *Seeligson & Co. v. Brown*, 61 Tex. 114. See also *Masury v. Arkansas Nat. Bank*, 93 Fed. 603, rev'g on other grounds 87 Fed. 381.

⁷⁸ See § 3795, supra.

⁷⁹ See § 3441, supra.

⁸⁰ *California*. *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, 163 Pac. 47; *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676; *Spreckels v. Nevada Bank of San Francisco*, 113 Cal. 272, 33 L. R. A. 459, 54 Am. St. Rep. 348, 45 Pac. 329; *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600; *People v. Elmore*, 35 Cal.

653; *Naglee v. Pacific Wharf Co.*, 20 Cal. 529.

Colorado. *Ironstone Ditch Co. v. Equitable Securities Co.*, 52 Colo. 268, 121 Pac. 174.

Kentucky. *First Nat. Bank of Lexington v. Bowman*, 168 Ky. 433, 182 S. W. 195; *Thurber v. Crump*, 86 Ky. 408, 6 S. W. 145; *Spalding v. Paine's Adm'r*, 81 Ky. 416, 5 Ky. L. Rep. 391.

Michigan. *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147.

New Hampshire. See *Scripture v. Francetown Soapstone Co.*, 50 N. H. 571.

New York. *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Cady v. Potter*, 55 Barb. 463.

South Carolina. See *Fraser & Dill v. Charleston*, 11 S. C. 486.

⁸¹ *Williams v. Mechanics' Bank*, 5 Blatchf. 59, Fed. Cas. No. 17,727; *Wetumpka Bridge Co. v. Kidd*, 124 Ala.

On the other hand, there are numerous holdings to the effect that if a purchaser or pledgee from the registered owner,⁸² or a purchaser at an attachment or execution sale of the stock as the property of the registered owner,⁸³ has notice of the prior unregistered transfer, he

242, 27 So. 431; West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622; Farmers' Nat. Gold Bank v. Wilson, 58 Cal. 600; Winter v. Belmont Min. Co., 53 Cal. 428; Naglee v. Pacific Wharf Co., 20 Cal. 529.

See also § 3811, supra.

⁸² Des Moines Loan & Trust Co. v. Des Moines Nat. Bank, 97 Iowa 668, 66 N. W. 914; May v. Cleland, 117 Mich. 45, 44 L. R. A. 163, 75 N. W. 129; Newberry v. Detroit & L. S. Iron Mfg. Co., 17 Mich. 141; Scripture v. Francetown Soapstone Co., 50 N. H. 571; George R. Barse Live-Stock Co. v. Range Valley Cattle Co., 16 Utah 59, 50 Pac. 630.

See Hotchkiss & Upson Co. v. Union Nat. Bank, 68 Fed. 76, construing the Connecticut statute as to unregistered pledges; National Bank of Pacific v. Western Pac. R. Co., 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676; Spreckels v. Nevada Bank of San Francisco, 113 Cal. 272, 33 L. R. A. 459, 54 Am. St. Rep. 348, 45 Pac. 329.

⁸³ United States. Bridgewater Iron Co. v. Lissberger, 116 U. S. 8, 29 L. Ed. 557; Masury v. Arkansas Nat. Bank, 93 Fed. 603, rev'g 87 Fed. 381.

Alabama. Selma Bridge Co. v. Harris, 132 Ala. 179, 31 So. 508; Wetumpka Bridge Co. v. Kidd, 124 Ala. 242, 27 So. 431.

California. National Bank of Pacific v. Western Pac. R. Co., 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676; Blakeman v. Puget Sound Iron Co., 72 Cal. 321, 13 Pac. 872; Farmers' Nat. Gold Bank v. Wilson, 58 Cal. 600; Winter v. Belmont Min. Co., 53 Cal. 428; People v. Elmore, 35 Cal. 653; Weston v. Bear

River & A. Water & Mining Co., 6 Cal. 425.

Dakota. Van Cise v. Merchants' Nat. Bank, 4 Dak. 485, 33 N. W. 897.

Indiana. Boone v. Van Gorder, 164 Ind. 499, 108 Am. St. Rep. 314, 74 N. E. 4.

Massachusetts. Bridgewater Iron Co. v. Lissberger, 116 U. S. 8, 29 L. Ed. 557, holding that this is true under the Massachusetts statute as construed by the courts of that state.

Michigan. May v. Cleland, 117 Mich. 45, 44 L. R. A. 163, 75 N. W. 129; Newberry v. Detroit & L. S. Iron Mfg. Co., 17 Mich. 141.

Minnesota. Lund v. Wheaton Roller Mill Co., 50 Minn. 36, 36 Am. St. Rep. 623, 52 N. W. 268.

Missouri. McClintock v. Central Bank of Kansas City, 120 Mo. 127, 24 S. W. 1052; Wilson v. St. Louis & S. F. Ry. Co., 108 Mo. 588, 32 Am. St. Rep. 624, 18 S. W. 286; Merchants' Nat. Bank v. Richards, 6 Mo. App. 454, aff'd 74 Mo. 77. See also Seligman v. St. Louis & S. F. R. Co., 22 Fed. 39.

New Jersey. Rogers, Ketchum & Grosvenor v. New Jersey Ins. Co., 8 N. J. Eq. 167.

Utah. Barse Live-Stock Co. v. Range Valley Cattle Co., 16 Utah 59, 50 Pac. 630.

Washington. Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co., 6 Wash. 597, 34 Pac. 155.

The transferee whose transfer is not registered has no right to enjoin the execution sale under such circumstances since the levy in question is not illegal or wrongful. And especially is this true where it does not appear that the stock is of any peculiar value or use to him, or that the

acquires no title as against the transferee, whether the unregistered transfer be regarded as passing the legal title, or merely an equitable title as between the parties.

In some jurisdictions the rights of an unregistered transferee are superior to those of a purchaser at an execution or attachment sale even though the latter has no notice of the transfer; ⁸⁴ while in others the rights of such a purchaser are superior even though he has notice of the prior unregistered transfer. ⁸⁵

It has been held that where the stock certificates are not delivered to a purchaser, he is thereby bound to take notice of a previous transfer. ⁸⁶ So it has been held that the rights of a mortgagee of stock to whom the certificates have not been delivered are subordinate to those of a subsequent bona fide purchaser for value to whom the stock has been transferred on the books, or to whom the certificates, properly indorsed, have been delivered by the owner. ⁸⁷

In a number of states it is provided by statute that the delivery of a stock certificate with a written transfer of, or power of attorney to transfer, the same, shall be a sufficient delivery to transfer the title as against all persons, ⁸⁸ or as against subsequent purchasers from the

threatened sale will cause him any great or irreparable damage. *Boone v. Van Gorder*, 164 Ind. 499, 108 Am. St. Rep. 314, 74 N. E. 4.

See also § 3811, *supra*.

⁸⁴ *Flostroy v. William B. Corby Coal Co.*, 80 N. J. Eq. 547, 85 Atl. 578; *Reilly v. Absecon Land Co.*, 75 N. J. Eq. 71, 71 Atl. 248.

This is true in respect to shares of stock of national banks. *Hazard v. National Exch. Bank of Newport*, 26 Fed. 94.

See also § 3811, *supra*.

⁸⁵ *Hair v. Burnell*, 106 Fed. 280, holding that this is true under the Iowa statute as construed by the courts of that state.

See also § 3811, *supra*.

⁸⁶ *Baldwin v. Canfield*, 28 Minn. 43, 1 N. W. 261, 276.

⁸⁷ *Spalding v. Paine's Adm'r*, 81 Ky. 416, 5 Ky. L. Rep. 391.

⁸⁸ In Louisiana, under the Act of 1852, nothing more was required to perfect a contract of pledge than the delivery of the certificate, and the

rights of a pledgee to whom the certificate had been delivered were superior to the title of a purchaser at execution sale. *Smith v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 30 La. Ann. 1378. See also *Friedlander v. Crescent City Live-Stock L. & S. H. Co.*, 31 La. Ann. 523.

The Uniform Stock Transfer Act is now in force in this state.

Wisconsin St. 1898, § 1751, so provided. *Schwab v. Smith*, 143 Wis. 427, 128 N. W. 78.

Under a former statute providing that no transfer should be valid except as between the parties until entered on the corporate books, it was held that an unregistered transfer was invalid as against subsequent bona fide purchasers from the transferrer. In *re Murphy*, 51 Wis. 519, 8 N. W. 419.

The Uniform Stock Transfer Act is now in force in this state.

Many statutes of this character have been discussed at length in con-

registered owner.⁸⁹ And it is sometimes provided that no pledge of stock shall be effectual against any person but the pledgor and his executors or administrators unless consummated by an actual transfer of the stock to the name of the pledgee, or unless a copy of the power of attorney for the transfer is filed with one of certain designated officers of the company.⁹⁰ The Uniform Stock Transfer Act provides that title to a certificate and to the stock represented thereby may be transferred by indorsement and delivery of the certificate, or by delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby, and also that the title of a transferee of a certificate under a power of attorney or assignment not written upon the certificate, or of any person claiming under him, shall cease and determine if, at any time prior to the surrender of the certificate to the corporation, another person, for value in good faith and without notice of the prior transfer, shall purchase and obtain delivery of the certificate with the indorsement of the person appearing by the certificate to be the owner thereof, or with the written assignment or power of attorney of such person though contained in a separate document.⁹¹

XXIII. REFUSAL TO RECOGNIZE AND REGISTER TRANSFERS

§ 3816. Right to transfer and duty to make it. A transferee of shares ordinarily has the right to have them transferred into his name on the books of the company, and a new certificate issued to him,⁹² and this right generally extends to purchasers at execution

sidering the effect of an unregistered transfer as against creditors of the transferrer. See § 3811, *supra*.

⁸⁹ *Donnally v. Hearndon*, 41 W. Va. 519, 23 S. E. 646.

See also § 3811, *supra*.

⁹⁰ Conn. Gen. St. 1887, § 1924. The purpose of the statute is to protect subsequent purchasers and persons who subsequently acquire liens on the stock without notice of the prior pledge, and it does not operate to protect subsequent purchasers or lien holders who have such notice. *Hotchkiss & Upson Co. v. Union Nat. Bank*, 68 Fed. 76.

⁹¹ See §§ 1 and 4 of the act. This act is in force in Louisiana, Maryland,

Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁹² *United States*. *O'Neil v. Wolcott Min. Co.*, 174 Fed. 527, 27 L. R. A. (N. S.) 200.

Alabama. *Wetumpka Bridge Co. v. Kidd*, 124 Ala. 242, 27 So. 431; *Thompson v. Hudgins*, 116 Ala. 93, 22 So. 632.

Arkansas. *Bankers' Trust Co. of St. Louis v. McCloy*, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205.

Georgia. *Thornton v. Martin*, 116 Ga. 115, 42 S. E. 348; *Hilton v. Sylvania & G. R. Co.*, 8 Ga. App. 10, 68 S. E. 746.

Indiana. *Boone v. Van Gorder*, 164

sales,⁹³ and to executors of deceased stockholders,⁹⁴ and legatees to

Ind. 499, 108 Am. St. Rep. 314, 74 N. E. 4.

Kansas. Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273.

Louisiana. Eisenhauer v. New Orleans Cotton Exchange, 140 La. 574, 73 So. 685.

Maryland. Real Estate Trust Co. v. Bird, 90 Md. 229, 44 Atl. 1048.

Massachusetts. Bond v. Mt. Hope Iron Co., 99 Mass. 505, 97 Am. Dec. 49; Sargent v. Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306.

Missouri. Senn v. Union Premium & Mercantile Co., 115 Mo. App. 685, 92 S. W. 507; Crenshaw v. Columbian Min. Co., 110 Mo. App. 355, 86 S. W. 260.

New Hampshire. Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971; Hill v. Pine River Bank, 45 N. H. 300.

Oklahoma. First Nat. Bank of Sulphur Springs v. Stribling, 16 Okla. 41, 86 Pac. 512.

Pennsylvania. Com. v. Camp, 102 Atl. 205.

Utah. Mundt v. Commercial Nat. Bank of Ogden, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

Washington. See Lacaff v. Dutch Miller Mining & Smelting Co., 31 Wash. 566, 72 Pac. 112.

This is true where each certificate states that it is transferable only on the books, although there is no provision on the subject in the charter or by-laws. Hilton v. Sylvania & G. R. Co., 8 Ga. App. 10, 68 S. E. 746.

One who presents the certificate with a proper assignment duly signed by the person to whom it was issued by the corporation has at least the prima facie legal right to have the stock transferred to him on the corporate books so that he may enjoy the

full benefits of a stockholder of record. Mundt v. Commercial Nat. Bank of Ogden, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

"A request by the vendor and purchaser of stock for its transfer upon the books of the corporation as effectually imposes the duty upon the corporation to transfer it when it is made in the performance of a contract of sale whose completion is conditioned by the transfer as when it is the result of a completed sale." O'Neil v. Wolcott Min. Co., 174 Fed. 527, 27 L. R. A. (N. S.) 200. See also State v. McIver, 2 S. C. 25.

The transferee may demand a transfer on the books, and is not limited as to the time within which he may do so. First Nat. Bank of Sulphur Springs v. Stribling, 16 Okla. 41, 86 Pac. 512.

The officers of the company are bound to make the transfer at any time whenever the certificate, properly indorsed, is delivered to them for that purpose and no lapse of time will protect them from the consequences of a refusal to do so. Barker v. Montana Gold, Silver, Platinum & Tellurium Min. Co., 35 Mont. 351, 89 Pac. 66.

See also cases cited in §§ 3817-3822, *infra*.

⁹³ Wetumpka Bridge Co. v. Kidd, 124 Ala. 242, 27 So. 431; West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622; Memphis Appeal Pub. Co. v. Pike, 9 Heisk. (Tenn.) 697.

⁹⁴ Under the laws of California, an executor may have shares of stock of his decedent transferred to his name as executor. London, P. & A. Bank, Ltd. v. Aronstein, 117 Fed. 601, certiorari denied 187 U. S. 641, 47 L. Ed. 345 (mem. dec.).

whom certificates have been assigned by an executor.⁹⁵ And it has been held that it exists although the stock is transferred while the corporation is in process of liquidation in insolvency proceedings.⁹⁶

The right is a contractual one. The corporation in effect agrees to make the transfer to a bona fide transferee on demand and presentation of the certificate. And having represented to its stockholders and to all who may desire to purchase its stock that it will invest the purchasers thereof with all the rights of stockholders by making a record on its books of the fact of each sale as made, it would be highly inequitable to permit it to repudiate the same to the prejudice of innocent purchasers.⁹⁷ It is a valuable right, and constitutes in a very material sense a part of the consideration for a vendee's purchase of stock.⁹⁸ "Without such a right enforceable in the courts of law, the sale of stocks would be injuriously hampered, resulting in much commercial and industrial inconvenience and embarrassment."⁹⁹

There is a corresponding duty on the part of the corporation to make or permit a transfer on its books, and to issue a new certificate to the transferee.¹ And if it refuses to make such a transfer without

⁹⁵ *Haebler v. John Eichler Brewing Co.*, 25 N. Y. Misc. 576, 55 N. Y. Supp. 1071.

⁹⁶ *People v. California Safe Deposit & Trust Co.*, 18 Cal. App. 732, 124 Pac. 558.

A proceeding to compel a transfer may properly be brought against the corporation and its receiver under such circumstances, where it is alleged that the receiver has possession of the corporate books and papers, and refuses to allow the transferee or the corporation to register the transfer. The directors need not be made parties, since if the receiver is required by order of court to enter the transferee's name in the stock book, it will follow that that act will be performed by those officers upon whom the duty rests. *People v. California Safe Deposit & Trust Co.*, 18 Cal. App. 732, 124 Pac. 558.

⁹⁷ *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

⁹⁸ *Westminster Nat. Bank v. New*

England Electrical Works, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

⁹⁹ *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

¹ *United States. Johnston v. Lafin*, 103 U. S. 800, 26 L. Ed. 532, aff'g 5 Dill. 65, Fed. Cas. No. 7,393; *O'Neil v. Wolcott Min. Co.*, 174 Fed. 527, 27 L. R. A. (N. S.) 200.

Alabama. *Thompson v. Hudgins*, 116 Ala. 93, 22 So. 632.

Arkansas. *Bankers' Trust Co. of St. Louis v. McCloy*, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205.

California. *Ellsworth v. National Home & Town Builders*, 33 Cal. App. 1, 164 Pac. 14.

Georgia. *Hilton v. Sylvania & G. R. Co.*, 8 Ga. App. 10, 68 S. E. 746.

Illinois. *Kjellman v. Scandia Fish Co.*, 128 Ill. App. 544; *Smith v. Automatic Photographic Co.*, 118 Ill. App. 649.

Kansas. *Madison Bank v. Price*, 79 Kan. 289, 100 Pac. 280.

good cause,² it may be compelled to do so by a court of equity in a suit instituted for that purpose,³ or, in some jurisdictions, by mandamus,⁴ or the transferee may maintain an action at law against it for damages.⁵

§ 3817. Remedies for refusal to transfer—Suit in equity to compel transfer. There are some cases in which it has been held that a suit in equity will not lie to compel a corporation to register a transfer on its books and issue a new certificate to the transferee, on the ground that there is an adequate remedy at law by an action to recover dam-

Maine. *Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922.

Maryland. *Real Estate Trust Co. v. Bird*, 90 Md. 229, 44 Atl. 1048.

Massachusetts. *Crocker v. Old Colony R. Co.*, 137 Mass. 417; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90, 19 Am. Dec. 306.

Montana. *Barker v. Montana Gold, Silver, Platinum & Tellurium Min. Co.*, 35 Mont. 351, 89 Pac. 66.

New Hampshire. *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971; *Hill v. Pine River Bank*, 45 N. H. 300.

New York. *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896, aff'g 47 App. Div. 17, 61 N. Y. Supp. 1033; *Hawes v. Gas Consumers' Ben. Co.*, 36 N. Y. St. Rep. 48, 12 N. Y. Supp. 924, rev'g 9 N. Y. Supp. 490.

Pennsylvania. *Com. v. Camp*, 102 Atl. 205.

Rhode Island. *Rowe v. Border City Garnetting Co.*, 101 Atl. 223.

Tennessee. *Memphis Appeal Pub. Co. v. Pike*, 9 Heisk. 697.

Utah. *Mundt v. Commercial Nat. Bank of Ogden*, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

The corporation has no right, except for good cause, to refuse to transfer the stock on its books and by such refusal deprive the assignee of his rights as a stockholder. *Mundt v.*

Commercial Nat. Bank of Ogden, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

The duty to make the transfer is enjoined by statute and is purely ministerial. *Madison Bank v. Price*, 79 Kan. 289, 100 Pac. 280; *Mundt v. Commercial Nat. Bank of Ogden*, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

The managing agents of a corporation have no discretionary power to refuse to register a proposed transfer. *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896, aff'g 47 N. Y. App. Div. 17, 61 N. Y. Supp. 1033.

The statutes of Tennessee make it the duty of the corporation to transfer stock sold under execution. It is a plain ministerial duty that is imposed, and the corporation has no discretion in the matter. *Memphis Appeal Pub. Co. v. Pike*, 9 Heisk. (Tenn.) 697.

No lapse of time will protect the officers against the consequences of a refusal to make the transfer. *Barker v. Montana Gold, Silver, Platinum & Tellurium Min. Co.*, 35 Mont. 351, 89 Pac. 66.

See also cases cited in the following sections.

² See § 3823 et seq., *infra*.

³ See § 3817, *infra*.

⁴ See § 3818, *infra*.

⁵ See § 3819, *infra*.

ages for its refusal to recognize and make the transfer.⁶ This view, however, is contrary to the overwhelming weight of authority. An action for damages does not always afford an adequate remedy for refusal of a corporation to recognize a person as a stockholder, and it is well settled, therefore, that if a corporation wrongfully refuses to recognize and register a valid transfer of stock, and issue a new certificate to the transferee, he may maintain a bill in equity to compel it to do so.⁷ And especially is this true "when the real and prospective

⁶ See *Cooper v. Dismal Swamp Canal Co.*, 6 N. C. 195.

⁷ **United States.** *Cecil Nat. Bank v. Watsonstown Bank*, 105 U. S. 217, 26 L. Ed. 1039; *Mechanics' Bank of Alexandria v. Seton*, 1 Pet. 299, 7 L. Ed. 152; *Jessup v. Chicago & N. W. Ry. Co.*, 188 Fed. 931; *O'Neil v. Wolcott Min. Co.*, 174 Fed. 527, 27 L. R. A. (N. S.) 200; *Gould v. Head*, 41 Fed. 240; *Wilson v. Atlantic & St. L. R. Co.*, 2 Fed. 459; *Hubbard v. Bank of United States*, 5 Hunt Mer. Mag. 75, Fed. Cas. No. 6,815. See also *Ryan v. Martin*, 165 Fed. 765.

Alabama. *Howison v. Baird*, 145 Ala. 683, 40 So. 94; *Johnson v. Hume*, 138 Ala. 564, 36 So. 421. See also *Wetumpka Bridge Co. v. Kidd*, 124 Ala. 242, 27 So. 431; *Thompson v. Hudgins*, 116 Ala. 93, 22 So. 632.

Arkansas. *Bankers' Trust Co. of St. Louis v. McCloy*, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205; *Thompson v. Grace*, 91 Ark. 52, 134 Am. St. Rep. 52, 120 S. W. 397.

California. *Spangenberg v. Western Heavy Hardware & Iron Co.*, 166 Cal. 284, 135 Pac. 1127; *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476. See also *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676; *Cahlan v. Bank of Lassen County*, 11 Cal. App. 533, 105 Pac. 765.

Colorado. *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546. See also *Farmers' Paw-*

nee Canal Co. v. Henderson, 46 Colo. 37, 102 Pac. 1063.

Georgia. *Thornton v. Martin*, 116 Ga. 115, 42 S. E. 348.

Illinois. *Lemon v. Lemon*, 192 Ill. App. 36. See also *Pease v. Chicago Crayon Co.*, 235 Ill. 391, 18 L. R. A. (N. S.) 1158, 14 Ann. Cas. 263, 85 N. E. 619; *Finch v. Macoupin Telephone & Telegraph Co.*, 146 Ill. App. 158.

Indiana. *Vernon, G. & R. R. Co. v. Washington Tp. Decatur Co.*, 48 Ind. App. 309, 95 N. E. 599.

Kansas. *Madison Bank v. Price*, 79 Kan. 289, 100 Pac. 280.

Kentucky. *Fitzhugh v. Bank of Shepherdsville*, 3 T. B. Mon. 126, 16 Am. Dec. 90.

Maryland. *Real Estate Trust Co. v. Bird*, 90 Md. 229, 44 Atl. 1048. See *Baltimore City Passenger Ry. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402.

Michigan. *Porter v. Marine Sav. Bank*, 186 Mich. 355, 153 N. W. 19; *Clarke v. Hill*, 132 Mich. 434, 93 N. W. 1044; *Walker v. Detroit Transit Ry. Co.*, 47 Mich. 338, 11 N. W. 187.

Minnesota. *Prince Inv. Co. v. St. Paul & S. C. Land Co.*, 68 Minn. 121, 70 N. W. 1079.

Mississippi. *Scherck v. Montgomery*, 81 Miss. 426, 33 So. 507.

Missouri. *Whiting v. Enterprise Land & Sheep Co.*, 265 Mo. 374, 177 S. W. 589; *Kretzer v. Cole Bros. Lighting Rod Co.*, 193 Mo. App. 99, 181 S. W. 1066; *Senn v. Union Premium & Mercantile Co.*, 115 Mo. App. 685, 92 S. W. 507; *Crenshaw v. Columbian*

value of the stock depends upon the future development and management of the corporate enterprise";⁸ or where the stock is not listed in general market reports, and is not a commercial commodity in the

Min. Co., 110 Mo. App. 355, 86 S. W. 260.

Montana. Fitzpatrick v. O'Neill, 43 Mont. 552, Ann. Cas. 1912 C 296, 118 Pac. 273; Durfee v. Harper, 22 Mont. 354, 56 Pac. 582. See also Barker v. Montana Gold, Silver, Platinum & Tellurium Min. Co., 35 Mont. 351, 89 Pac. 66.

Nebraska. Everitt v. Farmers & Merchants Bank, 82 Neb. 191, 20 L. R. A. (N. S.) 996, 117 N. W. 401.

New Hampshire. Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

New Jersey. Lockward v. Evans, — N. J. Eq. —, 102 Atl. 19; Morris v. Hussong Dyeing Mach. Co., 81 N. J. Eq. 256, 86 Atl. 1026; Reilly v. Absecon Land Co., 75 N. J. Eq. 71, 71 Atl. 248; Archer v. American Water Works Co., 50 N. J. Eq. 33, 24 Atl. 508.

New York. Travis v. Knox Terpezone Co., 215 N. Y. 259, L. R. A. 1916 A 542, Ann. Cas. 1917 A 387, 109 N. E. 250, aff'g 165 App. Div. 156, 150 N. Y. Supp. 621; Rice v. Rockefeller, 134 N. Y. 174, 17 L. R. A. 237, 30 Am. St. Rep. 658, 31 N. E. 907; Robinson v. National Bank, 95 N. Y. 637; Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315, aff'g 7 Daly 330, 53 How. Pr. 60; Powers v. Universal Film Mfg. Co., 162 App. Div. 806, 148 N. Y. Supp. 114; Gilkinson v. Third Ave. R. Co., 47 App. Div. 472, 63 N. Y. Supp. 792; Buckmaster v. Consumers' Ice Co., 5 Daly 313. See also Bedford v. American Aluminum & Specialty Co., 51 App. Div. 537, 64 N. Y. Supp. 856.

Ohio. Iron R. Co. v. Fink, 41 Ohio St. 321, 52 Am. Rep. 84.

Oklahoma. Litchfield v. Henson Oil

Co., 157 Pac. 137; Ardmore State Bank v. Mason, 30 Okla. 568, 39 L. R. A. (N. S.) 292, 120 Pac. 1080.

Oregon. Davidson v. Almeda Mines Co., 66 Ore. 412, 48 L. R. A. (N. S.) 847, 134 Pac. 782.

Texas. Rio Grande Cattle Co. v. Burns, 82 Tex. 50, 17 S. W. 1043; Spencer v. James, 10 Tex. Civ. App. 327, 43 S. W. 556, 31 S. W. 540.

Utah. See Mundt v. Commercial Nat. Bank of Ogden, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

Virginia. Feckheimer v. National Exch. Bank, 79 Va. 80.

Washington. Lacaff v. Dutch Miller Mining & Smelting Co., 31 Wash. 566, 72 Pac. 112.

Equity has jurisdiction of such a suit although the complainant has a remedy by mandamus to compel the officers of the corporation to issue certificates to him. Lemon v. Lemon, 192 Ill. App. 361.

Where a gift inter vivos of certificates of stock is complete, equity has power to compel a transfer of the stock on the books of the corporation. Gilkinson v. Third Ave. R. Co., 47 N. Y. App. Div. 472, 63 N. Y. Supp. 792.

A suit was held to be in the nature of a proceeding in rem, where brought to adjust the equitable interests in the stock of the corporation and to have record of the ownership in the stock made on the corporate books in conformity to the findings by the court. And where the stock was that of a domestic corporation and statutory notice was given, the court held that the decree rendered became binding on the interests of nonresident defendants. Patterson v. Farmington St. Ry. Co., 76 Conn. 628, 57 Atl. 853.

⁸ Westminster Nat. Bank v. New

community where the corporation does business.⁹ Such a suit is practically one for the specific performance of the implied promise on the part of the corporation to make the transfer.¹⁰ In a New York case, in which it was held that such a suit would lie, it was said: "The right of the plaintiff to maintain this action depends upon the question whether an equitable action will lie to compel a transfer of stock by a corporation to the owner of the same, or the plaintiff must seek a remedy by an action at law for damages. The latter action is frequently of no avail, and does not always afford complete and full redress. It is easy to see that a party may have become the owner or purchaser of stock in a corporation, which he desires to hold as a permanent investment, which may be at the time of but little value, in fact without any market value whatever, and its real worth may consist in the prospective rise which the owner has reason to anticipate will follow from facts within his knowledge. To say that the holder shall not be entitled to the stock, because the corporation, without any just reason, refuses to transfer it, and that he shall be left to pursue the remedy of an action for damages, in which he can recover only a nominal amount, would establish a rule which must work great injustice in many cases, and confer a power on corporate bodies which has no sanction in the law. A court of equity will enforce a specific performance of a contract for the sale of real estate, and compel the execution of a deed by the vendor to the vendee, although an action at law may be brought to recover damages for the breach of the contract. Such a case bears a striking analogy to the one now presented, and the same principle is manifestly applicable where the remedy at law is inadequate to furnish the proper relief."¹¹ It has also been said that the right to equitable relief is based on the fact that an

England Electrical Works, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

⁹ As where the stock is that of a small interior bank, which is not listed in general market reports, and is not a current commercial commodity in the community where the bank is located. *Madison Bank v. Price*, 79 Kan. 289, 100 Pac. 280.

¹⁰ *Spangenberg v. Western Heavy Hardware & Iron Co.*, 166 Cal. 284, 135 Pac. 1127; *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl.

971; *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50, 17 S. W. 1043. See also *Travis v. Knox Terpezone Co.*, 215 N. Y. 259, L. R. A. 1916 A 542, Ann. Cas. 1917 A 387, 109 N. E. 250, aff'g 165 N. Y. App. Div. 156, 150 N. Y. Supp. 621.

¹¹ *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315, quoted with approval in *Vernon, G. & R. R. Co. v. Washington Tp. Decatur Co.*, 48 Ind. App. 309, 95 N. E. 599; *Ardmore State Bank v. Mason*, 30 Okla. 568, 39 L. R. A. (N. S.) 292, 120 Pac. 1080.

assignee's title under the assignment "is an equitable title only, as between him and the company, and equitable relief is necessary to acquire the legal title and rights on the shares transferred."¹² Additional reasons why such circumstances call for equitable relief are that shares of stock in a certain corporation are frequently not so easily obtained on the market that money damages can be said to be an adequate remedy where the possession of the shares is desired, and that shares often have a peculiar value to certain persons who wish them for the power they will give in control of a corporation;¹³ and also that to deny the owner equitable relief upon the ground that he could recover damages at law "would be, in effect, to compel him to sell what he already owns at such price as a jury might think it was worth."¹⁴ Granting such relief in respect to the stock of a foreign corporation does not amount to a supervision or regulation of its internal affairs.¹⁵

Of course a court of equity may order a transfer when necessary to effectuate a decree in a suit of which it has jurisdiction on other grounds.¹⁶

The right to relief in equity is not an absolute one, and there may be circumstances surrounding a transfer which will induce the court to refuse to order a transfer on the books.¹⁷ And it has been held that where a stockholder agrees with the other stockholders to the consolidation of the corporation with another one and thereafter assigns his shares to a person having knowledge of such agreement

¹² *Morris v. Hussong Dyeing Mach. Co.*, 81 N. J. Eq. 256, 86 Atl. 1026.

A court of equity will exercise jurisdiction to compel a transfer on the theory that the transferee is the equitable owner and seeks to consummate a legal title. *Lockward v. Evans*, — N. J. Eq. —, 102 Atl. 19; *Reilly v. Absecon Land Co.*, 75 N. J. Eq. 71, 71 Atl. 248.

¹³ *Vernon, G. & R. R. Co. v. Washington Tp. Decatur Co.*, 48 Ind. App. 309, 95 N. E. 599.

¹⁴ *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971, quoted with approval in *Vernon, G. & R. R. Co. v. Washington Tp. Decatur Co.*, 48 Ind. App. 309, 95 N. E. 599.

¹⁵ *Westminster Nat. Bank v. New*

England Electrical Works, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971; *Travis v. Knox Terpezzone Co.*, 215 N. Y. 259, L. R. A. 1916 A 542, Ann. Cas. 1917 A 387, 109 N. E. 250, aff'g 165 N. Y. App. Div. 156, 150 N. Y. Supp. 621.

¹⁶ *Farmers' Pawnee Canal Co. v. Henderson*, 46 Colo. 37, 102 Pac. 1063.

So a court of chancery has plenary power to protect the purchaser at a sale of stock ordered by it in a suit to foreclose a mortgage, and to see that he secures a correct transfer on the corporate books and a perfect legal title. *Thompson v. Grace*, 91 Ark. 52, 134 Am. St. Rep. 52, 120 S. W. 397.

¹⁷ *Senn v. Union Premium & Mercantile Co.*, 115 Mo. App. 685, 92 S. W. 507.

and who consents to be bound by it, a decree directing a transfer to him will be conditioned that he shall be so bound.¹⁸

A transferee will not be deemed guilty of laches in instituting suit to compel transfer, as a matter of law, where the delay has not been unreasonable and the corporation fails to show prejudice resulting therefrom.¹⁹

Ordinarily the corporation is the only indispensable party defendant;²⁰ and adverse claimants of the stock need not be joined, since, if they are not parties, they will not be affected by the decree, and they will still be as free as before to enforce any rights they may have to the stock or to a record of it in their names, both against the complainant and the corporation.²¹ The corporate officers to whom the duty of making transfer is intrusted, need not be joined where the suit is against the corporation.²² And it has been held that the fact that the president of the company, who controls its management, claims to own the stock in question will not justify the plaintiff in making him a party defendant, where it would not justify the corporation in refusing to make the transfer.²³ On the other hand, it has been held that the corporation is not a necessary party where the suit is against the officers of the corporation.²⁴ The assignor is a proper party defendant to a suit by the assignee against the corporation to compel a transfer, since he is interested as the assignor and because he is entitled to have the transfer made on the books so as to relieve himself from, and subject the assignee to, the obligations to the company arising from the legal and record ownership of the shares.²⁵ And it has been held that the assignor and the corporation may be joined where both refuse to recognize the validity of the assignment or to allow a transfer on the books.²⁶ And also that the corporation

¹⁸ *Senn v. Union Premium & Mercantile Co.*, 115 Mo. App. 685, 92 S. W. 507.

¹⁹ *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

²⁰ *O'Neil v. Wolcott Min. Co.*, 174 Fed. 527, 27 L. R. A. (N. S.) 200.

²¹ *O'Neil v. Wolcott Min. Co.*, 174 Fed. 527, 27 L. R. A. (N. S.) 200.

²² The cashier of a bank is not a necessary party to a suit to compel the bank to record a transfer of certain stock on its books. *Johnson v. Hume*, 138 Ala. 564, 36 So. 421.

²³ *Powers v. Universal Film Mfg. Co.*, 162 N. Y. App. Div. 806, 148 N. Y. Supp. 114.

²⁴ *Gould v. Head*, 41 Fed. 240.

²⁵ *Morris v. Hussong Dyeing Mach. Co.*, 81 N. J. Eq. 256, 86 Atl. 1026.

²⁶ Where the vendor of stock and the corporation refuse to recognize the validity of the sale or to allow a transfer on the books, they may be joined in a suit to restrain the vendor from disposing of the stock or interfering with its transfer, and to compel the corporation to make the transfer. The union of the vendor and the corporation does not consti-

may be joined as a defendant in a suit to have stock held by the other defendant declared to be held in trust for the complainant, and to compel a transfer thereof to him.²⁷ If the assignee claims as pledgee, merely, for a debt against which the statute of limitations has run, the assignor, or his personal representative in case of his death, is a necessary party.²⁸

It has been held that, in such a suit, it is sufficient to allege the ultimate fact of ownership of the stock without alleging the evidentiary facts showing such ownership.²⁹ It is not incumbent on the complainant to negative matters of defense.³⁰

§ 3818. — Mandamus to compel transfer. There is a conflict of authority as to whether mandamus will lie to compel a corporation to register a transfer of stock and issue a new certificate to the transferee, which, it has been said, "seems to be largely due to the common-law rule and the various state statutes upon the rights of stockholders and duties of the various corporation officers, and the scope of the mandamus procedure at common law and in the different states."³¹ The general rule is that mandamus will not lie when there is an adequate remedy by ordinary process of law; and since a transferee of a certificate of stock

tute a misjoinder of parties, nor do the purposes sought to be accomplished constitute a misjoinder of causes of action. *Thornton v. Martin*, 116 Ga. 115, 42 S. E. 348.

²⁷ This is true where a demand has been made on the corporation to transfer the stock, and such demand has been refused. *Howison v. Baird*, 145 Ala. 683, 40 So. 94.

²⁸ A pledgee of stock was given an irrevocable power of attorney to make transfer for six years after the pledge. Dividends were collected by the owner of the stock. Two years later judgment was taken by the pledgee, and five years later the pledgee brought action to revive the judgment, although no judgment was in fact entered. Nearly thirty years had elapsed after the stock had been pledged during which time the owner had died. The court held that representatives of owners were necessary parties to an action against the

corporation to compel it to record a transfer of the stock. *Wadlinger v. First Nat. Bank*, 209 Pa. 197, 58 Atl. 359.

²⁹ So where original ownership in a decedent and transfer by him to the plaintiffs and possession of the certificates by them is alleged, this is sufficient to admit evidence in support thereof though it shows that the decedent held the stock in trust for plaintiffs. *Cahlan v. Bank of Lassen County*, 11 Cal. App. 533, 105 Pac. 765.

³⁰ A purchaser of stock at an execution sale may sue to compel the corporation to register the transfer to him, and he need not allege that the purchase was made without notice that persons other than the execution debtor claimed an interest in the stock. *Wetumpka Bridge Co. v. Kidd*, 124 Ala. 242, 27 So. 431.

³¹ *Amidon v. Florence Farmers' Elevator Co.*, 28 S. D. 24, 132 N. W. 166.

has an adequate remedy at law by an action to recover damages, or in equity by a suit to compel the corporation to register his transfer, and issue him a proper certificate, in case the corporation wrongfully refuses to recognize the transfer, most of the courts have held that mandamus will not lie.³²

32 California. Spangenberg v. Western Heavy Hardware & Iron Co., 166 Cal. 284, 135 Pac. 1127; Kimball v. Union Water Co., 44 Cal. 173, 13 Am. Rep. 157. In *People v. Crockett*, 9 Cal. 112, a judgment in mandamus compelling a transfer was affirmed, but, as pointed out in *Spangenberg v. Western Heavy Hardware & Iron Co.*, 166 Cal. 284, 135 Pac. 1127, the objection that mandamus was not the proper remedy was not raised or discussed.

Connecticut. Tobey v. Hakes, 54 Conn. 274, 1 Am. St. Rep. 114, 7 Atl. 551; American Asylum for Education & Instruction of Deaf & Dumb v. Phoenix Bank, 4 Conn. 172, 10 Am. Dec. 112.

Georgia. Mandamus will not lie except in the case of a judicial sale of stock. *Terrell v. Georgia Railroad & Banking Co.*, 115 Ga. 104, 41 S. E. 262; *Bank of State v. Harrison*, 66 Ga. 696.

Massachusetts. Stackpole v. Seymour, 127 Mass. 104; *Murray v. Stevens*, 110 Mass. 95.

Michigan. *Clarke v. Hill*, 132 Mich. 434, 93 N. W. 1044; *Lamphere v. Grand Lodge*, 47 Mich. 429, 11 N. W. 268.

Minnesota. *Baker v. Marshal*, 15 Minn. 177.

Missouri. *State v. Rombauer*, 46 Mo. 155.

Nevada. *State v. Guerrero*, 12 Nev. 105.

New Jersey. *Galbraith v. People's Building & Loan Ass'n of Camden*, 43 N. J. L. 389. See *Siegel v. Riverside Box & Lumber Co.*, 89 N. J. L. 595, 99 Atl. 407.

New York. *People v. Utah Gold &*

Copper Mines Co., 135 App. Div. 418, 119 N. Y. Supp. 852; *People v. Miller*, 39 Hun 557, aff'd 114 N. Y. 636, 21 N. E. 1120; *Ex parte Fireman's Ins. Co.*, 6 Hill 243; *People v. Parker Vein Coal Co.*, 10 How. Pr. 543; *Shipley v. Mechanics' Bank*, 10 Johns. 484. See also *Travis v. Knox & Terpezone Co.*, 215 N. Y. 259, L. R. A. 1916 A 542, Ann. Cas. 1917 A 387, 109 N. E. 250, aff'g 165 App. Div. 156, 150 N. Y. Supp. 621.

North Dakota. See *Second Nat. Bank of Grand Forks v. First Nat. Bank*, 8 N. D. 50, 76 N. W. 504, where it is said by way of dictum that the weight of authority is against the issuance of the writ, except under special circumstances.

Ohio. *Freon v. Carriage Co.*, 42 Ohio St. 30, 51 Am. Rep. 794.

Oregon. *Durham v. Monumental Silver Min. Co.*, 9 Ore. 41. Mandamus will not lie in the case of a voluntary sale in view of the statutory provision that the writ shall not issue where there is a plain, speedy and adequate remedy in the ordinary course of the law. And this is true although the company is insolvent and an action at law might therefore prove inadequate, since the same relief can be obtained by a suit in equity. *Davidson v. Alameda Mines Co.*, 66 Ore. 412, 48 L. R. A. (N. S.) 847, 134 Pac. 782. *Slemmons v. Thompson*, 23 Ore. 215, 31 Pac. 514, apparently holds to the contrary, but as pointed out in *Davidson v. Alameda Mines Co.*, supra, the real holding there was that where the corporation was apparently insolvent, mandamus would lie to compel a transfer to a purchaser whose title was derived from an execution sale.

In some jurisdictions, however, a contrary rule prevails.³³

Pennsylvania. Birmingham Fire Ins. Co. v. Com., 92 Pa. St. 72.

England. Rex v. Bank of England, 2 Dougl. 526.

The federal circuit court had no original jurisdiction to issue writs of mandamus for this or any other purpose. Jessup v. Chicago & N. W. Ry. Co., 188 Fed. 931.

As to whether mandamus will lie to compel the issuance of a certificate generally, see § 3484, *supra*.

33 Illinois. People v. Goss & Phillips Mfg. Co., 99 Ill. 355; Carus v. Matthiessen, 196 Ill. App. 445; Smith v. Automatic Photographic Co., 118 Ill. App. 649. See also Lemon v. Lemon, 192 Ill. App. 361; Tyng v. United Mercantile Agency, 184 Ill. App. 433. The reason sometimes given for denying the writ that there is an adequate remedy by an action for damages or a suit in equity to compel a transfer is removed by the provision of the Illinois statute (J. & A. ¶ 7338) that the writ shall not be denied because the petitioner may have another specific legal remedy where such writ will afford a proper and sufficient remedy. Carus v. Matthiessen, 196 Ill. App. 445.

Indiana. Burnsville Turnpike Co. v. State, 119 Ind. 382, 3 L. R. A. 265, 20 N. E. 421; Green Mount & S. L. Turnpike Co. v. Bulla, 45 Ind. 1. See also Evansville Union Stockyards Co. v. State, 179 Ind. 505, 101 N. E. 822. But see State v. First Nat. Bank, 45 Ind. 1, where it is said that the contrary is, perhaps, the general rule.

Iowa. See Dooley v. Gladiator Consol. Gold Mines & Milling Co., 134 Iowa 468, 13 Ann. Cas. 297, 109 N. W. 864, where it is said by way of dictum that an assignee may secure a transfer by way of mandamus, citing Hair v. Burnell, 106 Fed. 280, in which case, however, the relator obtained title under a judicial sale. See

also Croft v. Colfax Elec. Light & Power Co., 113 Iowa 455, 85 N. W. 761.

Kansas. See Steele v. Farmers' & Merchants' Mut. Tel. Ass'n, 95 Kan. 580, 148 Pac. 661, where a writ of mandamus was granted to compel a transfer, but the appropriateness of the remedy was not raised or referred to. And see dictum in Madison Bank v. Price, 79 Kan. 289, 100 Pac. 280, to the effect that the courts have recognized a remedy by mandamus.

Louisiana. Mandamus will lie where there is no real dispute as to the ownership of the stock, and the transfer has been made in accordance with the conditions of the act of incorporation. State v. Caddo Rock Drill Bit Co., 141 La. 353, 75 So. 78; State v. Bank of Baton Rouge, 125 La. 138, 136 Am. St. Rep. 332, 51 So. 95; State v. Consumers' Brewing Co., 115 La. 782, 40 So. 45; State v. Southern Mineral & Land Improvement Co., 108 La. 24, 32 So. 174; Mechanics' & Traders' Ins. Co. v. Gerson, 38 La. Ann. 310. See also Eisenhauer v. New Orleans Cotton Exchange, 140 La. 574, 73 So. 685.

Maine. Dennett v. Acme Mfg. Co., 106 Me. 476, 76 Atl. 922. In the above case it is said: "Notwithstanding the fact that the weight of authority in other jurisdictions appears to be otherwise, we are unable to assent to the fact that a bona fide share owner in a private corporation, existing under our statutes, who is wrongfully denied his statutory right to have a certificate of his shares issued to him by the corporation, and a record transfer thereof made on its books, is afforded an adequate remedy—a remedy commensurate with his special and peculiar rights and necessities under all the circumstances, by an action at law against the corporation for the value of his shares, or by equitable

In some of the jurisdictions in which mandamus will not ordinarily lie, an exception to the general rule has been recognized where the

proceedings for a specific performance. And we are of opinion that such remedies should not constitute a bar to relief by mandamus to compel such issue and transfer where the petitioner's right is unquestioned, and where neither the corporation nor its officers have, or pretend to have, any reason or excuse for their refusal. We readily perceive that great injury would often result to a petitioner from a refusal of mandamus in such case as the one at bar, while, on the other hand, we fail to perceive how injustice could be done to any one from granting it in such case, since no reason is given or suggested why the shares should not be transferred as suggested."

Mississippi. See dictum in *Scherck v. Montgomery*, 81 Miss. 426, 33 So. 507.

North Carolina. In *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894, it is said by way of dictum that mandamus will lie to compel a corporation to transfer stock.

Pennsylvania. In *Catherwood v. Guarantee Trust & Safe Deposit Co.*, 252 Pa. 466, 97 Atl. 703, mandamus was granted without discussing whether it was the proper remedy. In *Sproul v. Standard Plate Glass Co.*, 201 Pa. 103, 50 Atl. 1003, it was said that in view of a statute giving the purchaser of stock at a pledgee's sale the right to compel a transfer upon the corporate books, "mandamus would seem prima facie to be an appropriate remedy to enforce a transfer," but the question was not decided because all objections to the form of the action were expressly waived. In *Com. v. Camp*, 102 Atl. 205, mandamus was granted to compel a transfer by a foreign corporation, it being held that the question

of jurisdiction was waived because it was not raised or considered in the trial court. In *Birmingham Fire Ins. Co. v. Com.*, 92 Pa. St. 72, it was held that mandamus will not lie where there is an adequate remedy by an action for damages and the right is disputed.

Rhode Island. Mandamus will lie under Gen. Laws, c. 272, § 2, giving the supreme court permission to issue the writ, where there is no dispute as to the title to the stock, and the circumstances of the case show, in the judgment of the court, that the petitioner has no other adequate legal remedy, and that justice can be done only by mandamus. So it will lie where, owing to the financial condition of the company, the remedy by an action at law would be inadequate. But the court may, in its discretion, refer the petitioner to his remedy at law if it deems such remedy adequate under the circumstances. *Rowe v. Border City Garnetting Co.*, 101 Atl. 223. In the above case the court says that the conclusion arrived at is not in conflict with *Wilkinson v. Providence Bank*, 3 R. I. 22, where it was held that mandamus would not lie, pointing out that in that case the title to the stock was in dispute, and also that it was decided before the enactment of the statute and in accordance with the principles of the common law.

South Carolina. In *State v. McIver*, 2 S. C. 25, it was held that mandamus would lie to compel a transfer of stock of a railroad corporation, on the ground that such a company is so far a public corporation that its officers owe duties to the public which they may be compelled to perform by mandamus.

South Dakota. Mandamus will lie

person seeking the transfer claims title under a judicial sale, and the statute imposes a duty upon the proper corporate officer to transfer the stock on the books to such a purchaser,³⁴ and there is no dispute as to the title;³⁵ this on the theory that under such circumstances the officer is *pro hac vice* a public officer charged with the duty of making such transfer.³⁶ It has also been held that mandamus will lie to give the sheriff access to the corporate books for the purpose of making a transfer, where he is required by the statute to make the transfer on the books.³⁷ And it has been held that a federal court has power, as an ancillary proceeding to its jurisdiction of the main action, to compel a transfer by mandamus to a purchaser at an execution sale under a judgment rendered by it.³⁸ Mandamus has also been held to be the appropriate remedy to enforce a transfer to a purchaser of stock sold in satisfaction of a debt for which it is pledged, where the statute provides that the purchaser at such a sale shall have a right

where there has been a bona fide transfer of stock by indorsement, and where there are no questions to be litigated concerning the title, ownership or right to transfer, and where it is a purely legal right that is withheld or denied the owner of the stock. *Amidon v. Florence Farmers' Elevator Co.*, 28 S. D. 24, 132 N. W. 166.

Texas. See *Milner v. Brewer-Monaghan Mercantile Co.*, — Tex. Civ. App. —, 188 S. W. 49, where it was held that the petition was insufficient to warrant relief by mandamus.

As to whether mandamus will lie to compel the issuance of a certificate generally, see § 3484, *supra*.

³⁴ *Terrell v. Georgia Railroad & Banking Co.*, 115 Ga. 104, 41 S. E. 262; *Bailey v. Strohecker*, 38 Ga. 259, 95 Am. Dec. 388; *Memphis Appeal Pub. Co. v. Pike*, 9 Heisk. (Tenn.) 697. See also *Bank of State v. Harrison*, 66 Ga. 696; *Davidson v. Alameda Mines Co.*, 66 Ore. 412, 48 L. R. A. (N. S.) 847, 134 Pac. 782; *Durham v. Monumental Silver Min. Co.*, 9 Ore. 41.

It will lie under the Iowa statute under such circumstances. *Hair v. Burnell*, 106 Fed. 280.

The writ was granted under such circumstances in *People v. Goss & Phillips Mfg. Co.*, 99 Ill. 355, but as is shown in the preceding note mandamus will lie in Illinois even in the case of a private sale.

An order appointing a trustee for a person and directing him to sell stock in which such person has an interest does not present a case within this rule so as to afford a proper basis for mandamus to compel the corporation to transfer the stock to the trustee so as to enable him to make the sale. *Terrell v. Georgia Railroad & Banking Co.*, 115 Ga. 104, 41 S. E. 262.

³⁵ Mandamus will not lie even in such cases, where the right to the shares is disputed. *Durham v. Monumental Silver Min. Co.*, 9 Ore. 41.

³⁶ *Terrell v. Georgia Railroad & Banking Co.*, 115 Ga. 104, 41 S. E. 262; *Bailey v. Strohecker*, 38 Ga. 259, 95 Am. Dec. 388. See also *Bank of State v. Harrison*, 66 Ga. 696.

³⁷ *State v. First Nat. Bank*, 89 Ind. 302, 307.

³⁸ *Hair v. Burnell*, 106 Fed. 280.

to compel a transfer upon the corporate books and the delivery of a proper certificate therefor.³⁹

To obtain the writ in any case, the applicant must show a specific and complete right which is to be enforced,⁴⁰ a clear and unquestionable legal and equitable right to the transfer,⁴¹ and a clear legal obligation to perform the duty required.⁴² It will not be granted where the title to the stock is in dispute,⁴³ nor to compel a transfer to a person whose claim rests merely upon an equitable right,⁴⁴ nor where other adequate and specific remedies may be had,⁴⁵ nor to compel the corporation to make a transfer which it would have no right to make voluntarily,⁴⁶ nor where the relator has not complied with the by-laws

³⁹ *Deal v. Erie Coal & Coke Co.*, 244 Pa. 622, 90 Atl. 915; *Sproul v. Standard Plate Glass Co.*, 201 Pa. 103, 50 Atl. 1003.

In *Deal v. Erie Coal & Coke Co.*, 244 Pa. 622, 90 Atl. 915, the petition was held to conform to the statutory requirements.

⁴⁰ *Memphis Appeal Pub. Co. v. Pike*, 9 Heisk. (Tenn.) 697.

⁴¹ *Townes v. Nichols*, 73 Me. 515; *State v. McIver*, 2 S. C. 25.

⁴² *Evansville Union Stockyards Co. v. State*, 179 Ind. 505, 101 N. E. 822.

It will not be granted in a doubtful case. *State v. Warren Foundry & Machine Co.*, 32 N. J. L. 439.

"The petition, to be sufficient against a demurrer, must not only show a right in the plaintiff to have the transfer made, but also a corresponding obligation on the part of the officer or the private corporation itself." *Milner v. Brewer-Monaghan Mercantile Co.*, — Tex. Civ. App. —, 188 S. W. 49.

⁴³ *Durham v. Monumental Silver Min. Co.*, 9 Ore. 41; *Rowe v. Border City Garnetting Co.*, — R. I. —, 101 Atl. 223; *Wilkinson v. Providence Bank*, 3 R. I. 22. See also *Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582.

It will not be granted where the relator is not the owner of the stock, or if the certificates have not been assigned to him, and hence should not be granted on the pleadings where

these matters are put in issue by the answer. *Cook Ry. Signal Co. v. Buck*, 59 Colo. 368, 149 Pac. 95.

Where other persons intervene and claim title to the stock, and the case presents equitable issues on the part of all those making contest, the cause is properly transferred to the equity docket. *Croft v. Colfax Elec. Light & Power Co.*, 113 Iowa 455, 85 N. W. 761.

It will not be granted where the stock is claimed by other persons who are not parties to the proceeding. *State v. Guerrero*, 12 Nev. 105. Or where the relator's title depends upon his being able to set aside a prior title on the ground of fraud. *State v. Warren Foundry & Machine Co.*, 32 N. J. L. 439.

⁴⁴ Since mandamus is strictly a legal remedy, it cannot be resorted to by an equitable assignee, even though the right to a transfer may be clear. *Burnsville Turnpike Co. v. State*, 119 Ind. 382, 3 L. R. A. 265, 20 N. E. 421.

⁴⁵ *State v. McIver*, 2 S. C. 25.

In *Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582, the court, while refusing to hold that mandamus would not lie in any case, held that it was not the proper remedy where the ownership of the stock was in litigation in an injunction suit in which the relief sought could appropriately be granted.

⁴⁶ Since a corporation would have no right to make a transfer without

relating to the transfer of shares,⁴⁷ nor where the transfer is in violation of the provisions of a contract to which the transferee is a party,⁴⁸ nor where the right is or will become a mere abstract or moot question, and its enforcement, by reason of some change of circumstances, can be of no substantial or practical benefit to the petitioner, and the matter is not one of public interest.⁴⁹ Nor is a purchaser of stock at an execution sale entitled to the writ, where he has released all rights acquired by him under such sale, and estopped himself to assert any title which he may have acquired thereby.⁵⁰

A court cannot order two peremptory writs requiring two transfers of the same stock and the issuance of two certificates to the transferee.⁵¹

A demand and refusal to make the transfer must be shown, but a failure to appear at the office of the corporation and make such demand is excused where the corporation gives notice that no transfer will be made.⁵²

The purchasers of stock may properly join with the sellers in the application for the writ.⁵³

§ 3819. — Action against corporation for damages. If a corporation wrongfully refuses to recognize a valid transfer of stock and to permit a transfer on its books, the transferee has a choice of remedies. The duty to permit a transfer raises an implied promise on the part of the corporation, for a breach of which the transferee may maintain an action of assumpsit to recover the damages sustained by him by

proof, by written assignment, power of attorney or otherwise, that the person seeking the transfer has the title, it cannot be compelled by mandamus to do so in the absence of such proof. *Burnsville Turnpike Co. v. State*, 119 Ind. 382, 3 L. R. A. 265, 20 N. E. 421.

⁴⁷*Cook Ry. Signal Co. v. Buck*, 59 Colo. 368, 149 Pac. 95; *Evansville Union Stockyards Co. v. State*, 179 Ind. 505, 101 N. E. 822; *State v. McIver*, 2 S. C. 25.

Where the statute provides that the stock shall be transferable only on the books of the corporation "in such manner as the by-laws may prescribe," a petition for mandamus must show what the by-laws prescribe in respect to making transfers on the

books. *Milner v. Brewer-Monaghan Mercantile Co.*, — Tex. Civ. App. —, 188 S. W. 49.

⁴⁸*Cook Ry. Signal Co. v. Buck*, 59 Colo. 368, 149 Pac. 95.

⁴⁹*Carus v. Matthiessen & Hegeler Zinc Co.*, 196 Ill. App. 449.

⁵⁰As where, after the sale, he receives the full amount of his execution from the debtor, including the amount bid by him for the stock, this being prima facie an abandonment of his purchase and an estoppel against a subsequent assertion of title. *Memphis Appeal Pub. Co. v. Pike*, 9 Heisk. (Tenn.) 697.

⁵¹*Carus v. Matthiessen & Hegeler Zinc Co.*, 196 Ill. App. 449.

⁵²*State v. McIver*, 2 S. C. 25.

⁵³*State v. McIver*, 2 S. C. 25.

reason of the refusal.⁵⁴ Or he may treat the wrongful refusal to allow a transfer as a conversion of the shares, and recover damages in an action of trover for the conversion.⁵⁵ And it has been held that he

54 United States. *Case v. Citizens' Bank*, 100 U. S. 446, 25 L. Ed. 695; *First Nat. Bank v. Lahier*, 11 Wall. 369, 20 L. Ed. 172.

Illinois. See *Lewis v. Bidwell Elec. Co.*, 141 Ill. App. 33.

Maryland. *Baltimore City Passenger Ry. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402.

Massachusetts. *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306.

New Hampshire. *Scripture v. Francetown Soapstone Co.*, 50 N. H. 571. See also *Pinkerton v. Manchester & L. R. R.*, 42 N. H. 424.

New Jersey. *Jackson's Adm'rs v. Newark Plank Road Co.*, 31 N. J. L. 277.

New York. *Travis v. Knox Terpezone Co.*, 215 N. Y. 259, L. R. A. 1916 A 542, Ann. Cas. 1917 A 387, 109 N. E. 250, aff'g 165 App. Div. 156, 150 N. Y. Supp. 621; *Shipley v. Mechanics' Bank*, 10 Johns. 484; *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348, 34 Am. Dec. 317; *Kortright v. Buffalo Commercial Bank*, 20 Wend. 91.

Pennsylvania. *Morgan v. Bank of North America*, 8 Serg. & R. 73, 11 Am. Dec. 575.

England. *Rex v. Bank of England*, 2 Dougl. 525.

Assumpsit in the form of a special action on the case will lie under such circumstances. *Case v. Citizens' Bank*, 100 U. S. 446, 25 L. Ed. 695.

55 United States. *London, P. & A. Bank, Ltd. v. Aronstein*, 117 Fed. 601, certiorari denied 187 U. S. 641, 47 L. Ed. 345 (mem. dec.).

Arkansas. See *Bankers' Trust Co. of St. Louis v. McCloy*, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205.

California. *Craig v. Hesperia Land & Water Co.*, 113 Cal. 7, 35 L. R. A. 306, 54 Am. St. Rep. 316, 45 Pac. 10; *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476; *Kimball v. Union Water Co.*, 44 Cal. 173, 13 Am. Rep. 157.

Georgia. *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226; *Hilton v. Sylvania & G. R. Co.*, 8 Ga. App. 10, 63 S. E. 746.

Illinois. *Lewis v. Bidwell Elec. Co.*, 141 Ill. App. 33; *Kjellman v. Scandia Fish Co.*, 128 Ill. App. 544.

Indiana. *Vernon, G. & R. R. Co. v. Washington Tp. Decatur Co.*, 48 Ind. App. 309, 95 N. E. 599; *B. L. Blair Co. v. Rose*, 26 Ind. App. 487, 60 N. E. 10.

Iowa. *Dooley v. Gladiator Consol. Gold Mines & Milling Co.*, 134 Iowa. 468, 13 Ann. Cas. 297, 109 N. W. 864.

Kansas. See *Madison Bank v. Price*, 79 Kan. 289, 100 Pac. 280.

Kentucky. *Bank of America v. McNeil*, 10 Bush 54.

Louisiana. *Eisenhauer v. New Orleans Cotton Exchange*, 140 La. 574, 73 So. 685.

Maryland. *Baltimore City Passenger Ry. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402.

Massachusetts. *Bond v. Mt. Hope Iron Co.*, 99 Mass. 505, 97 Am. Dec. 49; *Plymouth Bank v. Bank of Norfolk*, 10 Pick. 454.

Minnesota. *Humphreys v. Minnesota Clay Co.*, 94 Minn. 469, 103 N. W. 338; *Niccollet Nat. Bank v. City Bank*, 38 Minn. 85, 8 Am. St. Rep. 643, 35 N. W. 577.

Mississippi. *Bank of Holly Springs v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330.

Missouri. *Withers v. Lafayette*

may sue in conversion even though he might vote the stock and be eligible to a corporate office without having the transfer made on the books.⁵⁶

In some of the early cases it was held that the transferee might maintain a special action on the case, where there was a wrongful refusal to transfer the stock to him on the books.⁵⁷ And it has been held that instead of suing as for a conversion he may elect to retain the stock and sue for special damages only.⁵⁸

An action either in trover or assumpsit may be maintained in

County Bank, 67 Mo. App. 115; Carroll v. Mullanphy Sav. Bank, 8 Mo. App. 249.

Nebraska. Herrick v. Humphrey Hardware Co., 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685.

Nevada. Robinson Min. Co. v. Riepe, 37 Nev. 27, 138 Pac. 910.

New Jersey. Siegel v. Riverside Box & Lumber Co., 89 N. J. L. 595, 99 Atl. 407.

New York. Travis v. Knox Terpezone Co., 215 N. Y. 259, L. R. A. 1916 A 542, Ann. Cas. 1917 A 387, 109 N. E. 250, aff'g 165 App. Div. 156, 150 N. Y. Supp. 621; Robinson v. National Bank, 95 N. Y. 637; People v. Utah Gold & Copper Mines Co., 135 App. Div. 418, 119 N. Y. Supp. 852.

North Dakota. Second Nat. Bank of Grand Forks v. First Nat. Bank, 8 N. D. 50, 76 N. W. 504.

Oregon. Davidson v. Almeda Mines Co., 66 Ore. 412, 48 L. R. A. (N. S.) 847, 134 Pac. 782; Slemmons v. Thompson, 23 Ore. 215, 31 Pac. 514.

Pennsylvania. Birmingham Fire Ins. Co. v. Com., 92 Pa. St. 72; Morgan v. Bank of North America, 8 Serg. & R. 73, 11 Am. Dec. 575.

Texas. Rio Grande Cattle Co. v. Burns, 82 Tex. 50, 17 S. W. 1043; Milner v. Brewer-Monaghan Mercantile Co., — Tex. Civ. App. —, 188 S. W. 49; Gresham v. Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556.

Washington. See Lacaff v. Dutch Miller Mining & Smelting Co., 31

Wash. 566, 72 Pac. 112; Huggins v. Milwaukee Brewing Co., 10 Wash. 579, 39 Pac. 152.

Wisconsin. Greenleaf v. Ludington, 15 Wis. 558, 82 Am. Dec. 698.

Where a stockholder has paid the corporation in full for his stock, and been refused a certificate, he may assign his shares, and the assignee may demand a certificate, and sue the corporation if it is refused. Rio Grande Cattle Co. v. Burns, 82 Tex. 50, 17 S. W. 1043.

For the proper method of pleading the plaintiff's ownership of the stock in such an action, see Paine v. British-Butte Min. Co., 41 Mont. 28, 108 Pac. 12.

⁵⁶ London, P. & A. Bank, Ltd. v. Aronstein, 117 Fed. 601.

⁵⁷ Protection Life Ins. Co. v. Osgood, 93 Ill. 69; Morgan v. Bank of North America, 8 Serg. & R. (Pa.) 73, 11 Am. Dec. 575. See Baltimore City Passenger Ry. Co. v. Sewell, 35 Md. 238, 6 Am. Rep. 402.

Assumpsit in the form of a special action on the case will lie under such circumstances. Case v. Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695.

See also Lewis v. Bidwell Elec. Co., 141 Ill. App. 33, and McLean v. Charles Wright Medicine Co., 96 Mich. 479, 56 N. W. 68, which was an action on the case for damages for refusal to register a transfer.

⁵⁸ Siegel v. Riverside Box & Lumber Co., 89 N. J. L. 595, 99 Atl. 407.

respect to the shares of a foreign corporation, since it does not involve in any prohibited sense a regulation of its internal management.⁵⁹

To sustain an action of conversion, a proper request to make the transfer must be shown.⁶⁰

It has been held that the transferrer may sue for damages,⁶¹ since it is as much his right and duty to procure a transfer as it is that of the transferee.⁶² But there is authority to the effect that the transferee is the proper party to sue in conversion, and that such an action cannot be maintained by the transferrer.⁶³

An executor may maintain an action of conversion for refusal to transfer stock standing in the name of his testator to him as executor, even in states where he does not obtain title to personal property belonging to the estate, but is only entitled to possession of it for the payment of debts and the expenses of administration.⁶⁴

Generally the right to sue for damages is not lost by mere inaction, so long as a prescription has not accrued,⁶⁵ although there is authority to the contrary where the rights of innocent third parties have intervened.⁶⁶ The transferee is not under any obligation to prevent the accruing of damages by bringing mandamus proceedings to compel a transfer.⁶⁷

It has been held that since the action for damages is based on the

⁵⁹ *Travis v. Knox Terpezone Co.*, 215 N. Y. 259, L. R. A. 1916 A 542, Ann. Cas. 1917 A 387, 109 N. E. 250, aff'g 165 N. Y. App. Div. 156, 150 N. Y. Supp. 621.

⁶⁰ As to the sufficiency of a request, see *Dooley v. Gladiator Consol. Gold Mines & Milling Co.*, 134 Iowa 468, 13 Ann. Cas. 297, 109 N. W. 864.

By absolutely refusing to make the transfer, a corporate officer waives the objection that the request was made on the street and that there was no formal presentation and request in his office. *Dooley v. Gladiator Consol. Gold Mines & Milling Co.*, 134 Iowa 468, 13 Ann. Cas. 297, 109 N. W. 864.

⁶¹ *Lockwood v. United States Steel Corporation*, 153 N. Y. App. Div. 655, 138 N. Y. Supp. 725, rev'd on other grounds 209 N. Y. 375, L. R. A. 1915 C 471, 103 N. E. 697. See also *Lacaff v. Dutch Miller Mining & Smelting*

Co., 31 Wash. 566, 72 Pac. 112; *Higgins v. Milwaukee Brewing Co.*, 10 Wash. 579, 39 Pac. 152.

⁶² See § 3796, supra.

⁶³ *Lewis v. Bidwell Elec. Co.*, 141 Ill. App. 33.

⁶⁴ *London, P. & A. Bank, Ltd. v. Aronstein*, 117 Fed. 601.

⁶⁵ *Eisenhauer v. New Orleans Cotton Exchange*, 140 La. 574, 73 So. 685.

Since the action is at law, mere delay or acquiescence will not bar it, unless prolonged for the statutory period, save where the elements of an estoppel are present. *Doyle v. Burns*, 123 Iowa 488, 99 N. W. 195.

⁶⁶ *Pottsville Bank v. Minersville Water Co.*, 211 Pa. 566, 61 Atl. 119.

⁶⁷ The fact that he does not institute such proceedings does not affect his right to sue for damages. *Eisenhauer v. New Orleans Cotton Exchange*, 140 La. 574, 73 So. 685.

breach of the implied contract arising from the issuance of the certificates by the corporation, it can only be maintained against the corporation which issued them, and not against another corporation which has succeeded to all its property, rights and interests.⁶⁸

The measure of damages depends on the nature of the action.⁶⁹ If the plaintiff sues in conversion he is entitled to recover the value of the stock, as in other cases of conversion.⁷⁰ But if he claims special damages only, and seeks to retain the stock he cannot recover its value.⁷¹ This is true, for example, where he does not sue in trover but brings an action on the case, and under such circumstances if he does not prove any special damages he can recover nominal damages only.⁷²

§ 3820. — Action against person causing refusal. It is a general principle that all persons who bid, command, advise or countenance the commission of a tort by another, or who approve of it after it is done, if done for their benefit, are liable therefor to the same extent as if they had themselves committed the tort. It is also a general principle that a request or indemnity to a sheriff or other executive officer to do an act or withhold property, which turns out to be wrongful, makes the party liable for all damages which may ensue. And it has been held, applying these principles, that the holder of a certificate of stock may maintain an action for damages against a former owner of the certificate, who, after having assigned the same, has caused the corporation to refuse to transfer the stock on its books by presenting to it an affidavit that he has lost the certificate, and procuring a new certificate to be issued to him in its stead, upon giving the corporation a bond of indemnity.⁷³

§ 3821. — Liability of officers or transfer agents. Generally corporate officers⁷⁴ or transfer agents⁷⁵ whose duty it is to make trans-

⁶⁸ *Higgins v. Milwaukee Brewing Co.*, 10 Wash. 579, 39 Pac. 152.

⁶⁹ *Siegel v. Riverside Box & Lumber Co.*, 89 N. J. L. 595, 99 Atl. 407.

⁷⁰ See § 3449 et seq., supra.

⁷¹ *Siegel v. Riverside Box & Lumber Co.*, 89 N. J. L. 595, 99 Atl. 407.

⁷² *McLean v. Charles Wright Medicine Co.*, 96 Mich. 479, 56 N. W. 68.

⁷³ *Greenleaf v. Ludington*, 15 Wis. 558, 82 Am. Dec. 698.

⁷⁴ *Cooley v. Curran*, 54 N. Y. Misc. 221, 104 N. Y. Supp. 424; *Id.*, 54 N.

Y. Misc. 572, 104 N. Y. Supp. 751. But see *Hine v. Commercial Bank of Bay City*, 119 Mich. 448, 78 N. W. 471.

As to the liability of corporate officers to third persons for torts generally, see § 2534 et seq., supra.

⁷⁵ *Dunham v. City Trust Co.*, 115 N. Y. App. Div. 584, 101 N. Y. Supp. 87, aff'd 193 N. Y. 642, 86 N. E. 1123; *Denny v. Manhattan Co.*, 2 Den. (N. Y.) 115, aff'd 5 Den. (N. Y.) 639.

lers on the corporate books are not liable directly to a transferee for a failure or refusal to make such a transfer. Such failure or refusal is merely nonfeasance for which the officer or agent is liable to the corporation alone, and for which in turn it is liable to those injured thereby.⁷⁶

§ 3822. — Statutory remedies. The statutes of Wisconsin provide that whenever it shall be made to appear to the circuit court, by affidavit or otherwise, that the secretary or other proper officer of any corporation has, upon proper demand, neglected or refused for two days to transfer on the stock books of the corporation any stock which it is his duty to transfer, the court shall immediately issue an order requiring him to show cause why he should not transfer such stock, and that unless he shows cause to the satisfaction of the court why such stock should not be transferred, the court shall order such transfer to be made, and may enforce the performance thereof by proceedings for contempt.⁷⁷ In transferring stock under this provision the secretary of a corporation is performing a purely ministerial duty.⁷⁸ He does not try or decide the question of ownership and should not be ordered to make the transfer when a bona fide contest exists between rival claimants for the stock which is already in the courts or is about to be brought there.⁷⁹ An order directing the trans-

⁷⁶ As to the liability of the corporation under such circumstances, see § 3819, *supra*.

⁷⁷ Wis. St. 1915, § 1752. *Corn Exch. Nat. Bank v. Kaiser*, 160 Wis. 199, 151 N. W. 259; *Farmers' Mercantile & Supply Co. v. Laun*, 146 Wis. 252, 131 N. W. 366; *Schwab v. Smith*, 143 Wis. 427, 128 N. W. 78; *In re Klaus*, 67 Wis. 401, 29 N. W. 582.

"The statute does not prescribe any method of trying such a controversy. It simply provides a method of making a case by affidavit on the one side and that it shall prevail unless satisfactorily disproved by the adverse party. * * * The statute contemplates that the opposing affidavit shall be viewed in the nature of a pleading and as evidence as well and that the court shall weigh the probabilities appearing thereby and decide

accordingly, the burden of proof being on the one refusing to transfer the stock." The court may decide the matter upon the affidavits, or may receive evidence from either side, if any is offered. It is not bound to regard a mere evasive denial in the opposing affidavit as satisfactory. *Schwab v. Smith*, 143 Wis. 427, 128 N. W. 78.

A transfer is properly ordered where the petitioner has possession of the certificates, duly assigned, and the claimant does not appear at the hearing though properly notified. *Corn Exch. Nat. Bank v. Kaiser*, 160 Wis. 199, 151 N. W. 259.

⁷⁸ *Corn Exch. Nat. Bank v. Kaiser*, 160 Wis. 199, 151 N. W. 259; *Holyoke v. Millmann*, 151 Wis. 551, 43 L. R. A. (N. S.) 790, 139 N. W. 392.

⁷⁹ *Corn Exch. Nat. Bank v. Kaiser*, 160 Wis. 199, 151 N. W. 259.

fer does not settle the question of title to the stock, if there is one, but it may be determined in a proper action for that purpose in the courts notwithstanding the transfer.⁸⁰

The Code of California provides that whenever any officer of a corporation shall refuse to transfer stock on the books of the corporation or to issue a certificate, or certificates therefor to the transferee, he shall be subject to a penalty of four hundred dollars, to be recovered as liquidated damages, in an action brought against him by the person aggrieved.⁸¹ To warrant the recovery of such penalty the refusal to make the transfer must, of course, have been wrongful.⁸² A complaint in such an action *prima facie* states a cause of action where it alleges, in the language of the statute, a refusal to comply with a request for the performance of the statutory duty to make the transfer.⁸³ It is not necessary to allege that the refusal was wilful and without lawful excuse. "The reasons for such refusal, if any, are properly pleaded only as a matter of defense."⁸⁴

In Kentucky the corporation may be required to make a transfer in a proper case by an order of court issued on a rule to show cause why the transfer should not be made.⁸⁵

The English statutes provide for a summary proceeding to rectify the register of members of a corporation on motion of the corporation or any person aggrieved in case the name of any person is, without sufficient cause, entered in or omitted from such register, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company.⁸⁶

"He is not a trier of controversies that should be settled in the courts. He is required by the statute to make a transfer only when 'it is his duty to do so.' It is not his duty to make the transfer when there is a bona fide claim on the part of the corporation that the person seeking to have the transfer made is not and never was a stockholder. Much less is it his duty to make the transfer when it seems reasonably certain that the corporation is correct in its contention. It was not the purpose of the legislature in enacting sec. 1752 to permit the secretary of a corporation to disturb the status quo while a contest was pending or was being carried on by rival claimants for stock." *Holyoke v. Millmann*, 151 Wis. 551,

43 L. R. A. (N. S.) 790, 139 N. W. 392.

⁸⁰ *Corn Exch. Nat. Bank v. Kaiser*, 160 Wis. 199, 151 N. W. 259.

⁸¹ *Civ. Code*, § 324. *Ramage v. Gould*, — Cal. —, 169 Pac. 670; *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

⁸² See § 3823, *infra*.

⁸³ *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

⁸⁴ *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

⁸⁵ *Bank of Kentucky v. Winn*, 110 Ky. 140, 61 S. W. 32.

⁸⁶ *Shaw v. Goebel Brewing Co., Ltd.*, 202 Fed. 408, 45 L. R. A. (N. S.) 1090; *Ex parte Shaw*, 2 Q. B. D. 463, *aff'd* 46 L. J. 394.

§ 3823. Refusal must be wrongful—In general. Of course, a corporation is not liable for refusal to permit a transfer on its books to the assignee of a certificate of stock, nor can it be compelled to make such a transfer, unless the circumstances are such as to entitle the latter to a transfer on the books, and to render the refusal wrongful.⁸⁷ "In order to cast a duty upon the corporation, there must be either a power of attorney authorizing some one to act for the original shareholder, or else a valid sale which gives the person demanding transfer title to the stock."⁸⁸ "It may always refuse to make a transfer when it has reasonable ground for so doing,"⁸⁹ but it must act in good faith, and present some adequate reason for its refusal and support the same by some evidence.⁹⁰ It is under no obligation to register a transfer to a person who is not the owner of the stock and has no interest in it,⁹¹ as where it has notice of a prior valid transfer to

⁸⁷ *Young v. New Standard Concentrator Co.*, 148 Cal. 306, 83 Pac. 28; *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476; *Hilton v. Sylvania & G. R. Co.*, 8 Ga. App. 10, 68 S. E. 746; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 81; *Livezey v. Northern Pac. R. R.*, 157 Pa. St. 75, 27 Atl. 379; *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232.

An action for damages will lie only where there is a clear legal right on the part of the assignee to have a transfer. *Lacaff v. Dutch Miller Mining & Smelting Co.*, 31 Wash. 566, 72 Pac. 112; *Huggins v. Milwaukee Brewing Co.*, 10 Wash. 579, 39 Pac. 152.

In an action against the corporation for conversion, evidence is admissible to show any circumstance which would justify or excuse the refusal to make the transfer. *Young v. New Standard Concentrator Co.*, 148 Cal. 306, 83 Pac. 28.

⁸⁸ *Brown v. Hotel Ass'n*, 63 Neb. 181, 88 N. W. 175.

⁸⁹ *Mundt v. Commercial Nat. Bank of Ogden*, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

⁹⁰ *Mundt v. Commercial Nat. Bank of Ogden*, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

When called into court it should present its reasons for refusing to make the transfer as a defense, and not rely merely upon a denial of ownership for want of knowledge, or, upon an averment upon information and belief, that the assignee is not the true owner. *Mundt v. Commercial Nat. Bank of Ogden*, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

If the certificate, its assignment, and the request for the transfer are in regular form, and on their face entitle the assignee to a transfer, the presumption is that they have been lawfully and honestly made and acquired, and the burden is on the corporation to justify its refusal to make the transfer. *O'Neil v. Wolcott Min. Co.*, 174 Fed. 527, 27 L. R. A. (N. S.) 200.

⁹¹ The corporation may show that the person seeking to compel a transfer is not the owner of the stock. *Hannahs v. Hammond Typewriter Co.*, 158 N. Y. App. Div. 620, 143 N. Y. Supp. 939.

The corporate officers may properly refuse to make a transfer where there is a bona fide claim on the part of the corporation that the person seeking it is not and never was a stockholder, especially where it is reason-

another person, which is good as against the person demanding registration;⁹² or if it has some claim upon the stock, or some rights against the assignor which would or might be affected or lost by the transfer;⁹³ or where by so doing it would expose itself to a successful claim by any one for the replacement of the stock or its value;⁹⁴ or if the certificate of stock is fictitious or has been illegally issued, unless the circumstances are such as to estop the corporation to deny its validity in the hands of the transferee;⁹⁵ or if the holder of the certificate has not complied with the provisions of the corporate by-laws

ably certain that it is correct in its contention. *Holyoke v. Millmann*, 151 Wis. 551, 43 L. R. A. (N. S.) 790, 139 N. W. 392.

"A person who has no interest in the stock cannot ask a court of equity to decree a transfer to him." *Nagel v. Ham, Yearsley & Ryrie*, 88 Wash. 99, 152 Pac. 520.

Where no title to a stolen certificate passes to a transferee, the transfer agent of the corporation is not liable to the transferee, either in contract or in tort, for refusing to return the certificate presented to him for transfer, or to issue a new certificate therefor. *Barstow v. City Trust Co.*, 216 Mass. 330, 103 N. E. 911.

⁹²See *Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351.

Where a purchaser of stock fails to have the transfer to him recorded and the record owner thereafter again sells the stock to a bona fide purchaser, the corporation cannot be held liable for refusing to transfer the stock on its books to the first purchaser. *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 81.

Where a corporation, shares of stock of which have been pledged, becomes the owner of the pledgor's interest in the stock, the pledgee is not entitled to compel it to transfer the stock to him on the books until he proves some beneficial interest in the stock. *Second Nat. Bank of Grand Forks v. First Nat. Bank*, 8 N. D. 50, 76 N. W. 504.

As to the duty of the corporation where there are conflicting claims to the same stock, see § 3824, *infra*.

⁹³*Mundt v. Commercial Nat. Bank of Ogden*, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

⁹⁴*Livezey v. Northern Pac. R. R.*, 157 Pa. St. 75, 27 Atl. 379; *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232.

See also §§ 3827, 3828, *infra*.

⁹⁵One who takes stock with knowledge of the fact that it was issued to directors, without authority, as compensation for services rendered, is not a bona fide holder for value, and the corporation cannot be required to enter a transfer of the stock in his name. *Grafner v. Pittsburg, N. I. & C. St. R. Co.*, 207 Pa. 217, 56 Atl. 426.

In a Connecticut case, after a corporation, on discovering the fraud of a transfer agent, whereby certificates of stock were fraudulently issued, had closed its books pending an investigation and the appointment of another agent, the plaintiffs, who held stock in pledge, demanded a transfer on its books, and the transfer was refused at the time, but there was no refusal to allow the transfer at some future time. In an action for damages for the refusal, it was held that the circumstances were such as to justify the refusal at the time the demand was made. *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

The burden of showing that the certificates do not represent genuine

governing transfers.⁹⁶ So it cannot be compelled to make a transfer, or be held liable for refusing to do so, if it has a lien upon the shares as against the transferee,⁹⁷ unless he is entitled to a transfer subject to the lien;⁹⁸ or if the transferrer has not complied with the provisions of a valid by-law⁹⁹ or contract¹ requiring stockholders to offer their stock to the corporation before disposing of it to others; or if the transferee's rights are subject to a valid and enforceable agreement which suspends for a time the right of alienation and transfer usually enjoyed by a stockholder.² The same has been held to be true where the stock was attached by a creditor of the transferrer³ prior

stock is on the corporation. *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

The corporation cannot justify its refusal to make a transfer on the ground that the certificate is void, where both it and its stockholders are estopped to question its validity as against the transferee. *Ellsworth v. National Home & Town Builders*, 33 Cal. App. 1, 164 Pac. 14; *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

As to fictitious and illegally issued certificates generally, see § 3486 et seq., supra.

96 Illinois. *Tyng v. United Mercantile Agency*, 184 Ill. App. 433; *Shirley Farmers' Grain & Coal Co. v. Douglas*, 130 Ill. App. 285; *Kjellman v. Scandia Fish Co.*, 128 Ill. App. 544.

Kansas. *Star Mut. Tel. Co. v. Longfellow*, 85 Kan. 353, 116 Pac. 506.

Louisiana. *State v. New Orleans & C. R. Co.*, 30 La. Ann. 308.

South Carolina. *State v. McIver*, 2 S. C. 25.

Washington. *Lacaff v. Dutch Miller Mining & Smelting Co.*, 31 Wash. 566, 72 Pac. 112.

⁹⁷ See § 3606, supra.

⁹⁸ See § 3613, supra.

⁹⁹ *Nicholson v. Franklin Brewing Co.*, 82 Ohio St. 94, 137 Am. St. Rep. 764, 19 Ann. Cas. 699, 91 N. E. 991.

As to the validity of such by-laws, see § 513, supra.

¹ *Barrett v. King*, 181 Mass. 476, 63 N. E. 934.

The court will not aid the assignor of stock acting with the assignee to commit a breach of the assignor's contract to sell the stock to his fellow stockholders at par before transferring it to any one else. *Farmers' Mercantile & Supply Co. v. Laun*, 146 Wis. 252, 131 N. W. 366.

As to the validity of such a contract, see § 3762, supra.

² *Cook Ry. Signal Co. v. Buck*, 59 Colo. 368, 149 Pac. 95.

As where a pledgee of stock who purchases it at a delinquent assessment sale agrees with the corporation, in order to prevent competition in the bidding, that he will continue to hold the stock as pledgee, and that the stock shall not be transferred without making provision for certain payments out of the proceeds of the sale. *Young v. New Standard Concentrator Co.*, 148 Cal. 306, 83 Pac. 28.

As to the validity of such contracts, see § 3761, supra.

³ *Matuskevitz v. Citizens' Dist. Messenger & Burglar-Alarm Tel. Co.*, 19 Mont. 368, 48 Pac. 552.

As to the relative rights of a transferee whose transfer has not been registered and an attaching or execution creditor of the transferrer, see § 3811, supra.

to the transfer, although as to this there is authority to the contrary.⁴

A corporation cannot refuse to recognize and register a transfer of shares merely because the transferee is a business rival, and may make use of his ownership of the shares in hostility to its interests.⁵

The refusal of a corporation to permit a transfer of stock on its books is not wrongful where the person demanding such transfer does not produce the certificate of stock, or show a good excuse for his failure to do so, for if a corporation should register a transfer and issue a new certificate while the original certificate is outstanding, it would incur the risk of liability upon both certificates in the hands of bona fide transferees.⁶

§ 3824. — Effect of conflicting claims to same stock. The corporation with respect to conflicting claims of different persons to the same stock, and the right of each to have a transfer thereof, occupies a fiduciary relation to both, and is bound to exercise good faith in determining the matter.⁷ "In the presence of such conflicting claims it is the privilege and the duty of the corporation or its officers, if there be a reasonable doubt as to the respective rights of the contending claimants, to refuse, or rather delay, registry to either party until the lapse of a reasonable time, within which the merits of the controversy may be determined by an independent investigation of the corporation, or, if necessary, by the institution of appropriate proceedings in the courts."⁸ "The law, however, does not require or permit the

⁴ *Ramage v. Gould*, — Cal. —, 169 Pac. 670. In this case it was held that a stockholder whose shares have been attached may sell the same subject to the attachment, and that there is no statutory provision authorizing the corporate officers to refuse to register such a transfer and issue a new certificate to the transferee.

⁵ *Rice v. Rockefeller*, 134 N. Y. 174, 17 L. R. A. 237, 30 Am. St. Rep. 653, 31 N. E. 907. See *Farmers' Loan & Trust Co. v. Chicago, P. & S. Ry. Co.*, 163 U. S. 31, 41 L. Ed. 60; *Insurance Bank of Columbus v. Bank of United States*, 4 Clark (Pa.) 125.

⁶ See § 3829, *infra*.

⁷ *Cooper v. Spring Valley Water*, 171 Cal. 158, 153 Pac. 936.

⁸ *Spangenberg v. Nesbitt*, 22 Cal. 74, 134 Pac. 343. See also

O'Neil v. Wolcott Min. Co., 174 Fed. 527, 27 L. R. A. (N. S.) 200; *Ramage v. Gould*, — Cal. —, 169 Pac. 670; *State v. McIver*, 2 S. C. 25.

"Generally speaking, the officers of a corporation may rightfully refuse, for the time being, a requested registry of stock, when notified to do so by a third person, who claims some interest in the stock, which might be lost or injuriously affected by the transfer." *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

It may refuse to make the transfer if it is notified by some third person not to make the transfer upon the ground that he claims some interest in it which would or might be lost if it were made. *Mundt v. Commercial Nat. Bank of Ogden*, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

officers of the corporation to assume the functions of a court of justice, and by their decision forever conclude the rights of the contending claimants."⁹ Nor has an officer any right, upon his own initiative, to determine from his personal knowledge of the dealings between conflicting claimants which is the rightful owner of the stock, and he acts at his peril in attempting to do so.¹⁰ "If within a reasonable time resort is not had to the courts for the determination of the controversy, either by the corporation itself or by the parties immediately involved, it becomes the duty of the corporation or its officer to register the disputed stock in the name of the first claimant," provided his rights are reasonably clear.¹¹ "Any other rule would tend to permit the corporation of its own motion, or at the mere instigation of third parties, to arbitrarily deprive a person presenting a prima facie right to the disputed stock of the possession and benefits thereof."¹²

The secretary of the corporation may properly refuse to make the transfer where a bona fide contest exists between rival claimants for the stock, which is in the courts or is about to be brought there. *Corn Exchange Nat. Bank v. Kaiser*, 160 Wis. 199, 151 N. W. 259; *Holyoke v. Millmann*, 151 Wis. 551, 43 L. R. A. (N. S.) 790, 139 N. W. 392.

⁹ *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

In transferring stock the secretary of the corporation acts in a purely ministerial capacity, and does not try or decide the question of ownership. *Corn Exch. Nat. Bank v. Kaiser*, 160 Wis. 199, 151 N. W. 259; *Holyoke v. Millmann*, 151 Wis. 551, 43 L. R. A. (N. S.) 790, 139 N. W. 392.

¹⁰ *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

In action for a statutory penalty for failure to transfer stock on the books, it is not competent for defendant's secretary to prove prior negotiations of the parties to the contract transferring the stock for purpose of bolstering up defendant's understanding of the legal effect of the contract. And testimony of the secretary as to information derived from the minute book of the corporation as

to the ownership of the stock is properly excluded, since the book itself is the best evidence. *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

¹¹ *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343. See also *Ramage v. Gould*, — Cal. —, 169 Pac. 670.

"Where the rights of a claimant are reasonably clear, and the corporation suspends action and gives to another an opportunity to establish his opposing claim, and he neither does so before the corporation nor commences any action to prevent the transfer within a reasonable time, it is the duty of the corporation to record the transfer demanded by the first claimant." *O'Neil v. Wolcott Min. Co.*, 174 Fed. 527, 27 L. R. A. (N. S.) 200.

A notice that the right of the officers of a corporation to sell stock in another corporation owned by it is disputed and that legal proceedings will be instituted to test the question cannot operate to justify a refusal to make a transfer persisted in after full time has been allowed for instituting such proceedings, which has not been done. *State v. McIver*, 2 S. C. 25.

¹² *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

Evidence of some adverse title, interest or lien, which at least raises a substantial doubt of the right of a demandant who presents a clear prima facie case for a transfer, is indispensable to sustain a refusal on the part of the corporation to make such transfer.¹³ "The corporation when it refuses, and upon the trial of the issue the court, must be able to see from the facts established that there is some question to be tried."¹⁴

It has been held that a mere claim of the stock or notice that its transfer is invalid is not sufficient,¹⁵ since otherwise any person could "deprive the owner of his stock temporarily by simply giving notice to the corporation that he claimed it and protested against its transfer."¹⁶

Where the statute provides that the delivery of a certificate to a bona fide pledgee with a written transfer of the same, or a written power of attorney to sell, assign and transfer the same, shall be a sufficient delivery to transfer the title as against all parties, it is the duty of the corporation to make a transfer to one to whom the stock has been pledged with power of attorney in the manner indicated although it is notified by the pledgor that he has revoked the power, where it knows that the pledge was made in good faith to secure a debt the amount of which was not determined when the pledge was made or the notice of revocation given.¹⁷

The corporation may protect itself, in the case of conflicting claims, by filing a bill of interpleader and surrendering the certificates to the court,¹⁸ or, if one of the claimants has commenced suit against it and the other claimant, it may obtain the same result by motion or petition therein.¹⁹ It is not obliged to pursue this course, however,

¹³ O'Neil v. Wolcott Min. Co., 174 Fed. 527, 27 L. R. A. (N.S.) 200. See also Wilson v. Atlantic & St. L. R. Co., 2 Fed. 459.

Admissions by one of the claimants bearing on his claim of title and against his interest are admissible in an action against the corporation for conversion. In such an action the question of ownership is for the jury, where the evidence on the subject is conflicting. Cooper v. Spring Valley Water Co., 171 Cal. 158, 153 Pac. 936.

¹⁴ O'Neil v. Wolcott Min. Co., 174 Fed. 527, 27 L. R. A. (N. S.) 200.

¹⁵ O'Neil v. Wolcott Min. Co., 174 Fed. 527, 27 L. R. A. (N. S.) 200; Ex

parte Sargent, 17 L. R. Eq. Cas. 273.

¹⁶ O'Neil v. Wolcott Min. Co., 174 Fed. 527, 27 L. R. A. (N. S.) 200; Ex parte Sargent, 17 L. R. Eq. Cas. 273.

¹⁷ Eisenhauer v. New Orleans Cotton Exchange, 140 La. 574, 73 So. 685.

¹⁸ Ramage v. Gould, — Cal. —, 169 Pac. 670; Cooper v. Spring Valley Water Co., 16 Cal. App. 17, 116 Pac. 298; Miller v. Doran, 151 Ill. App. 527, aff'd 245 Ill. 200, 91 N. E. 1039; Cady v. Potter, 55 Barb. (N. Y.) 463; State Ins. Co. v. Gennett, 2 Tenn. Ch. 82. See also New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30.

¹⁹ Miller v. Doran, 151 Ill. App. 527, aff'd 245 Ill. 200, 91 N. E. 1039.

and may decide without the aid of the court who it will recognize as the owner of the stock, but by so doing it takes the risk of having to pay the true owner the value of the stock if it decides wrongly.²⁰

§ 3825. — Right to inquire into validity of transfer as between the parties. Ordinarily the corporation is not concerned with the consideration paid for a transfer of shares of its stock.²¹ And the assignee has the right to have the stock transferred on the corporate books irrespective of the inadequacy of the price he paid therefor or the fact that the stock was a gift,²² although the inadequacy of the consideration may be considered as a circumstance to support a contention that no actual sale occurred.²³

Nor, as a rule, can the corporation inquire into or pass upon the legality of the transaction by which its shares are transferred from one person to another, or justify a refusal to register the transfer on the ground that the consideration for the transfer was illegal.²⁴

²⁰ *Cooper v. Spring Valley Water Co.*, 16 Cal. App. 17, 116 Pac. 298.

²¹ *Ellsworth v. National Home & Town Builders*, 33 Cal. App. 1, 164 Pac. 14; *Helm v. Swiggett*, 12 Ind. 194; *Mundt v. Commercial Nat. Bank of Ogden*, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

Where the assignment is admittedly genuine, the holder of the certificates, duly indorsed, is presumptively a holder for value, and he is not obliged to allege or prove the consideration in order to compel a transfer on the books. *Com. v. Camp*, — Pa. —, 102 Atl. 205.

²² *Ellsworth v. National Home & Town Builders*, 33 Cal. App. 1, 164 Pac. 14; *Madison Bank v. Price*, 79 Kan. 289, 100 Pac. 280; *Senn v. Union Premium & Mercantile Co.*, 115 Mo. App. 685, 92 S. W. 507.

²³ *Senn v. Union Premium & Mercantile Co.*, 115 Mo. App. 685, 92 S. W. 507.

²⁴ *Miller v. Houston City St. Ry. Co.*, 55 Fed. 366; *Com. v. Camp*, — Pa. —, 102 Atl. 205; *Mundt v. Commercial Nat. Bank of Ogden*, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

It cannot justify a refusal to trans-

fer the stock on its books on the ground that the assignment was for an illegal consideration. *Helm v. Swiggett*, 12 Ind. 194.

It is no excuse for a refusal to transfer stock on the books that the transferee acquired the stock through an illegal gambling contract, where the transferor has never repudiated the contract or made any claim against the corporation for the stock. *Miller v. Houston City St. Ry. Co.*, 55 Fed. 366.

It cannot justify such a refusal on the ground that the transferee won the stock on an election bet, where neither the transferor nor his creditors nor others entitled by statute to recover property so lost object or attempt to recover it within the time limited by the statute. *Crenshaw v. Columbian Min. Co.*, 110 Mo. App. 355, 86 S. W. 260.

Where the transferee is in possession of the certificates properly indorsed, and is thus clothed with the indicia of title, it can assert its right to demand the transfer without calling to its aid the contract with the transferor by which it obtained title to the stock. And to permit the cor-

Nor can the corporation or its officers justify a refusal to recognize a transferee as a stockholder or to transfer the stock to him on the books on the ground that the person seeking it has deluded a third person into believing that the latter had purchased all of his stock and hence is estopped;²⁵ nor because the transfer was in violation of a pooling agreement entered into between the transferrer and other stockholders, since such a contract is a matter between the parties thereto with which the corporation itself has no concern;²⁶ nor because the certificates were transferred as security for an indebtedness which has become barred by the statute of limitations, since the right to plead the statute as a defense under such circumstances is personal to the transferrer.²⁷

On the other hand, it has been held that the corporation cannot be held liable for refusal to make record of transfer to a pledgee who has assumed to acquire title to the stock contrary to the terms of the pledge;²⁸ nor to a purchaser at a foreclosure sale which is insufficient to give him good title;²⁹ or if there has been no delivery of the stock as between the parties to a contract for its transfer and the transferee notifies the corporation not to transfer it.³⁰

§ 3826. — Motive in transferring shares. As a general rule, the motive in transferring or purchasing shares is immaterial, and cannot be relied upon by the corporation as ground for refusing to recog-

poration to set up the illegality of the consideration would, in effect, be granting the transferrer affirmative relief by annulling the fully executed contract. *Com. v. Camp*, — Pa. —, 102 Atl. 205.

²⁵ *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

²⁶ *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806.

It cannot justify its refusal to make a transfer on its books on the ground that the stock was included in a proposed pooling agreement, where the agreement was never consummated and the stock was in the custody and control of the transferrer up to the time of the transfer. *Ellsworth v. National Home & Town Builders*, 33 Cal. App. 1, 164 Pac. 14.

²⁷ *Miller v. Houston City St. Ry. Co.*, 55 Fed. 366.

²⁸ *State v. North American Land &*

Timber Co., 112 La. 441, 36 So. 488.

²⁹ *Indiana & I. C. Ry. Co. v. McKernan*, 24 Ind. 62.

This is true where he has acquired the stock at a pledgee's sale which was invalid because public notice thereof was not given, even though the pledgor assigned the stock in blank with a power of attorney in blank authorizing the transfer. *Nagel v. Ham, Yearsley & Ryrie*, 88 Wash. 99, 152 Pac. 520.

The corporation cannot be compelled to transfer stock to a purchaser at a sale under a decree foreclosing a pledge, where such sale is insufficient to pass title because of a want of necessary parties to the suit. *Brown v. Hotel Ass'n*, 63 Neb. 181, 88 N. W. 175.

³⁰ *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905.

nize the transfer and register the same on its books; ³¹ "this being upon the well established ground that however important may be the motive which prompts one to the commission of a wrong, the motive which prompts him to the exercise of a legal right can never be the subject of judicial inquiry." ³² A person has a right to acquire stock for the purpose of obtaining control of the corporation. ³³ And it has repeatedly been held that a corporation cannot refuse to recognize or register a transfer on the ground that the object of the transfer is to obtain such control, or affect the voting at corporate meetings. ³⁴ So, too, the fact that a stockholder sells his shares for the purpose of escaping any further liability to the corporation or its creditors gives the corporation no right to refuse to recognize and register the transfer, if the transfer is bona fide, and to a person capable of assuming the obligations of a stockholder. ³⁵

The rule that the motive is immaterial does not apply, however, where a transfer is not made in good faith, but is merely colorable, and for the purpose of giving the transferee privileges of membership to which only bona fide and actual owners of shares are entitled. ³⁶ And

³¹ **Kansas.** *Madison Bank v. Price*, 79 Kan. 289, 100 Pac. 280.

Missouri. *Senn v. Union Premium & Mercantile Co.*, 115 Mo. App. 685, 92 S. W. 507.

New York. *Rice v. Rockefeller*, 134 N. Y. 174, 17 L. R. A. 237, 30 Am. St. Rep. 658, 31 N. E. 907.

Ohio. *Nicholson v. Franklin Brewing Co.*, 82 Ohio St. 94, 137 Am. St. Rep. 764, 19 Ann. Cas. 699, 91 N. E. 991.

South Carolina. *State v. McIver*, 2 Rich. 25.

Utah. *Mundt v. Commercial Nat. Bank of Ogden*, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

Vermont. *State v. Smith*, 48 Vt. 290.

Wisconsin. *In re Klaus*, 67 Wis. 401, 29 N. W. 582.

England. *Moffatt v. Farquhar*, 7 Ch. Div. 591; *Pender v. Lushington*, 6 Ch. Div. 75.

Ordinarily the motive with which a transferee takes, provided he is a genuine purchaser or donee and does not take under a secret trust or for

a wrongful purpose, does not affect his right to have the stock recorded in his name on the corporate books. *Senn v. Union Premium & Mercantile Co.*, 115 Mo. App. 685, 92 S. W. 507.

³² *Nicholson v. Franklin Brewing Co.*, 82 Ohio St. 94, 110, 137 Am. St. Rep. 764, 19 Ann. Cas. 699, 91 N. E. 991.

³³ *Bartlett v. Fourton*, 115 La. 26, 38 So. 882.

³⁴ *State v. Smith*, 48 Vt. 266; *Moffatt v. Farquhar*, 7 Ch. Div. 591. See *Senn v. Union Premium & Mercantile Co.*, 115 Mo. App. 685, 92 S. W. 507, and other cases in the note preceding.

³⁵ *Weston's Case*, 4 Ch. App. 20.

As to the effect of a sale on the vendor's liability to creditors, see subd. xxxiv, *infra*.

³⁶ *Gould v. Head*, 41 Fed. 240; *Cook Ry. Signal Co. v. Buck*, 59 Colo. 368, 149 Pac. 95; *Baker's Appeal*, 108 Pa. St. 510, 56 Am. Rep. 231, 1 Atl. 78; *Reg. v. Liverpool, M. & N. Ry. Co.*, 21 L. J. Q. B. 284.

In *Baker's Appeal*, 108 Pa. St. 510, 56 Am. Rep. 231, 1 Atl. 78, where the

it has been held to be a good defense to a bill to compel the registration of shares that they were acquired by the complainant for the purpose of enabling him, as the agent and instrument of third parties, to participate in a conspiracy formed by them to get control of the company for the purpose of wrecking it and thereby diminishing the value of shares of another company with which the company to be wrecked was affiliated in business.³⁷ It has also been intimated that equity will decline to require a transfer on the corporate books where the purpose of the transfer is to enable the transferee, as a mere puppet of the transferrer, to institute and carry on litigation for the latter's benefit or to wreak his spite,³⁸ and also that there may be other cases in which the purpose of the transfer may be so unconscionable that equity will refuse to interfere.³⁹

§ 3827. — Right to require proof of authority—In general. Since a corporation will be liable to the owner of stock if it allows a transfer on its books under a forged or unauthorized assignment and power of attorney, or otherwise in violation of his rights,⁴⁰ it has a right to protect itself against such liability.⁴¹ So it has the right,⁴² and it is its duty,⁴³ to make inquiry as to the authority of a person ask-

charter of a corporation to erect and maintain a theater provided that every five shares of stock should entitle the holder to a free ticket of admission, and that the directors should set apart a portion of the house for the exclusive use of such stockholders, and certain stockholders who held large amounts of stock undertook to make transfers of small lots to other persons, with the understanding that the same should be retransferred at the end of the season, it was held that the transfers should be enjoined as unauthorized by the charter, since "the purpose as well as the fact of the arrangement, was to clothe one person with a right to free admission to the academy, and an apparent, not a real, ownership, of the shares essential to the existence of that right, and another person with the real ownership of the same stock at the same time."

³⁷ Gould v. Head, 41 Fed. 240.

³⁸ In *Senn v. Union Premium & Mercantile Co.*, 115 Mo. App. 685, 92 S. W. 507, the court says that it seems likely that equity would decline to decree a transfer under such circumstances, although no instance has been found in which it has done so unless *Kingman v. Rome, W. & O. R. Co.*, 30 Hun (N. Y.) 73, is one. It is further said that it is not altogether clear whether the relief asked in the latter case was a decree for the transfer of shares, although the court thinks that it was.

³⁹ See *Senn v. Union Premium & Mercantile Co.*, 115 Mo. App. 685, 92 S. W. 507.

⁴⁰ See § 3830 et seq., *infra*.

⁴¹ *Nagel v. Ham, Yearsley & Ryrie*, 88 Wash. 99, 152 Pac. 520.

⁴² *Hughes v. Drovers' & Mechanics' Nat. Bank*, 86 Md. 418, 38 Atl. 936; *Baker v. Atlantic Coast Line R. Co.*, — N. C. —, 92 S. E. 170.

⁴³ See § 3830, *infra*.

ing for such a transfer, and may require him to produce evidence of his identity and of his right to the transfer, and therefore its refusal to register a transfer and issue a new certificate without such evidence is not wrongful.⁴⁴ In a leading case in the Supreme Court of the United States, it was said by Mr. Justice Field: "The officers of the company are the custodians of its stock books, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made."⁴⁵

⁴⁴ **United States.** *Western U. Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047.

California. *Taft v. Presidio & F. R. Co.*, 84 Cal. 131, 11 L. R. A. 125, 18 Am. St. Rep. 166, 24 Pac. 436.

Maryland. *Hughes v. Drovers' & Mechanics' Nat. Bank*, 86 Md. 418, 38 Atl. 936; *Chew v. Bank of Baltimore*, 14 Md. 299.

New York. *Spellissy v. Cook & Bernheimer Co.*, 58 App. Div. 283, 68 N. Y. Supp. 995.

Pennsylvania. *Livezey v. Northern Pac. R. R.*, 157 Pa. St. 75, 27 Atl. 379; *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232.

Rhode Island. *Davis v. National Eagle Bank*, 50 Atl. 530; *Peck v. Providence Gas Co.*, 17 R. I. 275, 15 L. R. A. 643, 23 Atl. 967, 21 Atl. 543.

Washington. *Nagel v. Ham, Yearsley & Ryrie*, 88 Wash. 99, 152 Pac. 520.

"A bank may refuse to recognize a power of attorney if not satisfied of its entire genuineness. It may require the personal attendance of the party for the very purpose of determining such matters of fact as may give rise to disputes." *Chew v. Bank of Baltimore*, 14 Md. 299.

"Before permitting a transfer to be made it may * * * require the

production of authority to make it, and may permit, or refuse to permit, the transfer according as the authority is, or is not, sufficient." *Peck v. Providence Gas Co.*, 17 R. I. 275, 15 L. R. A. 643, 23 Atl. 967, 21 Atl. 543, quoted with approval in *Davis v. National Eagle Bank (R. I.)*, 50 Atl. 530.

A corporation may properly refuse to make a transfer of stock issued by it to a certain party "attorney of Ellen Hayden" after said Hayden is dead, where thereafter the party presents to the corporation formal transfers of the certificates to himself "as attorney for Anne Callan," and signed by himself "as attorney of Ellen Hayden," there being an accompanying paper purporting to be executed by a certain party as executor of Ellen Hayden and by said Callan authorizing the transfer, there being no proof that the person named as executor was executor in fact. *Spellissy v. Cook & Bernheimer Co.*, 58 N. Y. App. Div. 283, 68 N. Y. Supp. 995.

⁴⁵ *Western U. Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047, quoted with approval in *Shirley Farmers' Grain & Coal Co. v. Douglas*, 130 Ill. App. 285; *Citizens' Nat. Bank v.*

§ 3828. — **Where stock is held in a fiduciary capacity.** If, by the form of the certificate or otherwise, the corporation has notice that the present holder is not the absolute owner, but holds the shares by such a title that he may not have authority to transfer them, it is not obliged, without evidence of such authority, to issue a certificate to his assignee,⁴⁶ so where a guardian seeks to transfer stock standing in the name of his ward the corporation has a right to inquire as to his authority and to refuse to make the transfer until such authority is shown.⁴⁷

Since a corporation is not bound to inquire as to the authority of an executor or administrator to transfer stock standing in the name of his decedent, except in so far as such authority is limited by restrictions in the will or the general law,⁴⁸ it cannot require proof of such authority before making a transfer on its books on his indorsement.⁴⁹ Nor will the mere fact that an executor is acting at his own risk in transferring stock to a legatee justify such a refusal, in the absence of a showing of other facts making the transfer improper.⁵⁰ But a corporation has the right, and it is its duty, to refuse to make a transfer on its books to one to whom the stock has been pledged by an executor as security for his personal debt, or to a transferee of the pledgee who takes with knowledge of the facts.⁵¹

If the corporation has notice that the stock is held in trust it may properly refuse to permit a transfer by the trustee until his authority to make it is exhibited,⁵² since, under such circumstances, it will be

State, 179 Ind. 621, 45 L. R. A. (N. S.) 1075, 101 N. E. 620.

See also § 3830, *infra*.

⁴⁶ *Loring v. Salisbury Mills*, 125 Mass. 138.

⁴⁷ *Kempner v. Wallis*, 2 Tex. App. Civ. Cas. § 584, *et seq.*

That the corporation is liable to the wards if it permits a transfer in violation of their rights where it has notice of the guardianship, see § 3838, *infra*.

⁴⁸ See § 3841, *infra*.

⁴⁹ *Catherwood v. Guarantee Trust & Safe Deposit Co.*, 252 Pa. 466, 97 Atl. 703; *Williams v. Pennsylvania R. Co.*, 9 Phila. (Pa.) 298.

⁵⁰ It is no defense to a mandamus proceeding to compel a transfer to a legatee that a year has not elapsed since the decedent's death, and that

the petition does not allege that all the debts of the estate have been paid, and that the distribution to the legatee was without an order of court or a refunding bond, where the executor may make a distribution under such circumstances at his own risk. *Catherwood v. Guarantee Trust & Safe Deposit Co.*, 252 Pa. 466, 97 Atl. 703.

⁵¹ *Davis v. National Eagle Bank (R. I.)*, 50 Atl. 530.

That the corporation is liable if it permits a transfer under such circumstances, see § 3841, *infra*.

⁵² *Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 119 Md. 21, 85 Atl. 949; *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232. See also *Livezey v. Northern Pac. R. R.*, 157 Pa. St. 75, 27 Atl. 379.

liable to the cestui que trust if it permits a transfer in violation of his rights.⁵³ In a suit by the personal representatives of a deceased stockholder to have stock standing in his name as "trustee" transferred, the burden is on them to show that the stock was his own individual property, and the corporation does not have the burden of showing who is the cestui que trust.⁵⁴ Where the corporation has notice of a testamentary trust in stock, and it is also claimed by the executors and by a third person individually, and later the executors acquiesce in the claim of such third person and disclaim title in themselves, it has a right to be protected by a judicial decree in an adversary proceeding, in which all parties interested should or might intervene, before it can be convicted of a wrongful refusal to transfer.⁵⁵ Where the statute permits persons holding stock in a fiduciary capacity to sell the same and reinvest the proceeds, and provides that the corporation shall not be liable for transferring stock so sold on its books on the order of the fiduciary, it cannot justify a refusal to make a transfer on the order of a trustee who has sold stock belonging to the trust estate and reinvested the proceeds on ground that it may thereby render itself liable to remaindermen.⁵⁶

Where stock stands on the books of the company in the name of a certain person, "agent," the word agent cannot be regarded as merely *descriptio personae*, but the *prima facie* presumption is that he does not hold the stock in his own right and as his own property, but rather that he holds it on behalf of some principal. And hence the corporation will not be compelled by the court in a suit brought for that purpose to transfer the stock to his personal representatives unless this presumption is overcome by proof. The burden of proof is on the personal representatives under such circumstances. Nor does the corporation have the burden of showing who is the principal for whom the stock was held. Nor will mere lapse of time after failure of the principal to appear and claim the stock, or dividends thereon, raise a presumption of personal ownership in the person so named as agent. The entry on the books of the company is a continuous assertion that the stock is not the private property of the person named and prevents the running of the statute of limitations.⁵⁷

⁵³ See § 3838, *infra*.

⁵⁴ *Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 119 Md. 21, 85 Atl. 949. See also *Tyson v. George's Creek Coal & Iron Co.*, 115 Md. 564, 81 Atl. 41.

⁵⁵ *Livezey v. Northern Pac. R. R.*,

157 Pa. St. 75, 27 Atl. 379.

⁵⁶ *Bank of Kentucky v. Winn*, 110 Ky. 140, 61 S. W. 32.

⁵⁷ *Tyson v. George's Creek Coal & Iron Co.*, 115 Md. 564, 81 Atl. 41.

See also § 3843, *infra*.

§ 3829. — Right to require production and surrender of old certificate. As was shown in another chapter, if a corporation issues a certificate of stock, the certificate, so long as it is outstanding, constitutes a continuing affirmation that the person named therein is the owner of the number of shares therein specified, and has the right to transfer the same, and it will be estopped to deny such affirmation as against bona fide purchasers of the certificate.⁵⁸ It follows that, if a corporation transfers shares on its books and issues a new certificate therefor while the original certificate is outstanding, it runs the risk of incurring liability on both certificates in the hands of bona fide purchasers.⁵⁹ It is well settled, therefore, that a corporation is not bound and cannot be required to register a transfer of stock, and issue a new certificate, unless the original certificate is produced and surrendered, or is clearly shown to have been destroyed or lost.⁶⁰

⁵⁸ See § 3753 et seq., supra.

⁵⁹ See § 3832, infra.

⁶⁰ **Colorado.** *Ironstone Ditch Co. v. Equitable Securities Co.*, 52 Colo. 268, 121 Pac. 174; *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691; *Isbell v. Graybill*, 19 Colo. App. 508, 76 Pac. 550.

Louisiana. *State v. New Orleans & C. R. Co.*, 30 La. Ann. 308.

Minnesota. *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183, 46 N. W. 337, qualified somewhat in *Guilford v. Western U. Tel. Co.*, 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324.

New York. *Bean v. American Loan & Trust Co.*, 122 N. Y. 622, 26 N. E. 11; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Smith v. American Coal Co.*, 7 Lans. 317.

Ohio. *National Bank v. Lake Shore & M. S. Ry. Co.*, 21 Ohio St. 221.

West Virginia. *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614; *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

Where a purchaser of stock has demanded of the corporation a transfer on its books and a new certificate and been refused, the corporation cannot escape liability on

the ground that he did not leave the old certificates with it, where he had them with him, and gave the corporation copies of his transfers, and the corporation based its refusal at the time upon another and untenable ground. *Bond v. Mt. Hope Iron Co.*, 99 Mass. 505, 97 Am. Dec. 49.

The Uniform Stock Transfer Act, which has been adopted in a number of states, provides (§ 13) that, except where a certificate is lost or destroyed, the corporation shall not be compelled to issue a new certificate until the old certificate is surrendered to it. *Parkhurst v. Almy*, 222 Mass. 27, 109 N. E. 733.

Putting in trust an equal number of certificates to be surrendered to the corporation in case the original certificates standing in the name of a judgment debtor have or shall come into the hands of a bona fide purchaser for value as a condition precedent to requiring the corporation to issue new certificates to a master, appointed in a proceeding to subject the judgment debtor's interest to the judgment creditor's claim, is equivalent to surrendering the original certificates within the meaning of this provision. *Parkhurst v. Almy*, 222 Mass. 27, 109 N. E. 733.

A court cannot compel a corporation to register a transfer of stock and issue a new certificate, while the original certificate is outstanding, unless it adequately protects the corporation by its decree against possible liability on the outstanding certificate, for, as we have seen, the doctrine of *lis pendens* does not apply to transfers of stock, and the decree of the court will not be binding upon persons who are not parties to the suit, and who have acquired or may acquire rights under the outstanding certificate.⁶¹ The decree, therefore, should in terms require the corporation to register the transfer and issue a new certificate only upon production and surrender of the outstanding certificate.⁶²

As we have seen, if a certificate of stock is lost or destroyed, the stockholder may require the corporation to replace it on giving a bond to indemnify it against possible liability, on the original.⁶³

XXIV. FORGED AND UNAUTHORIZED TRANSFERS, AND TRANSFERS IN BREACH OF TRUST

§ 3830. Duty of corporation with respect to transfers. A corporation whose stock is transferable only on the books of the company is, to a certain extent at least, a trustee for its stockholders in respect to their stock.⁶⁴ It is the custodian of the shares and of the primary

⁶¹ *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183, 46 N. W. 337; *Bean v. American Loan & Trust Co.*, 122 N. Y. 622, 26 N. E. 11; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616.

The court cannot compel the corporation to issue a new certificate while the original certificate remains in the hands of a bona fide purchaser for value. *Ironstone Ditch Co. v. Equitable Securities Co.*, 52 Colo. 268, 121 Pac. 174.

It has been held that the corporation may be required to transfer the stock on its books to an assignee in bankruptcy of the registered holder and to issue a new certificate to him although the bankrupt has taken the certificate out of the jurisdiction where the assignee tenders a bond of indemnity. *Wilson v. Atlantic & St. L. R. Co.*, 2 Fed. 459.

That the doctrine of *lis pendens*

does not apply to transfers of stock, see § 3778, *supra*.

⁶² *Bean v. American Loan & Trust Co.*, 122 N. Y. 622, 26 N. E. 11.

⁶³ See § 3498, *supra*.

⁶⁴ *United States. Lowry v. Commercial & Farmers' Bank, Taney*, 310, Fed. Cas. No. 8,581.

California. *Taft v. Presidio & F. R. Co.*, 84 Cal. 131, 11 L. R. A. 125, 18 Am. St. Rep. 166, 24 Pac. 436.

Colorado. *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691.

Illinois. *Hall v. Rose Hill & E. Road Co.*, 70 Ill. 673.

Indiana. *Vernon, G. & R. R. Co. v. Washington Tp. Decatur Co.*, 48 Ind. App. 309, 95 N. E. 599.

Maryland. *United States Express Co. v. Hurlock*, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834; *Baltimore Trust Co. v. George's Creek Coal &*

evidence of the title to the stock, and is clothed with power to protect the rights of its shareholders from unauthorized transfers. It is therefore its duty to exercise reasonable care and diligence to protect their interests by preventing such transfers, and it must respond in damages for any injury sustained by them in consequence of its negligence or misconduct in this regard.⁶⁵ And it follows that its

Iron Co., 119 Md. 21, 85 Atl. 949; **Marbury v. Ehlen**, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648.

North Carolina. **Baker v. Atlantic Coast Line R. Co.**, 92 S. E. 170; **Cox v. First Nat. Bank**, 119 N. C. 302, 26 S. E. 22.

Ohio. **Cleveland & M. R. Co. v. Robbins**, 35 Ohio St. 483.

Pennsylvania. **Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Franklin Fire Ins. Co.**, 181 Pa. St. 40, 37 L. R. A. 780, 37 Atl. 191; **Livezey v. Northern Pac. R. R.**, 157 Pa. St. 75, 27 Atl. 379; *In re Pennsylvania R. Co.'s Appeal*, 86 Pa. St. 80; **Bayard v. Farmers' & Mechanics' Bank**, 52 Pa. St. 232.

Rhode Island. **Davis v. National Eagle Bank**, 50 Atl. 530; **Peck v. Providence Gas Co.**, 17 R. I. 275, 15 L. R. A. 643, 23 Atl. 967, 21 Atl. 543; **Peck v. Bank of America**, 16 R. I. 710, 7 L. R. A. 826, 19 Atl. 369.

Tennessee. **Caulkins v. Gas-Light Co.**, 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S. W. 287.

Texas. **Kempner v. Wallis**, 2 Tex. App. Civ. Cas. § 584 et seq.

West Virginia. **La Belle Iron Works v. Quarter Sav. Bank**, 74 W. Va. 569, 82 S. E. 614.

⁶⁵ **United States.** **St. Romes v. Levee Steam Cotton Press Co.**, 127 U. S. 614, 32 L. Ed. 289; **Western U. Tel. Co. v. Davenport**, 97 U. S. 369, 24 L. Ed. 1047; **Wilson v. Colorado Min. Co.**, 227 Fed. 721; **Geyser-Marion Gold-Min. Co. v. Stark**, 106 Fed. 558, 53 L. R. A. 684; **Lowry v. Commercial & Farmers' Bank, Taney**, 310, 15 Fed. Cas. No. 8,581.

California. **Tafft v. Presidio & F. R. Co.**, 84 Cal. 131, 11 L. R. A. 125, 18 Am. St. Rep. 166, 24 Pac. 436.

Colorado. **Supply Ditch Co. v. Elliott**, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691.

Illinois. **Miller v. Doran**, 245 Ill. 200, 91 N. E. 1039, aff'g 151 Ill. App. 527; **Hall v. Rose Hill & E. Road Co.**, 70 Ill. 673. See also **Shirley Farmers' Grain & Coal Co. v. Douglas**, 130 Ill. App. 285.

Indiana. **Citizens' Nat. Bank v. State**, 179 Ind. 621, 45 L. R. A. (N. S.) 1075, 101 N. E. 620.

Louisiana. **Leurey v. Bank of Baton Rouge**, 131 La. 30, Ann. Cas. 1913 E 1168, 58 So. 1022.

Maryland. **United States Exp. Co. v. Hurlock**, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834; **Baltimore Trust Co. v. George's Creek Coal & Iron Co.**, 119 Md. 21, 85 Atl. 949; **Hughes v. Drovers' & Mechanics' Nat. Bank**, 86 Md. 418, 38 Atl. 936; **Marbury v. Ehlen**, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648; **Chew v. Bank of Baltimore**, 14 Md. 299.

Massachusetts. **Loring v. Salisbury Mills**, 125 Mass. 138.

North Carolina. **Baker v. Atlantic Coast Line R. Co.**, 92 S. E. 170; **Wooten v. Wilmington & W. R. Co.**, 128 N. C. 119, 56 L. R. A. 615, 38 S. E. 298; **Cox v. First Nat. Bank**, 119 N. C. 302, 26 S. E. 22.

Ohio. **Cleveland & M. R. Co. v. Robbins**, 35 Ohio St. 483.

Pennsylvania. **Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Franklin Fire Ins. Co.**, 181 Pa. St. 40, 37 L. R. A. 780, 37

own safety requires that it be satisfied of the right of a person pro-

Atl. 191; Livezey v. Northern Pac. R. R., 157 Pa. St. 75, 27 Atl. 379; In re Pennsylvania R. Co.'s Appeal, 86 Pa. St. 80; Bayard v. Farmers' & Mechanics' Bank, 52 Pa. St. 232.

Rhode Island. Davis v. National Eagle Bank, 50 Atl. 530; Peck v. Providence Gas Co., 17 R. I. 275, 15 L. R. A. 643, 23 Atl. 967, 21 Atl. 543; Peck v. Bank of America, 16 R. I. 710, 7 L. R. A. 826, 19 Atl. 369.

South Carolina. Webb v. Graniteville Mfg. Co., 11 S. C. 396, 32 Am. Rep. 479.

Tennessee. Caulkins v. Gas-Light Co., 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S. W. 287.

Texas. Strange v. Houston & T. C. R. Co., 53 Tex. 162; Baker v. Wasson, 53 Tex. 150, 59 Tex. 140; Kempner v. Wallis, 2 Tex. App. Civ. Cas. § 584 et seq.

Utah. Rasmussen v. Sevier Valley Canal Co., 40 Utah 371, 121 Pac. 741; Mundt v. Commercial Nat. Bank of Ogden, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454. See also Kimball v. Success Min. Co., 38 Utah 78, 110 Pac. 872.

Washington. Nagel v. Ham, Yearsley & Ryrie, 88 Wash. 99, 152 Pac. 520.

West Virginia. La Belle Iron Works v. Quarter Sav. Bank, 74 W. Va. 569, 82 S. E. 614; Snyder v. Charleston & S. Bridge Co., 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616.

The rights of stockholders and persons interested in the stock are placed by law under the protection of the corporation so far as concerns the transfer on its books. "It is made the custodian of the shares of its stockholders and is clothed with power to protect the rights of everyone from unauthorized transfer. It is a trust placed in its hands for the protection of individual interests, as well as its own, and like every other

trustee, it is bound to execute the trust with proper diligence and care, and is responsible for any loss sustained by its negligence or misconduct." Cox v. First Nat. Bank, 119 N. C. 302, 26 S. E. 22, quoted with approval in Baker v. Atlantic Coast Line R. Co., — N. C. —, 92 S. E. 170.

"Corporations issue certificates of the ownership of their stock. They condition the rights of their stockholders to vote, to participate in their management, and to receive dividends upon their stock, upon a registry of their ownership of their shares in the corporate books and upon these certificates. They make the certificates and keep the registries, and they thereby assume an obligation to each stockholder to use reasonable diligence to certify, and to make their records declare the truth. No man can be lawfully deprived of his property without his consent except by due process of law, and, if he once becomes the owner of stock in a corporation, that association cannot recklessly deprive him of that ownership, and confer it upon another, without liability for the damage it causes. It is bound to use reasonable diligence in every case to ascertain whether or not a transfer of stock requested is duly authorized by the former owner, to make those transfers that are so authorized, and to prevent those that are unauthorized; and for every breach of this obligation it is legally liable to the parties injured for the damage it thus inflicts." Geyser-Marion Gold-Min. Co. v. Stark, 106 Fed. 558, 53 L. R. A. 684.

"A corporation whose stock is * * * transferable only on the books of the company, is made the custodian of the shares, and is clothed with power to protect the rights of its shareholders from unauthorized transfers. With this power there exists the duty

posing to make a transfer to do what he proposes.⁶⁶ It has the right,⁶⁷ and it is its duty, when a transfer is demanded, to use reasonable diligence to ascertain whether or not the transfer requested is duly authorized, and to make those transfers that are so authorized and to prevent those that are not.⁶⁸ So it is bound to see that the transfer and power of attorney presented are genuine;⁶⁹ and cannot justify its transfer of stock registered in the name of the true owner because it relied on a forged power of attorney to effect such transfer.⁷⁰ It is

that rests upon all trustees to protect, so far as the exercise of proper diligence and care can do so, the interests of the *cestuis que' trust*; and it must respond in damages for any injury sustained in consequence of its negligence or misconduct." *Caulkins v. American Gas-Light Co.*, 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S. W. 287, quoted with approval in *Baker v. Atlantic Coast Line R. Co.*, — N. C. —, 92 S. E. 170.

"The corporation makes the certificates and keeps the registers, and it thereby assumes an obligation to the stockholders to use reasonable diligence to make the records of the corporation speak the truth." *Nagel v. Ham, Yearsley & Ryrie*, 88 Wash. 99, 152 Pac. 520.

"The corporation is not simply the custodian of the technical title of the stockholder, but of the subsistence of what the stock represents for the purpose of beneficial enjoyment by the stockholder," and its duty "is commensurate with the right of the stockholder to the full beneficial enjoyment of that which is represented by the stock." *Magwood v. Southwestern Railroad Bank*, 5 S. C. 379.

"This liability rests, perhaps, rather upon the ground of breach of contract upon the part of the company, of its undertaking to hold the stock for the benefit of the true owner of the certificate, than upon that of a technical tort." *Baker v. Wasson*, 53 Tex. 150.

To render the corporation liable in

any case, its negligence must have been the proximate cause of the loss. *Smith v. Railroad*, 91 Tenn. 221, 18 S. W. 546.

66 California. *Taft v. Presidio & F. R. Co.*, 84 Cal. 131, 11 L. R. A. 125, 18 Am. St. Rep. 166, 24 Pac. 436.

North Carolina. *Baker v. Atlantic Coast Line R. Co.*, 92 S. E. 170.

Pennsylvania. *Livezey v. Northern Pac. R. R.*, 157 Pa. St. 75, 27 Atl. 379; *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232.

Rhode Island. *Peck v. Bank of America*, 16 R. I. 710, 7 L. R. A. 826, 19 Atl. 369.

Tennessee. *Read v. Cumberland Telegraph & Telephone Co.*, 93 Tenn. 482, 27 S. W. 660.

"The corporation should at all times guard its own interests as well as those of its stockholders in making transfers." *Mundt v. Commercial Nat. Bank of Ogden*, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

⁶⁷ See § 3827, *supra*.

⁶⁸ *Geyser-Marion Gold-Min. Co. v. Stark*, 106 Fed. 558, 53 L. R. A. 684; *Nagel v. Ham, Yearsley & Ryrie*, 88 Wash. 99, 152 Pac. 520.

⁶⁹ *Crocker v. Old Colony R. Co.*, 137 Mass. 417; *Jennie Clarkson Home for Children v. Chesapeake & O. R. Co.*, 41 N. Y. Misc. 214, 83 N. Y. Supp. 913, *aff'd* 92 N. Y. App. Div. 491, 87 N. Y. Supp. 348, *aff'd* 182 N. Y. 508, 74 N. E. 1118.

⁷⁰ *Moores v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385; *Western U. Tel. Co. v. Davenport*, 97

also bound to make inquiry as to the authority of the person asking for the transfer,⁷¹ and to ascertain whether he is the owner of the stock.⁷² Especially is it responsible where it has notice of want of authority on the part of the person seeking the transfer, or of facts sufficient to put it upon inquiry.⁷³ So it is especially bound to make inquiry as to the authority of the transferrer where the transfer is made by a person other than the one to whom the stock was issued,⁷⁴

U. S. 369, 24 L. Ed. 1047; *Chicago Edison Co. v. Fay*, 164 Ill. 323, 45 N. E. 534, aff'g 62 Ill. App. 55; *Chew v. Bank of Baltimore*, 14 Md. 299; *Jennie Clarkson Home for Children v. Chesapeake & O. R. Co.*, 41 N. Y. Misc. 214, 83 N. Y. Supp. 913, aff'd 92 N. Y. App. Div. 491, 87 N. Y. Supp. 348, aff'd 182 N. Y. 508, 74 N. E. 1118.

⁷¹ *Crocker v. Old Colony R. Co.*, 137 Mass. 417; *Baker v. Atlantic Coast Line R. Co.*, — N. C. —, 92 S. E. 170; *Kempner v. Wallis*, 2 Tex. App. Civ. Cas. § 584 et seq.

"The officers of the company are the custodians of its stock-books, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having authority from them." *Western U. Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047, quoted with approval in *Citizens' Nat. Bank v. State*, 179 Ind. 621, 45 L. R. A. (N. S.) 1075, 101 N. E. 620.

"They are bound to require, and are entitled to, the production of satisfactory evidence of the authority of the person who proposes to make the transfer." *Hughes v. Drovers' & Mechanics' Nat. Bank*, 86 Md. 418, 38 Atl. 936.

⁷² *Western U. Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047; *Citizens' St. Ry. Co. v. Robbins*, 128 Ind. 449, 12 L. R. A. 498, 25 Am. St. Rep. 445, 26 N. E. 116; *Nagel v. Ham, Yearsley & Ryrie*, 88 Wash. 99, 152 Pac. 520.

⁷³ *Hughes v. Drovers' & Mechanics' Nat. Bank*, 86 Md. 418, 38 Atl. 936.

"Being thus bound to the exercise

of ordinary care and diligence, and having the right to require the production of authority to make a transfer, it follows that, if there be anything in the circumstances attending the proposed transfer which ought to excite suspicion in the mind of the officer of the corporation supervising the transfer, or, in other words, to put him upon inquiry into the authority to make it, he is bound to make that inquiry, and the corporation whose agent he is, is chargeable with notice of what such inquiry, reasonably prosecuted, would have disclosed, and that if loss results to the equitable owner of the stock from a failure to make such inquiry, the corporation must make good the loss sustained." *Peck v. Providence Gas Co.*, 17 R. I. 275, 15 L. R. A. 643, 23 Atl. 967, 21 Atl. 543, quoted with approval in *Davis v. National Eagle Bank (R. I.)*, 50 Atl. 530.

If put upon inquiry, it is chargeable with notice of all that the inquiry would reveal. *Lowry v. Commercial & Farmers' Bank, Taney*, 310, Fed. Cas. No. 8,581; *Baker v. Atlantic Coast Line R. Co.*, — N. C. —, 92 S. E. 170; *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232; *Peck v. Bank of America*, 16 R. I. 710, 7 L. R. A. 826, 19 Atl. 369.

⁷⁴ *Baker v. Atlantic Coast Line R. Co.*, — N. C. —, 92 S. E. 170; *Read v. Cumberland Telegraph & Telephone Co.*, 93 Tenn. 482, 27 S. W. 660; *Smith v. Railroad*, 91 Tenn. 221, 18 S. W. 546; *Kempner v. Wallis*, 2 Tex. App. Civ. Cas. § 584 et seq.

or where, by the form of the certificate, or otherwise, it has notice that he is not the absolute owner of the stock, but holds it by such a title that he may not have authority to transfer it.⁷⁵

Generally sufficient evidence of the right to make a transfer is found in the possession of legal title to the stock, but this is not always the case. The equitable ownership may be in some person other than the holder of the legal title and the transfer may be a gross wrong to such an equitable owner.⁷⁶ And to that wrong the corporation may make itself a party, if with knowledge that there is no equitable right to make a transfer, it permits the transfer to be made.⁷⁷

If the demand for a transfer is made by an agent, the corporation must look to his power of attorney;⁷⁸ if by an administrator, to his letters; and if by an executor, to the will,⁷⁹ since these are the sources of his power. "But when a transfer by one who has the full power to transfer is presented, the corporation has the right to act upon it, and it is not its duty to inquire into the purposes of the parties, or to investigate the question whether the transaction is in good faith or is fraudulent."⁸⁰

"Ordinary diligence, and not suspicious watchfulness, is the measure of duty which a corporation owes to its stockholders in such cases."⁸¹

It is the plain legal duty of the corporation never to "permit any other person than the stockholder in person to transfer stock on its books, without the production and proof of authority so to do." *Weyer v. Second Nat. Bank*, 57 Ind. 198.

⁷⁵ "If, by the form of the certificate or otherwise, the corporation has notice that the present holder is not the absolute owner, but holds the shares by such a title that he may not have authority to transfer them, the corporation is not obliged without evidence of such authority, to issue a certificate to his assignee; and if, without making any inquiry, it does issue a new certificate, and the rightful owner is injured by its negligent and wrongful act, the corporation is liable to him without proof of fraud or collusion." *Loring v. Salisbury Mills*, 125 Mass. 138.

⁷⁶ *Taft v. Presidio & F. R. Co.*, 84 Cal. 131, 11 L. R. A. 125, 18 Am. St.

Rep. 166, 24 Pac. 436; *Livezey v. Northern Pac. R. R.*, 157 Pa. St. 75, 27 Atl. 379; *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232.

⁷⁷ *Taft v. Presidio & F. R. Co.*, 84 Cal. 131, 11 L. R. A. 125, 18 Am. St. Rep. 166, 24 Pac. 436; *Livezey v. Northern Pac. R. R.*, 157 Pa. St. 75, 27 Atl. 379; *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232.

⁷⁸ *Baker v. Atlantic Coast Line R. Co.*, — N. C. —, 92 S. E. 170.

⁷⁹ *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648. And see *Wooten v. Wilmington & Weldon R. Co.*, 128 N. C. 119, 56 L. R. A. 615, 38 S. E. 298; *Cox v. First Nat. Bank of Wilson*, 119 N. C. 302, 26 S. E. 22.

⁸⁰ *Crocker v. Old Colony R. Co.*, 137 Mass. 417.

⁸¹ "Ordinary diligence, and not suspicious watchfulness, is the measure of duty which a corporation owes to its stockholders in such cases." *Peck*

The stockholders also have a right to expect that the corporation will observe its own by-laws in relation to the transfer, and it is liable for any damages resulting to them by reason of its failure to do so.⁸²

§ 3831. Good faith and absence of negligence on the part of the corporation. The fact that the corporation acted in good faith and without negligence in recognizing and registering a forged or unauthorized transfer is no defense as against the true owner. It is bound at its peril to ascertain whether an assignment and power of attorney purporting to have been executed by the owner of stock is genuine.⁸³ In making transfers the officers of the company "must act upon their own responsibility. In many instances they may be misled without any fault of their own, just as the most careful person may sometimes be induced to purchase property from one who has no title, and who may perhaps have acquired its possession by force or larceny. Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the

v. Providence Gas Co., 17 R. I. 275, 15 L. R. A. 643, 23 Atl. 967, 21 Atl. 543.

⁸² *Taft v. Presidio & F. R. Co.*, 84 Cal. 131, 11 L. R. A. 125, 18 Am. St. Rep. 166, 24 Pac. 436.

⁸³ *United States v. Western U. Tel. Co.*, v. Davenport, 97 U. S. 369, 24 L. Ed. 1047.

Indiana. See *Citizens' Nat. Bank v. State*, 179 Ind. 621, 45 L. R. A. (N. S.) 1075, 101 N. E. 620.

Louisiana. *Leurey v. Bank of Baton Rouge*, 131 La. 30, Ann. Cas. 1913 E 1168, 58 So. 1022.

Maryland. *Chew v. Bank of Baltimore*, 14 Md. 299.

Massachusetts. *Crocker v. Old Colony R. Co.*, 137 Mass. 417; *Loring v. Salisbury Mills*, 125 Mass. 138.

Mississippi. *Mobile & O. R. Co. v. Humphries*, 7 So. 522.

Ohio. *Cleveland & M. R. Co. v. Robbins*, 35 Ohio St. 483.

Utah. *Rasmussen v. Sevier Valley Canal Co.*, 40 Utah 371, 121 Pac. 741.

"It is well settled by a multitude of authorities that a corporation cannot justify its transfer of stock or

bonds registered in the name of the true owner because it relied upon a forged power of attorney to effect such transfer. Forgery can confer no power, nor transfer any rights. It is the duty of such corporation, before making such a transfer, to be satisfied of the genuineness of the power presented. In so doing they must act upon their own responsibility, and run their own risk of being misled by forgery or fraud; and it is no answer to a claim by the true owner that the company acted in good faith, upon what it supposed to be genuine authority, and without negligence. The true owner cannot thus be deprived of his property." *Jennie Clarkson Home for Children v. Chesapeake & O. R. Co.*, 41 N. Y. Misc. 214, 83 N. Y. Supp. 913, aff'd 92 N. Y. App. Div. 491, 87 N. Y. Supp. 348, aff'd 182 N. Y. 508, 74 N. E. 1118.

The principle results from the justice and expediency of casting the loss upon those who can best provide against it. *Cleveland & M. R. Co. v. Robbins*, 35 Ohio St. 483.

See also § 3830, *supra*.

purchaser of stolen property, will avail as an answer to the demand of the true owner. The great principle that no one can be deprived of his property without his assent, except by the processes of the law, requires in the cases mentioned that the property wrongfully transferred or stolen should be restored to its rightful owner. The maintenance of that principle is essential to the peace and safety of society, and the insecurity which would follow any departure from it would cause far greater injury than any which can fall, in cases of unlawful appropriation of property, upon those who have been misled or defrauded.”⁸⁴

§ 3832. Failure to require surrender of original certificate. Corporate charters and general laws regulating the transfer of stock frequently provide, in effect, that no transfer shall be registered on the corporate books except on the surrender of the original certificate, and similar provisions are often found in corporate by-laws and in the stock certificates themselves. Such a provision in a stock certificate is binding upon the corporation,⁸⁵ and is a continuing affirmation and guaranty by it that the stock will not be transferred on its books except on surrender of the certificate,⁸⁶ upon which assurance bona fide holders of the certificates have a right to rely.⁸⁷ While

⁸⁴ *Western U. Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047, quoted with approval in *Citizens' Nat. Bank v. State*, 179 Ind. 621, 45 L. R. A. (N. S.) 1075, 101 N. E. 620.

⁸⁵ *Shaw v. Goebel Brewing Co., Ltd.*, 202 Fed. 408, 45 L. R. A. (N. S.) 1090; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Litchfield v. Henson Oil Co.*, — Okla. —, 157 Pac. 137; *First Nat. Bank of Sulphur Springs v. Stribling*, 16 Okla. 41, 86 Pac. 512.

⁸⁶ *United States. First Nat. Bank of South Bend v. Lanier*, 11 Wall. 369, 20 L. Ed. 172.

Colorado. Supply Ditch Co. v. Elliott, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691.

Georgia. Bank of Culloden v. Bank of Forsyth, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226.

Louisiana. Smith v. Crescent City Live-Stock Landing & Slaughter-House Co., 30 La. Ann. 1378.

Minnesota. Joslyn v. St. Paul Distilling Co., 44 Minn. 183, 46 N. W. 337.

New York. Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30.

Oklahoma. First Nat. Bank of Sulphur Springs v. Stribling, 16 Okla. 41, 86 Pac. 512.

Texas. Strange v. Houston & T. C. R. Co., 53 Tex. 162.

“There is in the certificate, which evidences and represents the shares, the assurance of the corporation to the commercial world that no prior right to the stock can be obtained, unaccompanied by possession of the certificate, and that the shares shall not be transferred upon the books of the corporation unless the certificate is first surrendered.” *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183, 46 N. W. 337.

⁸⁷ *Bridgeport Bank v. New York &*

provisions of this character are for the benefit of the corporation, and hence it may waive them,⁸⁸ their purpose is to prevent the perpetration of frauds upon innocent third persons by the sale to them of outstanding certificates after the stock has been transferred on the corporate books,⁸⁹ and the corporation acts at its peril if it disregards them and makes a transfer and issues a new certificate without the production of the original one.⁹⁰ The nonproduction of the original certificate is notice to the corporation that a third party may have a superior title to it,⁹¹ and, by transferring the stock without it, it becomes liable to any person holding such certificate in good faith and under a superior title whether it has notice of his rights or not.⁹² "The company has the means of knowing whether a certificate of particular stock is outstanding or not, and the power to compel its return and cancellation before any transfer is made; and a buyer,

N. H. R. Co., 30 Conn. 231; Bath Sav. Institution v. Sagadahoc Nat. Bank, 89 Me. 500, 36 Atl. 996; Cleveland & M. R. Co. v. Robbins, 35 Ohio St. 483.

⁸⁸ See § 3793, supra.

⁸⁹ First Nat. Bank v. Gifford, 47 Iowa 575.

⁹⁰ Colorado. Supply Ditch Co. v. Elliott, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691.

Iowa. First Nat. Bank v. Gifford, 47 Iowa 575.

Louisiana. State v. New Orleans Cotton Exchange, 114 La. 324, 38 So. 204.

Mississippi. People's Bank v. Lamar County Bank, 107 Miss. 852, 67 So. 961, 66 So. 219.

New Jersey. See Campbell v. Perth Amboy Mut. Loan, Homestead & Building Ass'n, 76 N. J. Eq. 347, 74 Atl. 144.

New York. Brisbane v. Delaware, L. & W. R. Co., 94 N. Y. 204, aff'g 25 Hun 438; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30.

Texas. Strange v. Houston & T. C. R. Co., 53 Tex. 162.

It takes the risk that the original certificate may subsequently be presented by someone having a superior title. Brisbane v. Delaware, L. &

W. R. Co., 94 N. Y. 204, aff'g 25 Hun 438; Strange v. Houston & T. C. R. Co., 53 Tex. 162.

⁹¹ New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Strange v. Houston & T. C. R. Co., 53 Tex. 162. See also Baker v. Wasson, 59 Tex. 140, 53 Tex. 150.

When the original stockholder to whom a valid certificate has been issued, "comes to the corporation to transfer the stock, its books are notice to it that the certificate has been issued. The by-laws and the certificate are notice that it must be surrendered before the stock can be transferred, and its non-production is notice that it is not in possession of the party claiming to transfer. These facts operate as notice that some other party is its owner; and they put the corporation upon the inquiry that would lead ordinary sagacity to the truth; and this is equivalent in equity to actual notice of all the rights that inquiry might develop." New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30.

⁹² United States. First Nat. Bank of South Bend v. Lanier, 11 Wall. 369, 20 L. Ed. 172.

where the transfer is permitted by the corporation to be made on its books, by one to whose credit the stock is standing, has a right to presume that no certificate has issued, or, if one has, that his vendor has duly surrendered it for cancellation." ⁹³

The basis of the corporation's liability under such circumstances is estoppel. ⁹⁴ "A representation, which has tended to enhance the value of the stock, has been made with a view or expectation that it would be acted upon by another; it has or may have been so acted upon;

Indiana. Citizens' Nat. Bank v. State, 179 Ind. 621, 45 L. R. A. (N. S.) 1075, 101 N. E. 620.

Louisiana. State v. New Orleans Cotton Exchange, 114 La. 324, 38 So. 204; Friedlander v. Slaughter House Co., 31 La. Ann. 523; Smith v. Crescent City Live-Stock Landing & Slaughter-House Co., 30 La. Ann. 1378.

Maine. Bath Sav. Institution v. Sagadahoc Nat. Bank, 89 Me. 500, 36 Atl. 996.

Minnesota. Joslyn v. St. Paul Distilling Co.; 44 Minn. 183, 46 N. W. 337.

New York. Brisbane v. Delaware, L. & W. R. Co., 94 N. Y. 204, aff'g 25 Hun 438; Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Smith v. American Coal Co., 7 Lans. 317.

Ohio. Cleveland & M. R. Co. v. Robbins, 35 Ohio St. 483.

Oklahoma. Litchfield v. Henson Oil Co., 157 Pac. 137; First Nat. Bank of Sulphur Springs v. Stribling, 16 Okla. 41, 86 Pac. 512.

South Carolina. See Maybin v. Kirby, 4 Rich. Eq. 105.

Texas. Strange v. Houston & T. C. R. Co., 53 Tex. 162. See also Baker v. Wasson, 59 Tex. 140, 53 Tex. 150.

Washington. Gamble v. Dawson, 67 Wash. 72, Ann. Cas. 1913 D 501, 120 Pac. 1060.

West Virginia. La Belle Iron Works v. Quarter Sav. Bank, 74 W. Va. 569, 32 S. E. 614. See also Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

Especially is this true when it has such notice. Bridgeport Bank v. New York & N. H. R. Co., 30 Conn. 231; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30.

The rule stated in the text has been held to apply even though the certificate does not contain the usual provision requiring its surrender, where the stock is transferable by mere delivery of the certificate. Tractors' & Traders' Ins. Co. v. Marine Dry Dock & Shipyard Co., 31 La. Ann. 149.

⁹³ New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, quoted with approval in First Nat. Bank v. Gifford, 47 Iowa 575.

When a purchaser of stock receives his new certificate, he has the right to assume that the corporation has attended to all things in the transaction necessary to its own protection. Bank of Kentucky v. Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

⁹⁴ Shaw v. Goebel Brewing Co., Ltd., 202 Fed. 408, 45 L. R. A. (N. S.) 1090; Joslyn v. St. Paul Distilling Co., 44 Minn. 183, 46 N. W. 337; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Strange v. Houston & T. C. R. Co., 53 Tex. 162.

and a person who has relied upon the representation will be injured or damaged if it be withdrawn.”⁹⁵

Such reissued stock is fraudulent and void as against the rights of the bona fide holder of the original certificate,⁹⁶ and the latter loses nothing thereby,⁹⁷ but may compel the corporation to replace the shares in his name on the books, or hold it liable in damages on its refusal to do so, as in other cases of unauthorized transfers.⁹⁸ The corporation may also be liable to a bona fide holder of the new certificate.⁹⁹

The fact that the corporation requires an indemnity bond before it will reissue the stock in no way affects the rights of the holder of the original certificate.¹ Nor does it in any way relieve the corporation from the consequences of its fraudulent act,² but is rather a confession that it is violating its obligation not to transfer the stock except on surrender of the certificate.³

The corporation cannot be held liable either on the theory of estoppel or any other theory, however, if the transfer without a surrender of the certificate is made pursuant to a provision of the statute or articles of incorporation of which the party claiming the estoppel has actual or constructive notice.⁴ And it has been held by a number of courts

⁹⁵ *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183, 46 N. W. 337.

⁹⁶ *Hall v. Rose Hill & E. Road Co.*, 70 Ill. 673; *Litchfield v. Henson Oil Co.*, — Okla. —, 157 Pac. 137; *First Nat. Bank of Sulphur Springs v. Stribling*, 16 Okla. 41, 86 Pac. 512.

“Any attempt on the part of the transferrer * * * to secure a transfer of the stock on the books of the company in any name but that of the transferee, is an attempted fraud, if successful is a fraud, and the corporation acting in violation of its agreement not to transfer, except on surrender of the certificate, must be held to be a party to it.” *First Nat. Bank of Sulphur Springs v. Stribling*, 16 Okla. 41, 86 Pac. 512.

The holder of such reissued stock has no right to vote it, or to authorize, on account of it, a reorganization of the corporation. *First Nat. Bank of Sulphur Springs v. Stribling*, 16 Okla. 41, 86 Pac. 512.

⁹⁷ *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691.

⁹⁸ See § 3843, *infra*.

⁹⁹ See § 3848, *infra*.

¹ *Cleveland & M. R. Co. v. Robbins*, 35 Ohio St. 483; *First Nat. Bank of Sulphur Springs v. Stribling*, 16 Okla. 41, 86 Pac. 512.

² *Cleveland & M. R. Co. v. Robbins*, 35 Ohio St. 483; *First Nat. Bank of Sulphur Springs v. Stribling*, 16 Okla. 41, 86 Pac. 512.

As to the right to require such a bond, see § 3499, *supra*.

³ *First Nat. Bank of Sulphur Springs v. Stribling*, 16 Okla. 41, 86 Pac. 512.

⁴ The corporation cannot be held liable where the transfer is made pursuant to an order of court, and the statute permits the court, under the particular circumstances of the case, to order a change in the register of stockholders without the production of the certificate. *Shaw v. Goebel Brewing Co., Ltd.*, 202 Fed. 408, 45 L. R. A. (N. S.) 1090.

And especially is this true where the stock was assigned to the person claiming the estoppel 12 years be-

that the corporation is not liable where it is compelled to make a registry by legal proceedings.⁵ But there is authority to the effect that the corporation will be liable even under such circumstances, especially where the outstanding certificates were transferred prior to the rendition of the judgment directing the registry.⁶ And it has also been held that the court should protect the corporation by requiring the registration of the transfer and the issuing of a new certificate only on the surrender of the original certificate.⁷ The Uniform Stock Transfer Act provides that the issue of a new certificate under order of court, to replace one which has been lost or destroyed, shall not relieve the corporation from liability in damages to a person to whom the original certificate has been or shall be transferred for value without notice of the proceedings or of the issuance of the new certificate.⁸

Of course the corporation is not guilty of any dereliction of duty in permitting a transfer without a surrender of the certificate where no certificate has ever been issued.⁹

The right of a stockholder to compel the corporation to issue a new certificate, when the original has been lost or destroyed, has been shown in former sections.¹⁰

fore the order of court was made, and he never appraised the company of such assignment. *Id.*

The assignee of the stock is chargeable with notice of the statute. *Id.*

⁵ *Shaw v. Goebel Brewing Co., Ltd.*, 202 Fed. 408, 45 L. R. A. (N. S.) 1090; *Friedlander v. Slaughter House Co.*, 31 La. Ann. 523; *Gamble v. Dawson*, 67 Wash. 72, Ann. Cas. 1913 D 501, 120 Pac. 1060.

Where a court of the state in which a corporation is located, and by which it was created, has jurisdiction of a suit to determine the title to shares in the corporation, and of the person in whose name the shares are registered on the books of the corporation, its decree in such suit, under which the title to the shares is vested, through an assignment by a master thereunder, in a person other than the registered holder, the corporation having notice of the decree and assignment, is binding, not only as against the registered holder, but also as against any subsequent purchaser

of the outstanding certificate of the stock, although he may purchase without notice of the decree, and therefore he cannot hold the corporation liable for refusing to transfer the shares to him on its books. *Sprague v. Coheco Mfg. Co.*, 10 Blatchf. 173, Fed. Cas. No. 13,249.

That this is not true where the legal proceedings are void, see *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654.

⁶ *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183, 46 N. W. 337; *Bean v. American Loan & Trust Co.*, 122 N. Y. 622, 26 N. E. 11; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616.

⁷ See § 3829, *supra*.

⁸ See § 17 of the act. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island and Alaska.

⁹ *First Nat. Bank v. Gifford*, 47 Iowa 575.

¹⁰ See § 3498, *supra*.

§ 3833. Transfer under decree of court. If a corporation transfers stock on its books to a person other than the registered holder thereof, but who has been decreed to be its owner in a suit to which the corporation is a party, while such decree is subject to review and reversal, it does so at the risk of the decree being reversed, and if such transfer is not made pursuant to the command of the decree, and the decree is in fact reversed, it will be liable to the registered owner.¹¹

As we have seen, there is a conflict of authority as to the liability of a corporation for registering an unauthorized transfer on the ground that it failed to require the production of the original certificate, where it was compelled to make the transfer in legal proceedings.¹²

§ 3834. Title of transferee. Since certificates of stock are not negotiable instruments, and a transferee acquires no better title than his transferrer had, unless the circumstances are such as to create an estoppel in his favor,¹³ it follows that a transfer of a certificate of stock, even to a bona fide purchaser or pledgee, by one who has no title or authority to transfer the same, gives the transferee no title to the shares as against the true owner, unless the latter is for some reason estopped to assert his title.¹⁴

¹¹ This was held to be true where the transfer was made at the request of a member of the firm adjudged to be the owner of the stock who had obtained the certificates from the corporation, to which they had been sent for transfer, by a writ of replevin. *Miller v. Doran*, 245 Ill. 200, 91 N. E. 1039, *aff'g* 151 Ill. App. 527.

Pending an appeal from a decree of distribution the corporation has no authority to transfer stock distributed thereby to the distributee on the corporate books, or to his transferee, and it cannot derive any advantage from its wrongful act in so doing. Such action on its part is no defense to an action for dividends brought against it by the executor after the reversal of the decree of distribution. *Ashton v. Zeila Min. Co.*, 134 Cal. 408, 66 Pac. 494.

¹² See § 3832, *supra*.

¹³ See § 3779 *et seq.*, *supra*.

¹⁴ *United States. National Safe Deposit, Savings & Trust Co. v. Hibbs*,

229 U. S. 391, 57 L. Ed. 1241, *aff'g* 32 App. Cas. (D. C.) 459; *Western U. Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654; *Bangor Elec. Light & Power Co. v. Robinson*, 52 Fed. 520.

Alabama. *Nelson v. Owen*, 113 Ala. 372, 21 So. 75; *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 2 L. R. A. 836, 7 Am. St. Rep. 73, 5 So. 317.

California. *Swim v. Wilson*, 90 Cal. 126, 13 L. R. A. 605, 25 Am. St. Rep. 110, 27 Pac. 33; *Taft v. Presidio & F. R. Co.*, 84 Cal. 131, 11 L. R. A. 125, 18 Am. St. Rep. 166, 24 Pac. 436; *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412.

Illinois. *McCarthy v. Crawford*, 238 Ill. 38, 86 N. E. 750; *Hall v. Rose Hill & E. Road Co.*, 70 Ill. 673; *Doran v. Miller*, 124 Ill. App. 551, 151 Ill. App. 527, *aff'd* 245 Ill. 200, 91 N. E. 1039.

"The general rule of the law," said Lord Herschell in an English case, "is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shewn, a good title is acquired by personal estoppel against the true owner."¹⁵

In accordance with this principle, it has repeatedly been held that a bona fide purchaser or pledgee of a certificate of stock acquires no title thereto where he takes the same under a forged assignment and

Indiana. See *Citizens' Nat. Bank v. State*, 179 Ind. 621, 45 L. R. A. (N. S.) 1075, 101 N. E. 620.

Maryland. *Merchants' Nat. Bank v. Williams*, 110 Md. 334, 72 Atl. 1114; *German Sav. Bank of Baltimore City v. Renshaw*, 78 Md. 475, 28 Atl. 281; *Taliaferro v. First Nat. Bank of Baltimore*, 71 Md. 200, 17 Atl. 1036, 72 Md. 164, 19 Atl. 364; *Brown v. Howard Fire Ins. Co.*, 42 Md. 384, 20 Am. Rep. 90.

Massachusetts. *O'Herron v. Gray*, 168 Mass. 573, 40 L. R. A. 498, 60 Am. St. Rep. 411, 47 N. E. 429; *Pratt v. Taunton Copper Mfg. Co.*, 123 Mass. 110, 25 Am. Rep. 37; *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *Sewall v. Boston Water Power Co.*, 4 Allen 277, 81 Am. Dec. 701.

Nebraska. *Reynolds v. Touzalin Improvement Co.*, 62 Neb. 236, 87 N. W. 24.

New York. *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599; *Pollock v. National Bank*, 7 N. Y. 274, 57 Am. Dec. 520; *Reichard v. Hutton*, 158 App. Div. 122, 142 N. Y. Supp. 935; *Treadwell v. Clark*, 114 App. Div. 493, 100 N. Y. Supp. 1, aff'd 190 N. Y. 51, 82 N. E. 505; *Hall v. Wagner*, 111 App. Div. 70, 97 N. Y. Supp. 570.

Pennsylvania. *Westinghouse v. German Nat. Bank*, 188 Pa. St. 630, 41 Atl. 734; *Wood's Appeal*, 92 Pa. St. 379, 37 Am. Rep. 694; *Biddle v. Bayard*, 13 Pa. St. 150.

England. *Colonial Bank v. Cady*, 15 App. Cas. 267; *Hildyard v. South Sea Co.*, 2 P. Wms. 76.

"In the absence of some element of estoppel, no title can be acquired to personal property, other than negotiable instruments, as against the true owner." *Treadwell v. Clark*, 114 N. Y. App. Div. 493, 100 N. Y. Supp. 1, aff'd 190 N. Y. 51, 82 N. E. 505.

Certain shares of stock were pledged to a bank by one having no authority so to do. Under claim of ownership through foreclosure proceedings the bank endeavored to secure registry of the stock in its name. The court held that registry of the transfer would be enjoined at the instance of the true owner. *Reynolds v. Touzalin Improvement Co.*, 62 Neb. 236, 87 N. W. 24.

¹⁵ *London Joint Stock Bank v. Simmons*, [1892] App. Cas. 201, 215. And see *Bangor Elec. Light & Power Co. v. Robinson*, 52 Fed. 520.

As to estoppel of the owner, see § 3853, *infra*.

power of attorney. This is true, not only where the certificate is lost or stolen, and the assignment and power of attorney is forged by the finder or thief, but also where the forgery is committed by one to whom the certificate has been intrusted as agent or bailee.¹⁶ The same principle applies where an assignment of a certificate of stock is indorsed thereon by a person without any authority or apparent authority from the owner, although without any fraudulent intent.¹⁷ And even where a lost or stolen certificate has been indorsed in blank by the person appearing on the books of the corporation as owner, a bona fide transferee acquires no title as against the true owner,¹⁸ unless the latter

¹⁶ **United States.** *Western U. Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047.

Georgia. *Blaisdell v. Bohr*, 68 Ga. 56.

Massachusetts. *Pratt v. Taunton Copper Mfg. Co.*, 123 Mass. 110, 25 Am. Rep. 37; *Sewall v. Boston Water Power Co.*, 4 Allen 277, 81 Am. Dec. 701.

New York. *Pollock v. National Bank*, 7 N. Y. 274, 57 Am. Dec. 520; *Reichard v. Hutton*, 158 App. Div. 122, 142 N. Y. Supp. 935.

Pennsylvania. *Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Franklin Fire Ins. Co.*, 181 Pa. St. 40, 37 L. R. A. 780, 37 Atl. 191.

England. *Ashby v. Blackwell*, *Amblor* 503, 2 Eden 299; *Hildyard v. South Sea Co.*, 2 P. Wms. 76; *Simm v. Anglo-American Tel. Co.*, 5 Q. B. Div. 188.

"Inasmuch as stock certificates are not strictly negotiable instruments, they are, when stolen, dealt with the same as chattels and not as commercial paper." *National City Bank of Chicago v. Wagner*, 216 Fed. 473.

If the corporation issues a new certificate upon a forged or unauthorized transfer, the real owner retains his property in the stock. *Crocker v. Old Colony R. Co.*, 137 Mass. 417.

¹⁷ *Sewall v. Boston Water Power*

Co., 4 Allen (Mass.) 277, 81 Am. Dec. 701.

¹⁸ **United States.** *National Safe Deposit, Savings & Trust Co. v. Hibbs*, 229 U. S. 391, 57 L. Ed. 1241, aff'g 32 App. Cas. (D. C.) 459; *Bangor Elec. Light & Power Co. v. Robinson*, 52 Fed. 520.

Alabama. *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 2 L. R. A. 836, 7 Am. St. Rep. 73, 5 So. 317.

California. *Swim v. Wilson*, 90 Cal. 126, 13 L. R. A. 605, 25 Am. St. Rep. 110, 27 Pac. 33; *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349 (limiting *Winter v. Belmont Min. Co.*, 53 Cal. 428); *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412.

Illinois. *Doran v. Miller*, 124 Ill. App. 551, 151 Ill. App. 527, aff'd 245 Ill. 200, 91 N. E. 1039.

Massachusetts. *Barstow v. City Trust Co.*, 216 Mass. 330, 103 N. E. 911; *O'Herron v. Gray*, 168 Mass. 573, 40 L. R. A. 498, 60 Am. St. Rep. 411, 47 N. E. 429. See also *Scollans v. Rollins*, 173 Mass. 275, 73 Am. St. Rep. 284, 53 N. E. 863.

Minnesota. *Schumacher v. Greene Cananea Copper Co.*, 117 Minn. 124, 38 L. R. A. (N. S.) 180, Ann. Cas. 1913 C 1115, 134 N. W. 510.

Nevada. *Bercich v. Marye*, 9 Nev. 312.

New York. *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 31 L.

has been guilty of such negligence as will estop him from asserting his title.¹⁹

Where the owner of a certificate of shares sells part of them, and executes and delivers an assignment of the part so sold by partially filling up the blank assignment and power of attorney printed on the back of the certificate, being guilty of no want of care in the mode of filling the blank, and the assignment is afterwards altered without his consent, whether with or without a fraudulent intent, so as to purport to assign the whole of the shares, a bona fide purchaser of all of the shares from the assignee acquires no title to those not assigned by the owner.²⁰

The so-called Uniform Stock Transfer Act, which has been adopted in a number of states, provides that the delivery of a certificate to transfer title shall be effectual though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title.²¹

R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; *Anderson v. Nicholas*, 28 N. Y. 600; *Hannahs v. Hammond Type-writer Co.*, 158 App. Div. 620, 143 N. Y. Supp. 939; *Reichard v. Hutton*, 158 App. Div. 122, 142 N. Y. Supp. 935; *Wells v. Smith*, 7 Abb. Pr. 261.

Ohio. *Farmers' Bank v. Diebold Safe & Lock Co.*, 66 Ohio St. 367, 58 L. R. A. 620, 90 Am. St. Rep. 586, 64 N. E. 518.

Pennsylvania. *Biddle v. Bayard*, 13 Pa. St. 150.

Where stock is stolen from a pledgee, the true owner may assert title to it in whosoever hands he may find it, subject to the discharge of the pledgee's lien. *Treadwell v. Clark*, 190 N. Y. 51, 82 N. E. 505, aff'g 114 N. Y. App. Div. 493, 100 N. Y. Supp. 1.

Since no title passes to the purchaser, the transfer agent of the corporation is not liable to him either in contract or tort for refusal to return the certificate when presented by him for transfer, or to issue therefor a new certificate. *Barstow v. City Trust Co.*, 216 Mass. 330, 103 N. E. 911.

Where the cashier of a bank in which stock has been deposited for safe-keeping takes the same without authority, and pledges it as his own, the pledgee acquires no title or lien as against the owner. *O'Herron v. Gray*, supra.

¹⁹ See § 3853, *infra*.

²⁰ *Sewall v. Boston Water Power Co.*, 4 Allen (Mass.) 277, 81 Am. Dec. 701.

²¹ Section 5 of the act provides: "The delivery of a certificate to transfer title in accordance with the provisions of section one, shall be effectual, except as provided in section seven, though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title."

Section 7 of the act provides: "If the indorsement or delivery of a certificate, (a) was procured by fraud or duress, or (b) was made under such mistake as to make the indorsement or delivery inequitable; or if the delivery of a certificate was made (c) without the authority of the owner, or (d) after the owner's death

§ 3835. Transfers by persons under legal disability. A corporation is liable if it recognizes a power of attorney to transfer shares executed by a person under legal disability, as an infant or insane person, and allows a transfer under the same on the books.²² But if a sale by a minor is merely voidable at his election, the corporation has no right to refuse to make the transfer until it is avoided.²³

Although a sale of stock by a married woman to her husband without an order of court is void, a corporation which transfers stock on its books pursuant to such a sale cannot be held accountable to her therefor, unless, at the time it made the transfer or before the stock got into the hands of an innocent purchaser, it had notice of the marital relation existing between the parties.²⁴ The corporation is bound to take notice of the devolution of shares of stock constituting community property on the death of one of the spouses, and will be liable if it recognizes a transfer in violation of the rights of persons who inherit an interest therein under the statute,²⁵ provided it knows

or legal incapacity, the possession of the certificate may be reclaimed and the transfer thereof rescinded, unless:

(1) The certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful, or, (2) the injured person has elected to waive the injury, or has been guilty of laches in endeavoring to enforce his rights.”

Section 1 of the act prescribes the manner in which stock may be transferred. (See § 3784, *supra*.)

Section 8 of the act provides: “Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible right to the certificate and the shares represented thereby.”

This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

In *Miller v. Doran*, 151 Ill. App. 527, *aff'd* 245 Ill. 200, 91 N. E. 1039, it is said that the act, which has not yet been adopted in that state, provides for the protection of a bona fide purchaser or pledgee of a certificate which is stolen after it has been indorsed in blank.

These provisions have no extraterritorial application. *Barstow v. City Trust Co.*, 216 Mass. 330, 103 N. E. 911.

²² *Chew v. Bank of Baltimore*, 14 Md. 299.

²³ *Smith v. Railroad*, 91 Tenn. 221, 18 S. W. 546.

²⁴ *Bigby v. Atlanta & W. P. R. Co.*, 119 Ga. 685, 46 S. E. 827.

²⁵ It is bound to take notice that the stock, whether registered in the name of one spouse or the other, devolves in indivision upon the heirs of the deceased spouse and the surviving spouse, and that, if such heirs are minors, their interest can be sold

that the stock involved in the transaction was community property.²⁶

The Uniform Stock Transfer Act provides that nothing therein "shall be construed as enlarging the powers of an infant or other person lacking full legal capacity * * * to make a valid indorsement, assignment or power of attorney."²⁷

§ 3836. Unauthorized or fraudulent transfers by agents. The effect of an unauthorized transfer of shares by a person as agent for the owner must be determined by applying the general principles of the law of agency. If the transfer is within neither the actual nor the apparent scope of the agent's authority, the principal is not bound, and the transferee acquires no title. But it is otherwise if the transfer is within the apparent authority with which the principal has clothed the agent, although not within his actual authority, if the transferee relies on his apparent authority, and has no notice of the limitations upon such authority as between the principal and agent, or of secret instructions of the principal to the agent.²⁸

If an agent for the purchase of stock takes the legal title to it in his own name, without the knowledge of the principal, a bona fide purchaser from the agent takes title as against the principal.²⁹

If a person having possession of a certificate of stock as agent for another transfers it as his own, there is no question of agency, but the case is governed by the principles stated in the preceding sections. If, by an assignment and power of attorney, or otherwise, the principal has clothed the agent with apparent title, a bona fide purchaser from him acquires a good title as against the principal, for the latter is estopped to assert his title.³⁰ This rule does not apply, however, where the person in possession of the certificate does not assume to transfer

only in the manner prescribed by law. *Leurey v. Bank of Baton Rouge*, 131 La. 30, Ann. Cas. 1913 E 1168, 58 So. 1022.

²⁶ *Leurey v. Bank of Baton Rouge*, 131 La. 30, Ann. Cas. 1913 E 1168, 58 So. 1022.

The knowledge of an officer of the corporation in this regard will not be imputed to it, where he acquires it while purchasing the stock in his individual capacity and for his own personal benefit. *Leurey v. Bank of Baton Rouge*, 131 La. 30, Ann. Cas. 1913 E 1168, 58 So. 1022.

²⁷ See § 2 of the act. This act is

in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

²⁸ *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84; *Furber v. Dane*, 203 Mass. 108, 89 N. E. 227; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317.

See standard works on agency.

²⁹ *Johnson v. First Nat. Bank*, 132 N. Y. App. Div. 524, 117 N. Y. Supp. 39, aff'd 200 N. Y. 593, 94 N. E. 1095.

³⁰ See § 3853, *infra*.

the certificate as owner, but assumes to act as agent of the owner, and falsely represents that he has authority from the latter to sell or pledge the same. In such a case, the owner is not estopped as against the purchaser or pledgee, unless he has held the transferrer out as having authority to so act for him; and the fact that he has clothed the transferrer with apparent title to the stock, so that he would be estopped if the latter had transferred the same as owner, is immaterial.³¹

Where stock indorsed in blank is fraudulently taken from the possession of a pledgee by his agent and servant and pledged to secure the individual debt of the latter, the title of the second pledgee cannot be upheld on the ground of implied agency.³²

A broker who purchases stock for another broker and who knows or has reason to know that the latter is buying it for a third person has no reason to suppose that the latter will be willing to have it used to pay his broker's debts, and cannot hold it under a pledge to secure such a debt to him, even though the name of the principal is not disclosed.³³

Authority on the part of an agent to sell or transfer stock for the benefit of the principal does not authorize him to pledge it as security for his individual indebtedness,³⁴ or to procure a transfer of the stock on the corporate books and an issuance of new shares therefor to himself as an individual.³⁵

Where the by-laws of a corporation declare that its stock shall be transferred upon proper assignment and delivery to the assignee of the certificate, the corporation is liable if it accepts a surrender of the certificate, and issues a new certificate therefor to and in the name of an agent of the owner, when the certificate is not indorsed or as-

³¹ Merchants' Bank v. Livingston, 74 N. Y. 223.

³² Where the agent does not pretend to have or to exercise any such authority. Farmers' Bank v. Diebold Safe & Lock Co., 66 Ohio St. 367, 58 L. R. A. 620, 90 Am. St. Rep. 586, 64 N. E. 518.

³³ Fisher v. Brown, 104 Mass. 259, 6 Am. Rep. 235.

³⁴ Read v. Cumberland Telegraph & Telephone Co., 93 Tenn. 482, 27 S. W. 660.

³⁵ Taft v. Presidio & F. R. Co., 84 Cal. 131, 11 L. R. A. 125, 18 Am.

St. Rep. 166, 24 Pac. 436.

A transfer of stock from a principal to his agent on the books of the corporation is not authorized by the fact that the principal has given the agent a general power of attorney empowering him, among other things, "to sell, dispose of, transfer, and deliver all or any of my interests in the capital stock of any association, bodies corporate or politic." Taft v. Presidio & F. R. Co., 84 Cal. 131, 11 L. R. A. 125, 18 Am. St. Rep. 166, 24 Pac. 436.

signed either by the owner or the agent, although the agent has a general power of attorney empowering him to sell, transfer and deliver all the interest of the principal in the capital stock of any corporation.³⁶

§ 3837. Unauthorized or fraudulent transfers by trustees—Rights and liabilities of transferee. Whether a transferee of shares from a trustee acquires title as against the equitable rights of the cestui que trust depends upon the circumstances. If the trustee appears on the books of the corporation as the absolute owner of the shares, and the transferee has no notice, actual or constructive, that he holds the title in trust, he certainly acquires a good title.³⁷ "The general rule is, that when the legal title and apparent unlimited power of disposition is vested in a person, the rights of a purchaser from him, for a valuable consideration, without notice of a secret trust upon which the property is held, are unaffected; the purchaser in such case acquires an equity equal in dignity to the outstanding equity of which he has no notice. This principle is applicable to the sale and transfer of certificates of stock. It has accordingly been held that a power of attorney on a certificate of stock, authorizing its transfer to any person, renders the stock transferable by delivery; and if the holder of such certificate is shown to be a purchaser for value, without notice of an outstanding equity, from the person to whom it was issued, or his transferee, his title as such owner cannot be impeached. This principle, so far as we have discovered, is uniformly sustained by the authorities."³⁸ The fact that the transfer is not registered on the books of the corporation as required by a charter or statutory provi-

³⁶ *Taft v. Presidio & F. R. Co.*, 84 Cal. 131, 11 L. R. A. 125, 18 Am. St. Rep. 166, 24 Pac. 436.

³⁷ *United States*. *Lowry v. Commercial & Farmers' Bank*, Taney 310, Fed. Cas. No. 8,581.

Alabama. *Winter v. Montgomery Gas-Light Co.*, 89 Ala. 544, 7 So. 773.

California. *Brewster v. Sime*, 42 Cal. 139.

Georgia. *Nutting v. Thomason*, 46 Ga. 34.

Indiana. *Weyer v. Second Nat. Bank*, 57 Ind. 198.

Maryland. *Albert v. Savings Bank*, 1 Md. Ch. 407; *Farmers' & Mechanics' Bank v. Wayman*, 5 Gill 336.

Massachusetts. *Loring v. Salisbury Mills*, 125 Mass. 138; *Salisbury*

Mills v. Townsend, 109 Mass. 115.

New Jersey. *Mt. Holly, L. & M. Turnpike Co. v. Ferree*, 17 N. J. Eq. 117.

New York. *Weaver v. Barden*, 49 N. Y. 286; *Leitch v. Wells*, 48 N. Y. 585.

Ohio. *Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589, 57 N. E. 455.

Tennessee. *Smith v. Railroad*, 91 Tenn. 221, 18 S. W. 546.

Texas. *Anderson v. Waco State Bank*, 92 Tex. 506, 71 Am. St. Rep. 867, 49 S. W. 1030.

England. *Dodds v. Hills*, 2 Hem. & M. 424.

³⁸ *Winter v. Montgomery Gas-Light Co.*, 89 Ala. 544, 7 So. 773.

sion is immaterial, for registration is not necessary to pass the title as between the transferrer and transferee.³⁹

The rule is different where the transferee has actual or constructive notice that the shares are held in trust. In such a case, as a general rule, he takes subject to the trust and in subordination to the equitable rights of the cestui que trust.⁴⁰ "Notice of the existence of a trust is by all the authorities held to impose the duty of inquiry as to its character and limitations."⁴¹ "And whatever is sufficient to put a

³⁹ *Winter v. Montgomery Gas-Light Co.*, 89 Ala. 544, 7 So. 773; *Dodds v. Hills*, 2 Hem. & M. 424.

That registration is not necessary as between the parties, see § 3794, *supra*.

⁴⁰ *Winter v. Montgomery Gas-Light Co.*, 89 Ala. 544, 7 So. 773; *O'Herron v. Gray*, 168 Mass. 573, 40 L. R. A. 498, 60 Am. St. Rep. 411, 47 N. E. 429; *Blake v. Traders' Nat. Bank*, 145 Mass. 13, 12 N. E. 414; *Loring v. Brodie*, 134 Mass. 453; *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *Clemens v. Heckscher*, 185 Pa. St. 476, 40 Atl. 80.

A pledgee who takes with notice that the pledge is a breach of trust holds the stock as trustee *ex maleficio*, and cannot acquire title thereto by adverse holding under the statute of limitations, at least unless the cestui que trust has actual notice of his adverse holding. *Marshall's Estate*, 138 Pa. St. 285, 22 Atl. 24.

Notice to the cashier of a bank that stock pledged to it is held in trust is notice to the bank. *Loring v. Brodie*, 134 Mass. 453.

A statutory provision that the delivery of a stock certificate to a bona fide purchaser with a written transfer or power of attorney shall be a sufficient delivery to pass title in no way affects the power of an executor or other trustee to sell and convey stock. *Jones v. Atchison, T. & S. F. R. Co.*, 150 Mass. 304, 5 L. R. A. 538, 23 N. E. 43.

⁴¹ *Shaw v. Spencer*, 100 Mass. 382,

97 Am. Dec. 107, 1 Am. Rep. 115, quoted with approval in *First Nat. Bank of Paterson v. National Broadway Bank*, 22 N. Y. App. Div. 24, 47 N. Y. Supp. 880, *aff'd* 156 N. Y. 459, 42 L. R. A. 139, 51 N. E. 398; and see to the same effect *Duncan v. Jaudon*, 15 Wall. (U. S.) 165, 21 L. Ed. 142; *Grafflin v. Robb*, 84 Md. 451, 35 Atl. 971; *O'Herron v. Gray*, 168 Mass. 573, 40 L. R. A. 498, 60 Am. St. Rep. 411, 47 N. E. 429; *Loring v. Brodie*, 134 Mass. 453; *Clemens v. Heckscher*, 185 Pa. St. 476, 40 Atl. 80; *Marshall's Estate*, 138 Pa. St. 285, 22 Atl. 24. See also *Carter v. Manufacturers' National Bank*, 71 Me. 448, 36 Am. Rep. 338.

A pledgee of stock held in trust is bound to examine the instrument of trust. *First Nat. Bank of Paterson v. National Broadway Bank*, 156 N. Y. 459, 42 L. R. A. 139, 51 N. E. 398, *aff'g* 22 N. Y. App. Div. 24, 47 N. Y. Supp. 880.

"Notice of the existence of an instrument of trust affects the party purchasing trust property with full notice of its contents, whether he chooses to examine it or not. * * * He should be thus affected, not only with what appears on the face of such an instrument in terms, but by the information given by it, if such information, when made the subject of fair and reasonable examination, would show the conduct of the trustee to be such as it did not permit." *Loring v. Brodie*, 134 Mass. 453.

The burden is on the pledgee to

person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry might have led.”⁴² The transferee, under such circumstances, takes the stock at his peril, for there is no presumption that the trustee has a right to sell it,⁴³ since the common duty of a trustee is not administration or sale, but custody and management for his cestui que trust.⁴⁴

“Any person who receives property, knowing that it is the subject of a trust and that it has been transferred in violation of the duty or power of the trustee, takes it subject to the right, not only of the cestui que trust, but also of the trustee, to reclaim the property.”⁴⁵

prove what inquiry was made. *First Nat. Bank of Paterson v. National Broadway Bank*, 156 N. Y. 459, 42 L. R. A. 139, 51 N. E. 398, aff’g 22 N. Y. App. Div. 24, 47 N. Y. Supp. 880.

⁴² *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, quoted with approval in *First Nat. Bank of Paterson v. National Broadway Bank*, 22 N. Y. App. Div. 24, 47 N. Y. Supp. 880, aff’d 156 N. Y. 459, 42 L. R. A. 139, 51 N. E. 398. And see to the same effect *Duncan v. Jaudon*, 15 Wall. (U. S.) 165, 21 L. Ed. 142; *Johnson v. Amberson*, 140 Ala. 342, 37 So. 273; *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, — Cal. —, 163 Pac. 47; *Clemens v. Heckscher*, 185 Pa. St. 476, 40 Atl. 80.

In such case the pledgee is chargeable with notice of everything which, upon inquiry, he could have ascertained from the cestui que trust. *Duncan v. Jaudon*, 15 Wall. (U. S.) 165, 21 L. Ed. 142.

“Knowledge of the trustee’s violation of the trust conditions will be chargeable to the person dealing with him, if the facts were such as, in reason, to put him upon inquiry and to require him to make some investigation, as a result of which the true title and authority of the trustee might have been disclosed. He will, then, be regarded as having constructive notice of the terms of the

trust, whence the trustee derives his power to act.” *First Nat. Bank of Paterson v. National Broadway Bank*, 156 N. Y. 459, 42 L. R. A. 139, 51 N. E. 398, aff’g 22 N. Y. App. Div. 24, 47 N. Y. Supp. 880.

⁴³ *Duncan v. Jaudon*, 15 Wall. (U. S.) 165, 21 L. Ed. 142; *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98.

“Trustees have no authority to sell the trust property, unless authorized by the instrument creating the trust or by an order of the court of equity, and purchasers buy from them at their peril.” *Cox v. First Nat. Bank*, 119 N. C. 302, 26 S. E. 22.

The Uniform Stock Transfer Act, § 2, provides that nothing therein shall be construed as enlarging the powers of a trustee to make a valid indorsement, assignment or power of attorney. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁴⁴ *Duncan v. Jaudon*, 15 Wall. (U. S.) 165, 21 L. Ed. 142; *Carter v. Manufacturers’ Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338; *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98; *Prall v. Tilt*, 28 N. J. Eq. 479, aff’g 27 N. J. Eq. 393.

⁴⁵ *First Nat. Bank of Paterson v. National Broadway Bank*, 156 N. Y. 459, 42 L. R. A. 139, 51 N. E. 398,

According to the weight of authority, the fact that stock stands on the books of the corporation in the name of a person "as trustee," or that the holder is described as a "trustee" in the certificate, is notice to persons dealing with him that he does not hold the shares in his own right, and is sufficient to put them on inquiry as to his authority to transfer them.⁴⁶ Where a person holding a certificate of stock "as trustee" pledges or transfers the same as security for or in payment of his own debt, this is of itself sufficient to put the person taking the certificate upon inquiry as to his authority to do so,⁴⁷ since prima

aff'g 22 N. Y. App. Div. 24, 47 N. Y. Supp. 880.

⁴⁶ See § 3839, *infra*.

⁴⁷ **United States.** *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142.

Alabama. *Johnson v. Amberson*, 140 Ala. 342, 37 So. 273.

Massachusetts. *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115. See also *Fisher v. Brown*, 104 Mass. 259, 6 Am. Rep. 235.

New Jersey. *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98.

New York. *First Nat. Bank of Paterson v. National Broadway Bank*, 22 App. Div. 24, 47 N. Y. Supp. 880, aff'd 156 N. Y. 459, 42 L. R. A. 139, 51 N. E. 398.

Pennsylvania. *Clemens v. Heckscher*, 185 Pa. St. 476, 40 Atl. 80. See also *Marshall's Estate*, 138 Pa. St. 285, 22 Atl. 24.

England. *Walker v. Taylor*, 4 L. T. (N. S.) 845.

This is true where the transferee receives the stock to be applied as a credit on a pre-existing personal indebtedness of the trustee to him. *Johnson v. Amberson*, 140 Ala. 342, 37 So. 273.

"It matters not whether the stock is pledged for an antecedent debt of the trustee or for money lent him at the time. It is unlawful to use it for either purpose." *Duncan v. Jaudon*, 15 Wall. (U. S.) 165, 21 L. Ed. 142.

An examination of the instrument creating the trust is required to protect one who takes a pledge of stock

from a known trustee to secure a loan, at the request of one who claims untruly to be the sole beneficiary of the trust, and whom an order appointing the trustee describes as "the only person directly interested in the trust," but who in fact has only a life estate. *First Nat. Bank of Paterson v. National Broadway Bank*, 22 N. Y. App. Div. 24, 47 N. Y. Supp. 880.

But where a husband, holding certificates of stock in trust for his wife for life, with remainder to her children, pledged the same as collateral for her note, discounted by the pledgee, with her written authority and representation that she was the owner, and the pledgee, on nonpayment, sold the stock at public sale, in accordance with the note, purchasing himself, it was held that the transaction was equivalent to a pledge by the wife of her separate interest in the trust, and estopped her to claim any interest in the stock, there being no statute prohibiting alienation of their interests by cestuis que trust. *First Nat. Bank of Paterson v. National Broadway Bank*, 156 N. Y. 459, 42 L. R. A. 139, 51 N. E. 398, modifying 22 N. Y. App. Div. 24, 47 N. Y. Supp. 880.

A power given to a trustee to sell stock held by him, and reinvest the proceeds, gives him no authority to pledge the same. *First Nat. Bank of Paterson v. National Broadway Bank*,

facie the trustee has no authority to pledge the stock for such a purpose,⁴⁸ and the transaction is out of the common course of business.⁴⁹

If a trustee has authority to sell and transfer shares, the title of a bona fide purchaser is not affected by the fact that, unknown to him, the sale is made in violation of the trust.⁵⁰ Nor, under such circumstances, are purchasers from the trustee obliged to see to the application of the purchase money, and their title cannot be affected by a misapplication of the same in which they take no part.⁵¹ And this is the rule by statute in some jurisdictions.⁵² The contrary is true, however, if the party dealing with the trustee has, at the time, reasonable ground to believe that he intends to misapply the money, or is, in the very transaction, applying it to his own private use.⁵³

When a trustee fraudulently transfers certificates of stock in breach of the trust, the cestui que trust may waive his right to assert his claim against the transferee, or be estopped by his conduct from asserting the same. But to constitute a waiver, there must be an intentional relinquishment of his right; and to constitute an estoppel, he must, by his negligence or acts, have induced the transferee to innocently and ignorantly change his position for the worse in such

156 N. Y. 459, 42 L. R. A. 139, 51 N. E. 398, modifying 22 N. Y. App. Div. 24, 47 N. Y. Supp. 880.

One who has taken a pledge of certificates of stock which showed on their face that the stock was held in trust is not excused for failure to make inquiry by the fact that the stock had been pledged before with the knowledge of the cestui que trust and was in pledge at the time he took it. *Clemens v. Heckscher*, 185 Pa. St. 476, 40 Atl. 80.

⁴⁸ *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *First Nat. Bank of Paterson v. National Broadway Bank*, 22 N. Y. App. Div. 24, 47 N. Y. Supp. 880, aff'd 156 N. Y. 459, 42 L. R. A. 139, 51 N. E. 398; *Clemens v. Heckscher*, 185 Pa. St. 476, 40 Atl. 80.

⁴⁹ *Duncan v. Jaudon*, 15 Wall. (U. S.) 165, 21 L. Ed. 142; *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *First Nat. Bank of Paterson v. National Broadway Bank*,

22 N. Y. App. Div. 24, 47 N. Y. Supp. 880, aff'd 156 N. Y. 459, 42 L. R. A. 139, 51 N. E. 398; *Clemens v. Heckscher*, 185 Pa. St. 476, 40 Atl. 80.

⁵⁰ *Lowry v. Commercial & Farmers' Bank of Baltimore*, Taney 310, Fed. Cas. No. 8,581; *Brewster v. Sime*, 42 Cal. 139; *Albert v. Savings Bank of Baltimore*, 1 Md. Ch. 407, 2 Md. 159.

⁵¹ *Hughes v. Drovers' & Mechanics' Nat. Bank*, 86 Md. 418, 38 Atl. 936; *Ashton v. Atlantic Bank*, 3 Allen (Mass.) 217.

⁵² By statute in Kentucky fiduciaries holding stock in trust are given power to sell the same and reinvest the proceeds, and it is specifically provided that a purchaser in good faith from such a fiduciary shall not be bound to look to the application of the proceeds of the sale. *Bank of Kentucky v. Winn*, 110 Ky. 140, 61 S. W. 32.

⁵³ *Duncan v. Jaudon*, 15 Wall. (U. S.) 165, 21 L. Ed. 142.

a manner that it would operate as a fraud upon him to allow the right to be asserted.⁵⁴

The owner of stock certificates, which have been fraudulently sold or pledged by one holding them as trustee, is not estopped to assert his claim thereto by his conduct in standing by after having notified the purchaser or pledgee of his claim and demanded the certificates and without protest allowing the purchaser or pledgee to pay an assessment on the stock.⁵⁵

§ 3838. — Liability of corporation. What has been said above applies to the corporation itself where it is sought to hold it liable for permitting a transfer of stock by a trustee in violation of the trust. If the corporation has actual or constructive notice that the stock is held in trust, it becomes its duty to use reasonable diligence to ascertain whether the trustee has authority to transfer the stock before permitting the transfer to be made, and it will be liable to the cestui que trust if, without inquiry, it permits a transfer in violation of the terms of the trust.⁵⁶ The legal presumption is that a trustee has no power to sell or to transfer stock held by him in his fiduciary capaci-

⁵⁴ *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115.

⁵⁵ *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115.

⁵⁶ *United States*. *Geyser-Marion Gold-Min. Co. v. Stark*, 106 Fed. 558, 53 L. R. A. 684.

California. *Young v. New Standard Concentrator Co.*, 148 Cal. 306, 83 Pac. 28.

Maryland. *Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 119 Md. 21, 85 Atl. 949; *Marbury v. Ehlen*, 72 Md. 216, 20 Am. St. Rep. 467, 19 Atl. 648; *Farmers' & Mechanics' Bank v. Wayman*, 5 Gill 336.

Massachusetts. *Loring v. Salisbury Mills*, 125 Mass. 138.

New York. See *Cooper v. Illinois Cent. R. Co.*, 38 App. Div. 22, 57 N. Y. Supp. 925.

North Carolina. *Cox v. First Nat. Bank*, 119 N. C. 302, 26 S. E. 22.

Pennsylvania. *Catherwood v. Guarantee Trust & Safe Deposit Co.*, 252 Pa. 466, 97 Atl. 703; *In re Bohlen's*

Estate, 75 Pa. St. 304; *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232.

Rhode Island. *Peck v. Providence Gas Co.*, 17 R. I. 275, 15 L. R. A. 643, 23 Atl. 967, 21 Atl. 543.

South Carolina. *Chapman v. City Council of Charleston*, 28 S. C. 373, 13 Am. St. Rep. 681, 6 S. E. 158; *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396, 32 Am. Rep. 479; *Magwood v. Southwestern Railroad Bank*, 5 S. C. 379.

A corporation which transfers on its books stock registered in the name of a person as trustee, without inquiry for the cestui que trust, or as to the authority of the trustee to transfer, cannot escape liability to the cestui que trust by setting up a custom among brokers to carry in their names as trustees the stock of third persons, and to transfer it without the latter's consent, for a local custom which changes the obligations of the relation of two parties to each other is inoperative, unless known and as-

ty,⁵⁷ "and the fact that he holds it as trustee is a warning and a declaration to all the world that he is without the power of disposition, unless that power is specifically given by the instrument creating the trust, or by the assent of those whom he represents."⁵⁸

In a leading Massachusetts case it was said: "When the holder of a certificate of shares in a corporation is the absolute owner, his assignment and delivery thereof will pass the title to the assignee; and the latter, upon surrendering the former certificate, may obtain a new one in his own name. * * * If the holder appears upon the face of the old certificate to be the absolute owner, and the corporation has no notice that the fact is otherwise, it may safely issue a new certificate to the assignee, which, if taken in good faith and for a valuable consideration, will vest a perfect title in him. * * * But, for the protection of the rights of the lawful owner of the shares, the cor-

sented to by both. *Geyser-Marion Gold-Min. Co. v. Stark*, 106 Fed. 558, 53 L. R. A. 684.

"Ordinary diligence and not suspicious watchfulness is the measure of duty which a corporation owes to its stockholders in such cases." *Peck v. Providence Gas Co.*, 17 R. I. 275, 15 L. R. A. 643, 23 Atl. 967, 21 Atl. 543.

⁵⁷*Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648.

"Trustees have no authority to sell the trust property unless authorized by the instrument creating the trust or by an order of the court of equity." *Cox v. First Nat. Bank*, 119 N. C. 302, 26 S. E. 22.

The common duty of a trustee is not administration or sale, but custody and management. He may have power to sell, but such power is not necessarily incident to his trust. *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232.

"The term 'trustee' is a term of administration, and not of sale. A trustee ordinarily holds the property intrusted to his charge to collect the rents, issues, dividends, or profits thereof, and to apply them to some specified use. Brokers, administrators, and executors frequently have the power to dispose of the property in-

trusted to their charge. Trustees commonly have no such power. Hence the legal presumption is that a trustee has no power to sell or convey the property which he holds in his fiduciary capacity." *Geyser-Marion Gold-Min. Co. v. Stark*, 106 Fed. 558, 53 L. R. A. 684.

"There being no presumption of the right to sell, a corporation ought to be held affected with notice that a trustee is probably violating his trust when he attempts to sell trust property, known to the corporation to be such, without the production of authority for making the transfer." *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648, quoted in *Cooper v. Illinois Cent. R. Co.*, 38 N. Y. App. Div. 22, 57 N. Y. Supp. 925.

The Uniform Stock Transfer Act, § 2, provides that nothing therein shall be construed as enlarging the powers of a trustee to make a valid indorsement, delivery or power of attorney. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁵⁸*Geyser-Marion Gold-Min. Co. v. Stark*, 106 Fed. 558, 53 L. R. A. 684.

poration is bound to use reasonable care in the issue of certificates. If by the form of the certificate or otherwise, the corporation has notice that the present holder is not the absolute owner, but holds the shares by such a title that he may not have authority to transfer them, the corporation is not obliged, without evidence of such authority, to issue a certificate to his assignee; and if, without making any inquiry, it does issue a new certificate, and the rightful owner is injured by its negligent and wrongful act, the corporation is liable to him, without proof of fraud or collusion."⁵⁹

According to the weight of authority the fact that stock stands on the corporate books in the name of a person "as trustee," or that the holder is described as a "trustee" in the certificate, is notice to the corporation that he does not hold the shares in his own right, and is sufficient to put it on inquiry as to his authority to transfer them.⁶⁰

Where shares of stock stand on the books of a corporation in the name of a decedent, and a transfer is made by his executors to another person as trustee, the corporation is chargeable with notice of the will,⁶¹ and is required, before permitting a transfer by the trustee, to inform itself of the terms of the will, and of the trust upon which the executors were thereby authorized to transfer the stock to the trustee; and it will be liable if it permits the latter to transfer the stock under circumstances inconsistent with the trust.⁶²

The length of time during which the stock stands in the name of the trustee in such a case is altogether immaterial.⁶³ The same rule applies where the transfer is made to a third person by an executor who, because of the fact that the duties of administration have been completed, and in view of the duties remaining to be performed under the will, must be deemed to hold the stock as trustee rather than as executor.⁶⁴ Similarly where stock bequeathed in trust is transferred by executors to a third person and the corporation demands and receives a copy of the will, it is bound by the terms of the trust as therein set forth, and must see that the same are not violated in making the transfer.⁶⁵ So, too, where stock standing in the name of

⁵⁹ *Loring v. Salisbury Mills*, 125 Mass. 138.

⁶⁰ See § 3839, *infra*.

⁶¹ See § 3841, *infra*.

⁶² *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648; *Stewart v. Firemen's Ins. Co. of Baltimore*, 53 Md. 564, 565. See also *Hughes v. Drovers' & Mechanics' Nat. Bank*, 86 Md. 418, 38 Atl. 936; *Caulkins v.*

American Gas-Light Co., 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S. W. 287.

⁶³ *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648.

⁶⁴ *Peck v. Providence Gas Co.*, 17 R. I. 275, 15 L. R. A. 643, 23 Atl. 967, 21 Atl. 543.

⁶⁵ *Livezey v. Northern Pac. R. R.*, 157 Pa. St. 75, 27 Atl. 379.

executors is transferred by them to another person as guardian, the corporation is chargeable with notice of the persons represented by the guardian, and of their rights, and is liable if it permits a transfer in violation of those rights.⁶⁶

If a certificate of stock is issued in the name of A., devisee under the will of a certain person, deceased, the title of A. remains subject to all the conditions of the will by which it was bequeathed to him, and if the corporation permits him to surrender the stock, and issues in lieu thereof a certificate to him or to another person, in which no mention is made of the fact that the stock is held under or subject to the will, it will be answerable to any person injured by such surrender and reissue.⁶⁷ In such a case, the fact that the corporation acted under advice of counsel and in good faith is no defense.⁶⁸

If the trustee has power to dispose of the stock, the corporation is under no obligation to see to the application of the purchase money, and cannot be held responsible because the trustee misapplies it,⁶⁹ at least unless it knows or has reasonable ground for believing that he intended to misapply it, or by the very act of making the transfer was applying it in violation of the terms of the trust.⁷⁰ If he has authority to sell the stock but not to pledge it, the mere fact that he transfers it to a national bank is not sufficient to charge the corporation with notice that the transaction is a pledge and not a sale, even though national banks have no power to purchase shares in other corporations.⁷¹

⁶⁶ Webb v. Graniteville Mfg. Co., 11 S. C. 396, 32 Am. Rep. 479.

⁶⁷ Caulkins v. American Gas-Light Co., 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S. W. 287.

⁶⁸ Caulkins v. American Gas-Light Co., 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S. W. 287.

⁶⁹ Hughes v. Drovers' & Mechanics' Nat. Bank, 86 Md. 418, 38 Atl. 936.

A corporation is not liable for permitting the transfer on its books of stock sold by one to whom it has been bequeathed under a provision in the will that it be held "in her own name to use the interest thereof as long as she may live, and at her death to be equally divided among her children," as this provision confers upon her all the rights incident to full

ownership, as far as the power of disposition is concerned. Hughes v. Drovers' & Mechanics' Nat. Bank, 86 Md. 418, 38 Atl. 936.

⁷⁰ See Hughes v. Drovers' & Mechanics' Nat. Bank, 86 Md. 418, 38 Atl. 936.

⁷¹ The corporation has the right, under such circumstances, to presume that the transfers by a testamentary trustee are in pursuance of the authority contained in the will, and not in fraud thereof, and the purchaser of the stock might have borrowed money from the bank and might have directed that the transfer be made directly to it as security for his debt instead of to himself. Peck v. Providence Gas Co., 17 R. I. 275, 15 L. K. A. 643, 23 Atl. 967, 21 Atl. 543.

To render the corporation liable to the cestui que trust in any case it must have had either actual or constructive notice of the breach of trust involved in the transfer.⁷² And it must also appear that its act in recognizing the assignment and making the transfer operated to aid the breach of trust and contributed directly to the loss of the stock by the cestui que trust. In other words, the negligence of the corporation in making the transfer must be the efficient and proximate cause of such loss.⁷³ So it has been held that the corporation is not liable if the transfer on the books does not affect the rights and interests of the cestui que trust by reason of the fact that the purchaser had acquired a good and indefeasible title before such transfer, and could have compelled the corporation to make it.⁷⁴

Statutes in some states give persons holding stock in a fiduciary capacity power to sell the same and reinvest the proceeds when they deem it to be for the best interests of the trust estate, and specifically provide that the corporation shall not be liable for transferring stock so sold upon its books upon the order of such beneficiary.⁷⁵

§ 3839. — Use of word "trustee" as notice. According to the great weight of authority, the fact that stock stands on the corporate books in the name of a person "as trustee," or that the holder is described as a "trustee" in the certificate, is notice⁷⁶ both to the cor-

⁷² *Smith v. Nashville & D. R. Co.*, 91 Tenn. 221, 18 S. W. 546.

⁷³ *Smith v. Nashville & D. R. Co.*, 91 Tenn. 221, 18 S. W. 546.

⁷⁴ This is true where the assignment passes a complete equitable and legal title without registration. "If the purchaser's title was complete without the transfer, then it cannot be the efficient proximate cause of the loss. Such a purchaser could compel a transfer to himself, and it would be the gravest injustice to hold the corporation responsible when its refusal would subject it to liability to the purchaser and in no way improve the case of the cestui que trust." *Smith v. Nashville & D. R. Co.*, 91 Tenn. 221, 18 S. W. 546.

⁷⁵ *Bank of Kentucky v. Winn*, 110 Ky. 140, 61 S. W. 32.

Under this statute, where stock is

sold by a trustee pursuant to a judgment authorizing him to sell and invest in real estate, the corporation cannot refuse to transfer the stock on its books on the ground that it may become liable to contingent remaindermen, who were not parties to the action in which the judgment was rendered. They are not necessary parties, and the statute protects the corporation. *Bank of Kentucky v. Winn*, 110 Ky. 140, 61 S. W. 32.

⁷⁶ *United States v. Geyser-Marion Gold-Min. Co. v. Stark*, 106 Fed. 558, 53 L. R. A. 684.

Maryland. *Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 119 Md. 21, 85 Atl. 949; *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648.

Massachusetts. *Loring v. Salisbury Mills*, 125 Mass. 138.

poration and to persons who purchase such stock from the trustee,

New York. See *Cooper v. Illinois Cent. R. Co.*, 38 App. Div. 22, 57 N. Y. Supp. 925.

Pennsylvania. *Catherwood v. Guarantee Trust & Safe Deposit Co.*, 252 Pa. 466, 97 Atl. 703; *In re Bohlen's Estate*, 75 Pa. St. 304.

South Carolina. *Chapman v. City Council of Charleston*, 28 S. C. 373, 13 Am. St. Rep. 681, 6 S. E. 158; *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396, 32 Am. Rep. 479; *Magwood v. Southwestern Railroad Bank*, 5 S. C. 379.

"The word 'trustee' means something. It is a warning and declaration to every one who reads it (1) that the person so named is not the owner of the property to which it relates; (2) that he holds it for the use and benefit of another; and (3) that he has no right or power to sell or dispose of it without the assent of his cestui que trust. It denies the equitable ownership and beneficial interest of the party to whom it is applied, and asserts that he holds it in a representative capacity. It signifies the opposite of the word 'owner,' and means that, while the party called 'trustee' has the naked legal title, he has no beneficial right, title, or interest in the property. No one who should read in stock certificates or in corporate records that one share was owned by Felix J. Stark, while another was owned by Felix J. Stark, trustee, would fail to understand that he held the former for himself, and the latter for another." *Geyser-Marion Gold-Min. Co. v. Stark*, 106 Fed. 558, 53 L. R. A. 684.

In *Albert v. Mayor & City Council of Baltimore*, 2 Md. 159, stock standing in the name of certain persons as executors was by them transferred to certain other persons as trustees, and it was held that the mere fact that they were designated

as trustees, without a specification of the trust, or designation of the cestui que trust, could not possibly give the corporation any information, that there was no one to whom he could have applied for information but to the trustees themselves, that a reference to the will would have given no information on the subject, since the stock was purchased by the executors after the testator's death, and that therefore there was no such knowledge or neglect of duty on the part of the corporation as would render it liable for recognizing an unauthorized transfer by the trustees.

In *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648, it is said that the modern doctrine as to what constitutes notice in such cases is much broader in its reach than that found in *Albert's* case, and that the latter case should not be followed in any case which is not precisely analogous in all its facts.

In *Graffin v. Robb*, 84 Md. 451, 35 Atl. 971, a trustee in an equity case purchased stock in a municipal corporation, the certificates being made out in his name as trustee, without designating the beneficiary. Later he sold the stock to the corporation, and misappropriated the proceeds. A substituted trustee sued the corporation for making an unauthorized transfer, and it was held that he could not recover since the municipality could not have discovered the nature, extent and purposes of the trust by a seasonable and reasonable examination of the court records. In the course of the opinion the court says that it does not understand that the ruling in *Albert's*, as applicable to the state of facts there disclosed, has been reversed by any of the later cases on the subject, and that while in *Marbury v. Ehlen* it was said that the rule in

or take it from him as collateral security⁷⁷ that he does not hold the shares in his own right, and is sufficient to put them on inquiry as to his authority to transfer them. This is particularly true where the corporation or the transferee has notice of the name of the cestui que trust,⁷⁸ as where the cestui que trust is named in the certificate or on the corporate books.⁷⁹ And by the weight of authority, the

Albert's case should be limited to cases precisely analogous in all its facts, the case at bar is clearly within the rule as thus limited, since, as in the Albert case, the mere designation of the certificate holder as trustee without the reasonable possibility of getting information from any other reliable source, should not be held to impute knowledge, because it was knowledge which could not in any way required by law have been obtained by the corporation.

77 United States. See Geyser-Marion Gold-Min. Co. v. Stark, 106 Fed. 558.

Alabama. Johnson v. Amberson, 140 Ala. 342, 37 So. 273.

Maryland. Marbury v. Ehlen, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648; Stewart v. Firemen's Ins. Co. of Baltimore, 53 Md. 564, 575.

Massachusetts. Blake v. Traders' Nat. Bank, 145 Mass. 13, 12 N. E. 414; Loring v. Brodie, 134 Mass. 453; Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115.

New York. First Nat. Bank of Paterson v. National Broadway Bank, 156 N. Y. 459, 42 L. R. A. 139, 51 N. E. 398, aff'g 22 App. Div. 24, 47 N. Y. Supp. 880. And see Budd v. Munroe, 18 Hun 316.

Where the certificates and transfers thereof show upon their face that the stock is held in trust, knowledge of that fact will be imputed to one to whom they are pledged as collateral whether he reads them or not. Loring v. Brodie, 134 Mass. 453.

78 Loring v. Salisbury Mills, 125 Mass. 138.

79 United States. Duncan v. Jaudon, 15 Wall. 165, 21 L. Ed. 142.

Maryland. Farmers' & Mechanics' Bank v. Wayman, 5 Gill 336.

Massachusetts. Loring v. Brodie, 134 Mass. 453; Loring v. Salisbury Mills, 125 Mass. 138; Shaw v. Spencer, 100 Mass. 382.

New Jersey. Gaston v. American Exch. Nat. Bank, 29 N. J. Eq. 98.

New York. See Cooper v. Illinois Cent. R. Co., 38 App. Div. 22, 57 N. Y. Supp. 925.

Pennsylvania. Clemens v. Heckscher, 185 Pa. St. 476, 40 Atl. 80; In re Bohlen's Estate, 75 Pa. St. 304.

South Carolina. Maywood v. South-western Railroad Bank, 5 S. C. 379.

"Naming the person for whose benefit the stock is held is certainly a declaration of the trust." Bayard v. Farmers' & Mechanics' Bank, 52 Pa. St. 232.

Where the cestui que trust is named, the transferee is chargeable with constructive notice of everything which, upon inquiry, he could have ascertained from the cestui que trust. Duncan v. Jaudon, 15 Wall. (U. S.) 165, 21 L. Ed. 142.

See also Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237, a case involving the right of a person to whom a certificate was issued as trustee for a named person to vote, where it is said that the designation of such person as trustee "was sufficient to show that he did not hold the stock in his own right," and that, as the corporation was one of the parties to the contract under which he held the

fact that the cestui que trust is not named is immaterial.⁸⁰ Mere lapse of time after failure of the cestui que trust to appear and claim the stock, or dividends thereon, will not raise a presumption of personal ownership in the person named in the certificate as trustee. Nor will the fact that the person seeking the transfer has been unable to discover the cestui que trust. The entry on the books of the company is a continuous assertion that the stock is not the private property of the person named in the certificate and prevents the running of the statute of limitations.⁸¹

Evidence of a usage among brokers to buy and sell in the market, and without inquiry, stock certificates issued in the name of a person "as trustee," and by him assigned in blank, is not admissible to vary the established rule.⁸² Nor is the rule affected by the fact that it is common to issue certificates of stock in the name of a person as trustee, when no trust actually exists. "The rules of law are presumed to be known by all men; and they must govern themselves accordingly. The law holds that the insertion of the word 'trustee' after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry for the reason that a trust is frequently simulated or pretended when it really does not exist."⁸³

In at least one state, however, it is held that the affixing of the word "trustee" to the name of the shares in the certificate "does not,

stock, its officers were charged with notice of the manner in which he held it.

⁸⁰ **United States.** Geyser-Marion Gold-Min. Co. v. Stark, 106 Fed. 558, 53 L. R. A. 684.

Alabama. Johnson v. Amberson, 140 Ala. 342, 37 So. 273.

Maryland. Baltimore Trust Co. v. George's Creek Coal & Iron Co., 119 Md. 21, 85 Atl. 949. See also Tyson v. George's Creek Coal & Iron Co., 115 Md. 564, 81 Atl. 41.

Massachusetts. Loring v. Brodie, 134 Mass. 453; Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115. See also Fisher v. Brown, 104 Mass. 259, 6 Am. Rep. 235.

New Jersey. Gaston v. American Exch. Nat. Bank, 29 N. J. Eq. 98.

New York. First Nat. Bank of Paterson v. National Broadway Bank, 156 N. Y. 459, 42 L. R. A. 139, 51 N. E. 398, aff'g 22 App. Div. 24, 47 N. Y. Supp. 880.

South Carolina. Webb v. Graniteville Mfg. Co., 11 S. C. 396, 32 Am. Rep. 479.

⁸¹ Baltimore Trust Co. v. George's Creek Coal & Iron Co., 119 Md. 21, 85 Atl. 949. See also Tyson v. George's Creek Coal & Iron Co., 115 Md. 564, 81 Atl. 41.

⁸² Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115. And see Geyser-Marion Gold-Min. Co. v. Stark, 106 Fed. 558, 53 L. R. A. 684.

⁸³ Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115.

in and of itself, impart to any one dealing with such holder notice that he is not the owner of the stock, or, at least, that he has not authority to sell or hypothecate it."⁸⁴ And it has also been held that while the use of the word "trustee" is sufficient to put the purchaser upon inquiry, he cannot be held liable for misconduct on the part of the trustee, in the absence of fraud on his own part, if he could not have discovered the truth by a reasonably careful investigation of the records or other proper sources of information.⁸⁵

§ 3840. Unauthorized or fraudulent transfers by executors or administrators—Rights and liabilities of transferees. Persons who purchase shares of stock from an executor, with actual or constructive notice of the character in which he holds the title, are chargeable with notice of the contents of the will under which he acquired title, and take subject to any restrictions therein.⁸⁶

⁸⁴ *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, — Cal. —, 163 Pac. 47; *Thompson v. Toland*, 48 Cal. 99; *Brewster v. Sime*, 42 Cal. 139. See also *Fletcher v. Kidder*, 163 Cal. 769, 127 Pac. 73, where this rule was applied in a suit to establish an alleged trust.

"If it is intended that the so-called trustee shall not have power to sell or hypothecate the stock, without the express consent of the equitable owner, it is an easy matter to limit his authority by apt words in the certificate. In the absence of such words, the mere addition of the word 'trustee' after the name will not have the effect to limit the absolute power of disposition, or to operate as constructive notice of any secret equities, as against persons who, in good faith, purchase or advance money on the stock without notice. Standing alone, the mere fact that a person holding the legal title, and apparently having the right of disposition, is styled trustee, raises no implication that he has no authority to sell or hypothecate the stock in the usual course of business. If it should be held to raise a presumption that someone else was the owner, nevertheless the inference

would be, that, in clothing the trustee with the legal title, he had invested him with authority to sell and hypothecate in the usual course of business." *Brewster v. Sime*, 42 Cal. 139.

In *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, supra, it is said that the previous decisions to this effect in California must be considered as establishing a rule of property, on the faith of which, no doubt, many transactions have been entered into, and that therefore a change of decision on the subject is precluded by the doctrine of stare decisis. And it is also said that it is doubtful, in view of the holding in *Brewster v. Sime*, supra, whether any weight at all can be attached to the form of the certificate, either alone or in connection with other facts.

⁸⁵ *Graffin v. Robb*, 84 Md. 451, 35 Atl. 971. See also *Albert v. Mayor & City Council of Baltimore*, 2 Md. 159, rev'g on other grounds 1 Md. Ch. 407.

⁸⁶ *Lowry v. Commercial & Farmers' Bank of Baltimore*, Taney 310, Fed. Cas. No. 8,581; *Stewart v. Firemen's Ins. Co. of Baltimore*, 53 Md. 564; *Albert v. Savings Bank of Balti-*

They are also chargeable with notice of any restrictions upon his power to dispose of the shares imposed by the general law, and can acquire no title under a sale and transfer in violation of such restrictions. Thus, where a statute requires executors or administrators to sell property of the estate at public auction, unless a private sale is authorized by an order of the court, a private sale of stock by an executor or administrator without an order of the court, is a nullity, and conveys no title.⁸⁷

But in the absence of any restrictions in the will or the statute, the power of an executor or administrator to sell the stock for the purpose of converting the same into money to pay debts or distribute the same to legatees is absolute, the conversion of the personal estate into money being within the ordinary line of an executor's or administrator's duty, and persons who purchase from him in good faith acquire a good title, notwithstanding breach of trust or conversion on his part,⁸⁸ and they are not responsible for the application

more, 2 Md. 159, 1 Md. Ch. 407. See also *Ross v. Southwestern R. Co.*, 53 Ga. 514; *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648; *Marshall's Estate*, 138 Pa. St. 285, 22 Atl. 24; *Caulkins v. American Gas-Light Co.*, 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S. W. 287.

⁸⁷*Nutting v. Thomason*, 46 Ga. 34; *Weyer v. Second Nat. Bank*, 57 Ind. 198.

⁸⁸*Lowry v. Commercial & Farmers' Bank of Baltimore*, Taney 310, Fed. Cas. No. 8,581; *Weyer v. Second Nat. Bank*, 57 Ind. 198; *Cox v. First Nat. Bank*, 119 N. C. 302, 26 S. E. 22; *In re Wood's Appeal*, 92 Pa. St. 379, 37 Am. Rep. 694. See also *Gottberg v. United States Nat. Bank*, 26 Abb. N. Cas. (N. Y.) 50, 13 N. Y. Supp. 841, aff'd 61 Hun (N. Y.) 626, 16 N. Y. Supp. 45, aff'd 131 N. Y. 595, 30 N. E. 41, which was a case dealing with an unauthorized pledge of registered bonds.

"Mere knowledge on the part of a purchaser that an executor or administrator is dealing with the assets in a fiduciary capacity, is not enough to raise suspicion or to put the party

on inquiry, for the reason that it is their primary duty to dispose of the assets and settle the estate. A sale and transfer by them is ordinarily in the line of their duty." *Prall v. Tilt*, 28 N. J. Eq. 479, aff'g 27 N. J. Eq. 393.

Stock standing in the name of a testator was indorsed in blank by his executrix to certain of the heirs, to whom, by the terms of the will, she had power to advance certain sums. They pledged the stock to secure a debt of a firm of which they were the members, representing to the pledgee that the stock was their property and had been acquired by them on account of their interest in the estate. The pledgee knew that the stock had belonged to the estate, but had no knowledge, actual or constructive, that the representation was untrue. It was held that his rights were superior to those of the residuary legatees, although the transfer by the executrix was unauthorized. *Prall v. Tilt*, 28 N. J. Eq. 479, aff'g 27 N. J. Eq. 393.

Where the executor has power to invest the funds of the estate in safe stock, a purchaser of such stock from

of the purchase money.⁸⁹ Similarly, an executor has power to borrow money for purposes connected with the discharge of his duties, and to pledge the assets of the estate as security, and where he represents that he is borrowing for such a purpose, and the loan is made for a purpose apparently proper, the title of the pledgee will be perfect even if the executor intended a fraud, provided the pledgee had no knowledge, actual or implied, of such purpose.⁹⁰ "But this rule applies only where the purchaser relies upon the authority implied in the official character of the executor and deals with him as with one exercising a power."⁹¹ "For other dealing, where the purchaser relies upon the representations of the executor, who is not acting in the course of administration, he takes the chance."⁹² So if he takes the stock for other than the general purposes of the trust, or such as may reasonably be supposed to be within its scope, or in any manner contrary to the duty of the office of executor, he must look to the executor's authority at his peril.⁹³ Under such circumstances he has no right to rely upon the representations of the executor, and can escape responsibility only by ascertaining whether there are debts or other obligations of the estate, and seeing to it that the money paid is applied upon them.⁹⁴

Persons who purchase or take a pledge of stock from an executor or administrator with actual or constructive notice that he is disposing of the stock for his own purposes,⁹⁵ or with knowledge, or notice

him is only bound to inquire as to his authority to transfer it, and is not held to inquire whether the transfer was a wise one. *Ross v. Southwestern R. Co.*, 53 Ga. 514.

⁸⁹ *Goodwin v. American Nat. Bank*, 48 Conn. 550; *Moore v. American Loan & Trust Co.*, 115 N. Y. 65, 21 N. E. 681; *Leitch v. Wells*, 48 N. Y. 585; *Cox v. First Nat. Bank*, 119 N. C. 302, 26 S. E. 22.

⁹⁰ *Goodwin v. American Nat. Bank*, 48 Conn. 550; *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338.

⁹¹ *Moore v. American Loan & Trust Co.*, 115 N. Y. 65, 21 N. E. 681.

⁹² *Moore v. American Loan & Trust Co.*, 115 N. Y. 65, 21 N. E. 681.

⁹³ *Moore v. American Loan & Trust Co.*, 115 N. Y. 65, 21 N. E. 681.

⁹⁴ *Moore v. American Loan & Trust Co.*, 115 N. Y. 65, 21 N. E. 681.

⁹⁵ *Maine. Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338.

Massachusetts. Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115.

New York. Field v. Schieffelin, 7 Johns. Ch. 150, 11 Am. Dec. 441.

Pennsylvania. Marshall's Estate, 138 Pa. St. 285, 22 Atl. 24; *Appeal of Odd-Fellows' Sav. Bank*, 123 Pa. St. 356, 16 Atl. 606; *In re Wood's Appeal*, 92 Pa. St. 379, 37 Am. Rep. 694.

Rhode Island. Davis v. National Eagle Bank, 50 Atl. 530.

A pledgee who takes with actual or constructive notice that the pledge is a breath of trust on the part of the executor holds as a trustee *ex male-*

of facts which furnish reasonable ground for believing, that he intends to misapply the purchase money, or is in the very transaction applying it to his own use,⁹⁶ are not protected.

"A person holding stock in a fiduciary capacity has, *prima facie*, no right to pledge it to secure a debt growing out of an independent transaction unconnected with the trust; and whoever takes it as security for such a debt, does so at his own peril."⁹⁷ So if an executor applies stock belonging to the estate in payment of or as security for his own debt, or sells the same for his own benefit, to the knowledge of the purchaser, this is of itself a circumstance of suspicion, which should put a person taking the same upon inquiry as to the propriety of the transaction.⁹⁸ Similarly, if persons to whom an executor pledges stock to secure a debt of some of the remaindermen have notice of the character in which he holds the title, it is their duty to inquire as to his right to make the pledge, it being for a purpose obviously not connected with the trust, and if they fail to do so, they cannot claim protection as against the other remaindermen on the ground of *bona fides* and ignorance.⁹⁹

ficio, and hence cannot acquire title to the stock by adverse holding under the statute of limitations, at least in the absence of actual notice to the cestuis que trust of such adverse holding. *Marshall's Estate*, 138 Pa. St. 285, 22 Atl. 24.

⁹⁶ *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338. See also *Goodwin v. American Nat. Bank*, 48 Conn. 550. And see *Gottberg v. United States Nat. Bank*, 131 N. Y. 595, 30 N. E. 41, aff'g 61 Hun (N. Y.) 626, 16 N. Y. Supp. 45, 26 Abb. N. Cas. (N. Y.) 50, 13 N. Y. Supp. 841, and which involved a transfer of registered bonds by an executor.

⁹⁷ *Prall v. Tilt*, 28 N. J. Eq. 479, aff'g 27 N. J. Eq. 393.

An executor transferred stock belonging to the estate to a legatee without consideration, and to enable the legatee to use it as security for a loan. The legatee pledged it for that purpose and the pledgee took with knowledge of the facts. It was held that the stock could be recovered for the benefit of the estate, upon paying

such portion of the loan, if any, as came into the hands of the executor and was used by him in paying the debts of the estate, and also that the burden of showing that any of it was so used was on the pledgee. *Moore v. American Loan & Trust Co.*, 115 N. Y. 65, 21 N. E. 681.

⁹⁸ *Connecticut*. See *Goodwin v. American Nat. Bank*, 48 Conn. 550.

Maine. *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338.

Massachusetts. *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115.

North Carolina. See *Cox v. First Nat. Bank*, 119 N. C. 302, 26 S. E. 22.

Pennsylvania. *Marshall's Estate*, 138 Pa. St. 285, 22 Atl. 24; *Petrie v. Clark*, 11 Serg. & R. 377, 14 Am. Dec. 636.

Rhode Island. *Davis v. National Eagle Bank*, 50 Atl. 530.

England. *Walker v. Taylor*, 4 L. T. (N. S.) 845.

⁹⁹ *Prall v. Hamil*, 28 N. J. Eq. 66. In this case a transfer in blank of

Where an executor indorses on a certificate of stock an assignment and power of attorney in blank, and intrusts it to another for the purpose of having the shares registered on the books of the corporation in his own name as executor, and the depository fraudulently sells or pledges the same, the purchaser or pledgee acquires no title or right as against the executor, if the form of the indorsement is such as to put him on inquiry as to the authority of the depository.¹

Where a transfer of stock by an executor as such to himself as an individual is merely voidable, a legatee cannot maintain trover against a bona fide transferee of the executor as an individual, since the action necessarily goes upon the ground of a void transfer.²

Bona fide purchasers or pledgees who have no notice, actual or constructive, of the character in which the executor holds the title will be protected.³ And the same is true of a bona fide purchaser of stock from one who purchases it at a void administrator's sale.⁴

The Uniform Stock Transfer Act provides that nothing therein shall be construed as enlarging the powers of an executor or administrator to make a valid indorsement, assignment or power of attorney.⁵

§ 3841. — Liability of corporation. What has been said above as to the duties and liabilities of persons to whom stock is transferred by executors or administrators,⁶ applies also to the corporation when it is sought to hold it liable for registering a transfer by an executor.

stock standing in the name of the testator, purporting to have been made by the executrix in her official capacity and signed by her as executrix, and a receipt for the stock signed by the pledgees, which certified that the executrix, as such, had delivered to the pledgees the certificates of the stock, which it stated then stood in the name of the testator, was held to conclusively prove that the pledgees knew, at the time of the transfer, that the stock belonged to the estate.

¹ Colonial Bank v. Cady, 15 App. Cas. 267.

² Noyes v. Woodruff, — Vt. —, 100 Atl. 759.

³ Lowry v. Commercial & Farmers' Bank, Taney 310, Fed. Cas. No. 8, 581.

⁴ Nutting v. Thomason, 46 Ga. 34.

Where an administrator sold stock belonging to the estate in violation of the terms of the order of sale, and the corporation canceled the certificates and issued new ones, which in no way indicated that they were issued in lieu of those belonging to the estate, it was held that a bona fide purchaser of the new certificates was not bound to account to the estate for the stock, although the administrator's sale was void. Citizens' St. Ry. Co. v. Robbins, 128 Ind. 449, 12 L. R. A. 498, 25 Am. St. Rep. 445, 26 N. E. 116.

⁵ See section 2 of the act. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁶ See § 3840, supra.

From the fact that the transfer is made by an executor as such, the corporation is chargeable with notice that there is a will and with knowledge of its contents, and is liable if it permits a transfer in contravention of its terms.⁷ "And especially is this so where the company has taken up and canceled stock standing in the name of the testator, and issued in lieu thereof other stock, in terms referring on its face to such will."⁸ So if the transfer is by an executor to a legatee, the corporation must, at its peril, see that the provisions of the will in respect to the stock are carried out.⁹ For example, it is

7 United States. *Lowry v. Commercial & Farmers' Bank*, Taney 310, Fed. Cas. No. 8,581.

Maryland. *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648; *Stewart v. Firemen's Ins. Co. of Baltimore*, 53 Md. 564.

North Carolina. *Wooten v. Wilmington & W. R. Co.*, 128 N. C. 119, 56 L. R. A. 615, 38 S. E. 298.

Pennsylvania. See *Livezey v. Northern Pac. R. R.*, 157 Pa. St. 75, 27 Atl. 379; *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232.

Rhode Island. *Peck v. Providence Gas Co.*, 17 R. I. 275, 15 L. R. A. 643, 23 Atl. 967, 21 Atl. 543; *Peck v. Bank of America*, 16 R. I. 710, 7 L. R. A. 826, 19 Atl. 369.

South Carolina. *Chapman v. City Council of Charleston*, 28 S. C. 373, 13 Am. St. Rep. 681, 6 S. E. 158.

Tennessee. *Caulkins v. American Gas-Light Co.*, 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S. W. 287.

"Knowledge of the contents of a will on the part of a corporation is presumed by law from its knowledge that there is a will, upon the terms of which the title to its stock is made to depend." *Caulkins v. American Gas-Light Co.*, 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S. W. 287.

This is especially true where the statute requires the will to be recorded. *Lowry v. Commercial & Farmers' Bank*, Taney 310, Fed. Cas. No. 8,581.

Where stock is sold by executors to a third person, it is the right and

duty of the corporation to inquire into the right of the executors to make the sale. *Livezey v. Northern Pac. R. R.*, 157 Pa. St. 75, 27 Atl. 379.

8 Caulkins v. American Gas-Light Co., 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S. W. 287.

9 Wooten v. Wilmington & W. R. Co., 128 N. C. 119, 56 L. R. A. 615, 38 S. E. 298.

By a will certain shares of stock were bequeathed to one Bradley in trust for one Jewett during her life and upon her death to use and benefit of such of her children as might survive her. This stock was transferred by the executors on the corporate books "to Bradley, trustee for Jewett." Transfer was afterwards made to Jewett individually by Bradley and thereafter the identity of the stock became lost by successive transfers. The court held that the corporation must be held to have obtained constructive notice of the contents of the will by the attempt to transfer the stock by the executors, and that therefore the corporation must be deemed liable to the surviving children for value of the stock and such dividends as accrued after the death of Jewett. *Wooten v. Wilmington & W. R. Co.*, 128 N. C. 119, 56 L. R. A. 615, 38 S. E. 298. It was further held that the first transfer was the effective and proximate cause of the loss, the other transfers being made possible by it.

chargeable with knowledge that under the terms of the will the interest of the legatee will be terminated on his death without issue, and if he does in fact die without issue it is liable to the remainderman, if it has permitted a transfer of the stock in derogation of his rights.¹⁰ And of course this is equally true where it has actual knowledge of the terms of the will.¹¹

If the transfer is made by an administrator of the person in whose name the stock stands, the corporation is bound to inquire as to his power to make it,¹² and must look to his letters, since they are the source of his authority.¹³ If the transfer is made simply as administrator the corporation is not thereby charged with notice that there is a will,¹⁴ although the contrary would be true of a transfer as administrator cum testamento annexo.¹⁵ Nor does an assignment to "the heirs and distributees" of a decedent constitute such notice.¹⁶

The corporation is also chargeable with notice of restrictions imposed upon the powers of executors and administrators by the general law.¹⁷ So where the statute requires sales by executors or administrators to be made in a particular manner, as at public auction,¹⁸ or requires an order of court authorizing the sale,¹⁹ the

¹⁰ Where stock was bequeathed to a certain person with remainder over in case he died without issue, and was transferred to the legatee at the request of the executor, and then to a third person at the request of the legatee, and thereafter the legatee died without issue, the corporation was held to be liable in damages to the remainderman. *Baker v. Atlantic Coast Line R. Co.*, — N. C. —, 92 S. E. 170.

¹¹ Where stock was bequeathed in trust for the use of the testator's daughter, and, upon her death without issue, to his living children, and, after his death, the daughter presented the certificate to the corporation for transfer, being indorsed by the executors as sold and assigned to her for value received, and the corporation, with actual knowledge of the will, issued new certificates to the daughter, which were purchased by the president of the corporation a few days later, it was held that, if there was not an actual sale for value

by the executor, the corporation was liable to the remainderman, the daughter having died without issue. *Cox v. First Nat. Bank*, 119 N. C. 302, 26 S. E. 22.

¹² *Smith v. Nashville & D. R. Co.*, 91 Tenn. 221, 18 S. W. 546.

¹³ *Baker v. Atlantic Coast Line R. Co.*, — N. C. —, 92 S. E. 170. See also *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232.

¹⁴ *Smith v. Nashville & D. R. Co.*, 91 Tenn. 221, 18 S. W. 546.

¹⁵ *Smith v. Nashville & D. R. Co.*, 91 Tenn. 221, 18 S. W. 546.

¹⁶ *Smith v. Nashville & D. R. Co.*, 91 Tenn. 221, 18 S. W. 546.

¹⁷ *Baker v. Atlantic Coast Line R. Co.*, — N. C. —, 92 S. E. 170.

¹⁸ *Weyer v. Second Nat. Bank*, 57 Ind. 198, 209.

¹⁹ *Baker v. Atlantic Coast Line R. Co.*, — N. C. —, 92 S. E. 170.

Where an order of sale is required, the corporation is bound to know, not only that an order of sale has been

corporation is chargeable with notice of that fact, and, at its peril, must see that the provisions of the statute have been complied with.

It is also liable if it recognizes a transfer by an executor after he has been removed from office by an order of court.²⁰

In the absence of any restrictions in the will or the statute, an executor or administrator has authority to sell or pledge the personal property of his decedent for the purpose of paying debts, legacies and the expenses of administration, and therefore the conversion of stock standing in the name of the decedent into money is in the ordinary line of his duty. And it follows that if there are no such restrictions, the corporation may safely allow a transfer by him, without incurring any liability because of fraud or misapplication on his part, of which it has no notice.²¹ "In such a case, the officer

entered by the court, but also that the sale has been made in conformity to the terms of the order. So if the order of court requires the administrator to take good and sufficient security for the purchase price of the stock, and he fails to do so, the corporation is chargeable with notice of that fact and is liable to the estate if it cancels its certificates and issues new ones to the purchaser. *Citizens' St. R. Co. v. Robbins*, 128 Ind. 449, 12 L. R. A. 498, 25 Am. St. Rep. 445, 26 N. E. 116.

²⁰ *Mobile & O. R. Co. v. Humphries* (Miss.), 7 So. 522.

²¹ *United States. Lowry v. Commercial & Farmers' Bank*, Taney 310, Fed. Cas. No. 8,581.

Maryland. *Albert v. Mayor & City Council of Baltimore*, 2 Md. 159.

Massachusetts. *Crocker v. Old Colony R. Co.*, 137 Mass. 417; *Hutchins v. State Bank*, 12 Metc. 421.

Mississippi. *Myers v. Martinez*, 95 Miss. 104, 48 So. 291.

North Carolina. *Wooten v. Wilmington & W. R. Co.*, 128 N. C. 119, 56 L. R. A. 615, 38 S. E. 298; *Cox v. First Nat. Bank*, 119 N. C. 302, 26 S. E. 22.

Pennsylvania. *Catherwood v. Guarantee Trust & Safe Deposit Co.*, 252 Pa. 466, 97 Atl. 703; *In re Bohlen's Estate*, 75 Pa. St. 304; *Bayard v.*

Farmers' & Mechanics' Bank, 52 Pa. St. 232; *Williams v. Pennsylvania R. Co.*, 9 Phila. 298. See also *In re Wood's Appeal*, 92 Pa. St. 379, 37 Am. Rep. 694.

Tennessee. *Smith v. Nashville & D. R. Co.*, 91 Tenn. 221, 18 S. W. 546.

The rule applicable to trustees generally "does not apply * * * to the case of executors and administrators transferring stock standing in the name of a decedent, for the reason that the law casts upon them the legal ownership of the personal property of such decedent. It is their duty to pay debts and make distribution among heirs or legatees. To do so, they must convert the personalty into cash, and a transfer of stock, therefore, would be in due course of administration. It would be unreasonable to hold that a corporation in such case should be held to inquire whether in point of fact the particular stock was needed for the payment of debts or legacies." *In re Bohlen's Estate*, 75 Pa. St. 304, quoted with approval in *Catherwood v. Guarantee Trust & Safe Deposit Co.*, 252 Pa. 466, 97 Atl. 703. And see to the same effect *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232; *Williams v. Pennsylvania R. Co.*, 9 Phila. (Pa.) 298.

Although the corporation has knowl-

of the corporation, whose duty it is to supervise the transfer, can have no means of ascertaining whether or not the transfer is for the purposes named, except by inquiry of the executor himself, since, generally, no one else would have knowledge of the condition of the estate."²² But if the corporation, at the time, has reasonable ground for believing that the executor intends to misapply the money received by him for the stock, or is, in the very transaction, applying it to his own private use, it is responsible to the persons injured thereby, since by knowingly permitting the transfer under such circumstances it enables the executor to commit a breach of his trust, and is therefore as fully liable as if it had shared in the profits of the transaction.²³

"If * * * the circumstances attending the proposed transfer show that it is not in the ordinary course of administration, it becomes the duty of the transfer officer, before permitting it, to inquire into the authority of the executor to make it."²⁴ This is true, for example, where the transfer is made after the expiration of the period fixed by the statute within which the debts must be paid and the estate settled,²⁵ or where the character of the transfer is in itself

edge of the contents of the will, and though the stock is specifically bequeathed by the will, and the executor sells it with intent to convert the proceeds to his own use, the corporation is not liable unless at the time of the transfer it has reasonable ground to believe that the executor intends to misapply the money, or is in the very transaction applying it to his own use. *Wooten v. Wilmington & W. R. Co.*, 128 N. C. 119, 56 L. R. A. 615, 38 S. E. 298.

In making a transfer pursuant to an assignment by an administrator without inquiry the corporation merely assumes the risk as to his power to dispose of the stock, and if he has such power is not liable because such assignment constitutes a breach of trust, in the absence of circumstances calculated to excite the suspicions of a reasonably prudent man that a breach of trust was contemplated. *Smith v. Railroad*, 91 Tenn. 221, 18 S. W. 546.

²² *Peck v. Bank of America*, 16 R. I. 710, 7 L. R. A. 826, 19 Atl. 369.

²³ *Lowry v. Commercial & Farmers' Bank*, Taney 310, Fed. Cas. No. 8,581; *Albert v. Mayor & City Council of Baltimore*, 2 Md. 159; *Wooten v. Wilmington & W. R. Co.*, 128 N. C. 119, 56 L. R. A. 615, 38 S. E. 298.

In *Lowry v. Commercial & Farmers' Bank*, Taney 310, Fed. Cas. No. 8,581, it was held that the fact that the stock was transferred by one of two executors only, long after the death of the testator, who left a large estate, and without an order of court, was sufficient to put the transfer officer upon inquiry.

Constructive notice to the transfer agent is notice to the corporation, and the corporation is responsible for his act in making the transfer. *Lowry v. Commercial & Farmers' Bank*, Taney 310, Fed. Cas. No. 8,581.

²⁴ *Peck v. Bank of America*, 16 R. I. 710, 7 L. R. A. 826, 19 Atl. 369.

²⁵ *Stewart v. Firemen's Ins. Co. of*

sufficient to give the company notice that it is not made for the purpose of paying debts or legacies, or to put its officers upon inquiry as to the matter.²⁶ Even under such circumstances, however, if the will authorizes the executor to sell such part of the estate as he deems necessary or advisable for the security of the same and to reinvest the proceeds according to his discretion, the corporation is justified in permitting a transfer pursuant to a sale by him, provided nothing further appears to put it upon inquiry.²⁷

The Uniform Stock Transfer Act provides that nothing therein shall be construed as enlarging the powers of an executor or administrator to make a valid indorsement, assignment or power of attorney.²⁸

§ 3842. Unauthorized or fraudulent transfers by guardians.

Where stock belonging to minors stands in the name of their guardian, without anything to indicate that he holds it as guardian, one who purchases the shares from him in good faith and for value, and without notice of the guardianship, is entitled to hold them as against the wards.²⁹ But the contrary is true where the transferee has notice of the guardianship or notice of facts sufficient to put him on inquiry.³⁰ And the corporation is also liable to the wards if

Baltimore, 53 Md. 564; *Peck v. Providence Gas Co.*, 17 R. I. 275, 15 L. R. A. 643, 23 Atl. 967, 21 Atl. 543; *Peck v. Bank of America*, 16 R. I. 710, 7 L. R. A. 826, 19 Atl. 369.

²⁶ Where the transfer by one joint executor is made to his co-executor individually, this is sufficient to give the corporation notice that the payment of debts is not the purpose of the transfer, or at least to put it upon inquiry, since that is not the mode which joint executors would naturally adopt to effectuate such a purpose. *Stewart v. Firemen's Ins. Co. of Baltimore*, 53 Md. 564.

Where the transfer is made to the executrix individually for the purpose of affording security for her indorsement on the note of a third person, the facts are sufficient to put the transfer officer of the corporation upon inquiry. *Peck v. Bank of America*, 16 R. I. 710, 7 L. R. A. 826, 19 Atl. 369.

As to the liability of the corporation if it makes a transfer to one to whom an executor has pledged stock to secure his personal debt, or to a transferee of such pledgee who has knowledge of the facts, see *Davis v. National Eagle Bank (R. I.)*, 50 Atl. 530.

²⁷ *Peck v. Providence Gas Co.*, 17 R. I. 275, 15 L. R. A. 643, 23 Atl. 967, 21 Atl. 543.

²⁸ See section 2 of the act. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

²⁹ *Atkinson v. Atkinson*, 8 Allen (Mass.) 15.

³⁰ Under such circumstances, if the guardian assigns the certificate to indemnify the assignee as surety on his bond, his successor may procure a transfer of the stock to himself as guardian. *Atkinson v. Atkinson*, 8 Allen (Mass.) 15.

it permits an unauthorized transfer by the guardian under the last named circumstances.³¹ But where the guardian has power to sell and transfer the stock, the corporation has no right to prevent a transfer on its books, and cannot be held liable because he misappropriates the proceeds.³² Nor, under such circumstances, is a vendee or pledgee bound to inquire into the guardian's purpose in making the transfer, or to see to the application of the proceeds; and he will take a good title even though the transfer is made by the guardian as security for or in payment of his own debt, provided he has no notice of that fact.³³ If, however, he has knowledge of the guardian's unlawful purpose, he will be liable to account to the ward for the value of the stock.³⁴

If the stock stands on the books in the name of the ward it is the duty of the corporation to inquire as to the authority of the guardian to make the transfer and to refuse to make it until such authority is shown to exist.³⁵ And persons who, as purchasers or pledgees, take certificates of this character indorsed in blank by the guardian are put upon inquiry as to the rights of the ward.³⁶

³¹ Webb v. Graniteville Mfg. Co., 11 S. C. 396, 32 Am. Rep. 479.

The corporation is liable to the ward where it transfers the stock to one to whom the guardian has pledged it as security for his personal debt. *Kempner v. Wallis*, 2 Tex. App. Civ. Cas (Willson) § 584 et seq.

³² Bank of Virginia v. Craig, 6 Leigh (Va.) 399.

³³ Bank of Guntersville v. United States Fidelity & Guaranty Co., — Ala. —, 75 So. 168. See also *Ross v. Southwestern R. Co.*, 53 Ga. 514.

³⁴ Bank of Guntersville v. United States Fidelity & Guaranty Co., — Ala. —, 75 So. 168.

"Although the pledgee might be charged with knowledge of an unlawful purpose by the guardian, if the debt secured is, and appears to be, his pre-existing obligation, yet, if the pledge is for a present loan, though it be given to secure the guardian's personal obligation, and although he omit to designate his action as that of a guardian *eo nomine*, the pledgee with-

out knowledge to the contrary may assume the propriety of the transaction, and will take without liability to account as for a *devastavit*." *Bank of Guntersville v. United States Fidelity & Guaranty Co.*, — Ala. —, 75 So. 168.

³⁵ *Kempner v. Wallis*, 2 Tex. App. Civ. Cas. (Willson) § 584 et seq.

³⁶ If certificates issued in the name of the wards are indorsed in blank by the guardian, as such, and deposited with a bank, and the cashier of the bank embezzles them and pledges them as security for his own debt, there is notice to the pledgees on the face of the certificates that they were trust property while in the hands of the guardian, and they are put upon inquiry and have no right to receive the stock as a pledge for the cashier's debt without at least having information of facts which would warrant them in believing that the ward's interests had been protected in the transaction whereby they came into the cashier's hands, and having made no inquiry, they acquire no title as

If the certificate expresses on its face that the person to whom it is issued holds it as guardian for named wards, this is notice both to the corporation and to any one dealing with the stock that it is the property of the wards.³⁷ And the same is true even where the wards are not named in the certificate.³⁸

If the guardian cannot legally transfer the stock without an order of court, the corporation is charged with knowledge of that fact, and it is its duty to refuse to make a transfer upon its books until such an order is produced, and if it makes a transfer without such an order it is guilty of a breach of trust which renders it liable to the ward.³⁹ If an order of court is necessary and such an order is made, the transferee is chargeable with notice of its contents and with the extent of the authority thereby conferred.⁴⁰

The Uniform Stock Transfer Act provides that nothing therein shall be construed as enlarging the powers of a fiduciary to make a valid indorsement, assignment or power of attorney.⁴¹

§ 3843. Remedies of owner against corporation. If a corporation recognizes a forged or unauthorized assignment of a certificate of stock

against the wards. *O'Herron v. Gray*, 168 Mass. 573, 40 L. R. A. 498, 60 Am. St. Rep. 411, 47 N. E. 429.

³⁷ *Atkinson v. Atkinson*, 8 Allen (Mass.) 15.

³⁸ The corporation is chargeable with notice of the guardianship from the certificate. *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396, 32 Am. Rep. 479.

Where stock standing in the name of certain persons as executors of a named person is by them transferred to one as guardian, the corporation has knowledge of the sources from which it may obtain information as to the persons represented by the guardian, and it must be assumed that it either had full knowledge of their names or improperly neglected to inform themselves of the subject. *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396, 32 Am. Rep. 479. In this case stock standing in the name of executors was transferred on the books to one as guardian and a new certificate issued to him

as guardian. He indorsed it in blank and placed it in the hands of his counsel for purposes connected with the guardianship. The latter hypothecated it to a bank for money loaned for his personal use. The president of the corporation and another purchased the stock from the bank. It was held that the corporation was chargeable with notice of the breach of trust and was liable for making a transfer to the purchaser.

³⁹ *Kempner v. Wallis*, 2 Tex. App. Civ. Cas. (Willson) § 584 et seq.

⁴⁰ An order authorizing a sale of stock for purposes of reinvestment does not authorize the guardian to hypothecate the stock, and if he does so a purchaser from the pledgee is chargeable with notice of his breach of trust. *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396, 32 Am. Rep. 479.

⁴¹ See section 2 of the act. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

and power of attorney to transfer the same, and registers the transfer on its books, or if it registers a transfer without any assignment or authority from the owner, it is guilty of a conversion of the shares, and the registered owner may maintain an action against it for damages,⁴² unless he is estopped to assert his title.⁴³ Or such an action may be maintained by a transferee of the registered owner, after he has demanded a transfer on the books of the corporation, and been refused.⁴⁴

42 United States. First Nat. Bank of South Bend v. Lanier, 11 Wall. 369, 20 L. Ed. 172; Geyser-Marion Gold-Min. Co. v. Stark, 106 Fed. 558.

California. Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64, 65 Pac. 143; Tafft v. Presidio & F. R. Co., 84 Cal. 131, 11 L. R. A. 125, 18 Am. St. Rep. 166, 24 Pac. 436; Quay v. Presidio & F. R. Co., 82 Cal. 1, 22 Pac. 925.

Illinois. Chicago Edison Co. v. Fay, 164 Ill. 323, 45 N. E. 534, aff'g 62 Ill. App. 55. See Miller v. Doran, 151 Ill. App. 527, aff'd 245 Ill. 200, 91 N. E. 1039.

Indiana. Vernon, G. & R. R. Co. v. Washington Tp. Decatur Co., 48 Ind. App. 309, 95 N. E. 599.

Louisiana. Woodhouse v. Crescent Mut. Ins. Co., 35 La. Ann. 238, 241; Factors' & Traders' Ins. Co. v. Marine Dry Dock & Shipyard Co., 31 La. Ann. 149.

Maryland. Hughes v. Drovers' & Mechanics' Nat. Bank, 86 Md. 418, 38 Atl. 936; Marbury v. Ehlen, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648.

Missouri. Withers v. Lafayette County Bank, 67 Mo. App. 115.

New York. Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Pollock v. National Bank, 7 N. Y. 274, 57 Am. Dec. 520; Cooper v. Illinois Cent. R. Co., 38 App. Div. 22, 57 N. Y. Supp. 925; Smith v. American Coal Co., 7 Lans. 317.

North Carolina. Wooten v. Wil-

mington & W. R. Co., 128 N. C. 119, 56 L. R. A. 615, 38 S. E. 298.

Pennsylvania. Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Franklin Fire Ins. Co., 181 Pa. St. 40, 37 L. R. A. 780, 37 Atl. 191; Bayard v. Farmers' & Mechanics' Bank of Philadelphia, 52 Pa. St. 232.

Tennessee. Caulkins v. American Gas-Light Co., 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S. W. 237.

Texas. Baker v. Wasson, 59 Tex. 140, 53 Tex. 150; Strange v. Houston & T. Cent. R. Co., 53 Tex. 162.

Utah. Rasmussen v. Sevier Valley Canal Co., 40 Utah 371, 121 Pac. 741.

Washington. Nagel v. Ham, Yearsley & Ryrie, 88 Wash. 99, 152 Pac. 520.

West Virginia. See La Belle Iron Works v. Quarter Sav. Bank, 74 W. Va. 569, 82 S. E. 614.

Wisconsin. Casper v. Kalt-Zimmers Mfg. Co., 159 Wis. 517, 150 N. W. 1101, 149 N. W. 754.

England. See Harrison v. Pryse, Barnard Ch. 324.

As to the quantum of proof that the stock was stolen required in an action against the corporation for conversion, see Cooper v. Spring Valley Water Co., 16 Cal. App. 17, 116 Pac. 298.

⁴³ See § 3853, *infra*.

⁴⁴ See Mahaney v. Walsh, 16 N. Y. App. Div. 601, 44 N. Y. Supp. 969; Birdsall v. Davenport, 43 Hun (N. Y.) 552.

And see § 3819, *supra*.

Instead of suing at law for conversion, the owner of stock which has been transferred by the corporation on its books under a forged or unauthorized assignment and power of attorney may maintain a suit in equity to compel the corporation to replace the shares on its books in his name, and issue to him a proper certificate, or, in the alternative, to recover a judgment for their value.⁴⁵ And it has been held that it

45 United States. *St. Romes v. Levee Steam Cotton Press Co.*, 127 U. S. 614, 32 L. Ed. 289; *Western U. Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654; *Wilson v. Colorado Min. Co.*, 227 Fed. 721.

California. *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143.

Georgia. *Blaisdell v. Bohr*, 68 Ga. 56.

Illinois. *Chicago Edison Co. v. Fay*, 164 Ill. 323, 45 N. E. 534, aff'd 62 Ill. App. 55; *Doran v. Miller*, 124 Ill. App. 551, 151 Ill. App. 527, aff'd 245 Ill. 200, 91 N. E. 1039.

Indiana. *Vernon, G. & R. R. Co. v. Washington Tp. Decatur Co.*, 48 Ind. App. 309, 95 N. E. 599.

Louisiana. *Leurey v. Bank of Baton Rouge*, 131 La. 30, Ann. Cas. 1913 E 1168, 58 So. 1022.

Maryland. *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648; *Brown v. Howard Fire Ins. Co.*, 42 Md. 384, 20 Am. Rep. 90.

Massachusetts. *Pratt v. Taunton Copper Mfg. Co.*, 123 Mass. 110, 25 Am. Rep. 37.

Michigan. *Walker v. Detroit Transit Ry. Co.*, 47 Mich. 338, 11 N. W. 187.

Missouri. *Withers v. Lafayette County Bank*, 67 Mo. App. 115.

New York. *Brisbane v. Delaware, L. & W. R. Co.*, 94 N. Y. 204; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *Wells v. Smith*, 7 Abb. Pr. 261. See also *Jennie Clarkson Home for Children v. Chesapeake & O. R. Co.*, 41 Misc. 214,

83 N. Y. Supp. 913, aff'd 92 App. Div. 491, 87 N. Y. Supp. 348, 182 N. Y. 508, 74 N. E. 1118.

Ohio. *Cleveland & M. R. Co. v. Robbins*, 35 Ohio St. 483.

Oklahoma. *Litchfield v. Henson Oil Co.*, 157 Pac. 137.

Pennsylvania. *Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Franklin Fire Ins. Co.*, 181 Pa. St. 40, 37 L. R. A. 780, 37 Atl. 191.

Tennessee. *Read v. Cumberland Telegraph & Telephone Co.*, 93 Tenn. 482, 27 S. W. 660.

Texas. *Baker v. Wasson*, 59 Tex. 140, 53 Tex. 150.

West Virginia. *Snyder v. Charleston & S. Bridge Co.*, 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616.

Wisconsin. *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 150 N. W. 1101, 149 N. W. 754.

England. *Ashby v. Blackwell, Ambler* 503, '2 Eden 299; *Hildyard v. South Sea Co.*, 2 P. Wms. 76.

"The owner may sue in tort as for a conversion but he is not compelled to do so, and thereby give up his position as a stockholder." *Miller v. Doran*, 151 Ill. App. 527, aff'd 245 Ill. 200, 91 N. E. 1039.

The decree in such a suit properly directs the corporation to return the stock or to pay its value on the day when the decree is entered. *Miller v. Doran*, 151 Ill. App. 527, aff'd 245 Ill. 200, 91 N. E. 1039.

An averment of the par value of the stock in such a suit is a sufficient allegation of its value as against a demurrer since the par value of stock

is not necessary to pray for alternative relief in damages under such circumstances, where, upon the facts stated, the plaintiff is entitled to equitable relief.⁴⁶

According to the weight of authority, when a corporation recognizes and registers a forged or unauthorized transfer of stock, and refuses to recognize the rights of the true owner, the measure of damages in an action by the latter against the corporation is the value of the stock at the time of such refusal, with interest to the time of the trial.⁴⁷

The true owner of the stock is also entitled to recover from the corporation all dividends which have accrued thereon since the wrongful transfer, whether it has paid the same to the transferee or not.⁴⁸

Ordinarily the cause of action for damages accrues when the illegal transfer is made, and the statute of limitations begins to run at that time.⁴⁹ But it has been held that where stock is transferred on the books and a new certificate issued without a surrender of the original certificate, the statute of limitations does not commence to run against the holder of the original certificate until a transfer to him on the corporate books is refused or until he has notice that the stock has been transferred to other parties.⁵⁰ And as in other cases where the owner has both a legal and an equitable remedy for the same wrong, the statute runs upon the equitable remedy and bars that when it has run against the legal remedy.⁵¹ Where stock is transferred in derogation of the rights of a remainderman, his right of action against the corporation to recover the stock, or, in the alternative, its value, does

is prima facie its actual value. *Vernon, G. & R. R. Co. v. Washington Tp. Decatur Co.*, 48 Ind. App. 309, 95 N. E. 599.

⁴⁶ *Vernon, G. & R. R. Co. v. Washington Tp. Decatur Co.*, 48 Ind. App. 309, 95 N. E. 599. See also *Snyder v. Charleston & S. Bridge Co.*, 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616.

⁴⁷ See § 3449 et seq., *supra*.

⁴⁸ *United States. Western U. Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047; *Wilson v. Colorado Min. Co.*, 227 Fed. 721.

California. *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143.

Georgia. *Blaisdell v. Bohr*, 68 Ga. 56.

Massachusetts. *Pratt v. Taunton*

Copper Mfg. Co., 123 Mass. 110, 25 Am. Rep. 37.

West Virginia. *Snyder v. Charleston & S. Bridge Co.*, 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616.

⁴⁹ *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 150 N. W. 1101, 149 N. W. 754.

⁵⁰ *Cleveland & M. R. Co. v. Robbins*, 35 Ohio St. 483.

⁵¹ *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 150 N. W. 1101, 149 N. W. 754.

The statutory provision that a cause of action for fraud shall not be deemed to accrue until the discovery of the fraud relates to a fraud for which the sole redress is an action in equity. *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 150 N. W. 1101, 149 N. W. 754.

not accrue, and the statute of limitations does not commence to run, until the happening of the event on which he is to take.⁵²

The right to relief in equity may be lost by laches.⁵³

In an action against the corporation for damages for an unauthorized transfer the complaint must allege facts showing a violation of a legal duty by the defendant. Mere general statements by way of conclusion that the transfer was made wrongfully and without authority are insufficient.⁵⁴ Where the corporation alleges that the person to whom the transfer was made is the true owner of the stock, he should be made a party before proceeding further, in order that the whole matter may be adjudicated in one action and the interests of all concerned may be protected.⁵⁵

If the shares still stand on the books of the corporation in the name of the person from or through whom the plaintiff acquired title, he may sue to compel the corporation to transfer the same to him on its books, and to issue him a new certificate, making the claimant under the forged or unauthorized transfer a party defendant.⁵⁶

If the stock still stands in the name of the true owner he may sue to enjoin the corporation from registering the transfer.⁵⁷

§ 3844. Liability of corporation to holder of prior equitable title.

Where a corporation acts in good faith and without negligence in allowing a transfer by one who appears to be the absolute owner of shares, it is not liable to one having a mere equitable title by virtue of a prior unregistered transfer, or otherwise, of which it has no notice.⁵⁸ But it is liable if it has actual notice of the equitable title, or

⁵² *Baker v. Atlantic Coast Line R. Co.*, — N. C. —, 92 S. E. 170; *Wooten v. Wilmington & W. R. Co.*, 128 N. C. 119, 56 L. R. A. 615, 38 S. E. 298.

⁵³ *Snyder v. Charleston & S. Bridge Co.*, 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616.

⁵⁴ *Rasmussen v. Sevier Valley Canal Co.*, 40 Utah 371, 121 Pac. 741.

⁵⁵ *Rasmussen v. Sevier Valley Canal Co.*, 40 Utah 371, 121 Pac. 741.

⁵⁶ *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 2 L. R. A. 836, 7 Am. St. Rep. 73, 5 So. 317; *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; *Rasmussen v. Sevier Valley Canal Co.*, 40 Utah 371, 121 Pac. 741.

⁵⁷ *Reynolds v. Touzalin Improvement Co.*, 62 Neb. 236, 87 N. W. 24.

⁵⁸ *Leurey v. Bank of Baton Rouge*, 131 La. 30, Ann. Cas. 1913 E 1168, 58 So. 1022; *Loring v. Salisbury Mills*, 125 Mass. 138; *Shattuck v. American Cement Co.*, 205 Pa. 197, 97 Am. St. Rep. 735, 54 Atl. 785.

While a corporation is bound to protect its stockholders against unauthorized transfers by requiring satisfactory evidence of authority to transfer, it is not bound, where the power to transfer appears, to inquire whether the transferrer is attempting a fraud. *Hughes v. Drovers' & Mechanics' Nat. Bank*, 86 Md. 418, 38 Atl. 936.

if the form of the certificate or other circumstances are sufficient to put it upon inquiry.⁵⁹ These principles apply to transfers by persons holding the title to shares as trustees,⁶⁰ executors⁶¹ or guardians.⁶²

§ 3845. Liability of transferee to true owner. When certificates of stock have been transferred under a forged assignment and power of attorney, or when they have been lost or stolen, without negligence, after having been indorsed or assigned in blank, and have been transferred by the finder or thief, the true owner may recover the certificate from the transferee or any subsequent transferee; or he may join him in a suit against the corporation to compel a transfer or retransfer on its books, according to the circumstances.⁶³ Or he may maintain an action for conversion against the transferee to recover the value of the stock, even after the latter has sold and transferred the same to another.⁶⁴ And the same is true even though the owner has been negligent if the transferee takes with knowledge of the facts, or with notice of facts sufficient to put him on inquiry.⁶⁵ The owner may also recover from the transferee any dividends received by him.⁶⁶

The title of a minor to the interest in community property inherited by him from one of his parents is a legal and not a mere equitable title. *Leurey v. Bank of Baton Rouge*, 131 La. 30, Ann. Cas. 1913 E 1168, 58 So. 1022.

⁵⁹ *Loring v. Salisbury Mills*, 125 Mass. 138; *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115.

⁶⁰ See § 3838, *supra*.

⁶¹ See § 3841, *supra*.

⁶² See § 3842, *supra*.

⁶³ **United States.** See *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654.

Alabama. *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 2 L. R. A. 836, 7 Am. St. Rep. 73, 5 So. 317.

California. *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349.

Louisiana. *State v. Bank of Baton Rouge*, 125 La. 138, 136 Am. St. Rep. 332, 51 So. 95.

Maryland. *Brown, Lancaster & Co. v. Howard Fire Ins. Co.*, 42 Md. 384, 20 Am. Rep. 90.

New York. *Wells v. Smith*, 7 Abb. Pr. 261.

England. *Hildyard v. South Sea Co.*, 2 P. Wms. 76.

⁶⁴ **Louisiana.** *State v. Bank of Baton Rouge*, 125 La. 138, 136 Am. St. Rep. 332, 51 So. 95.

Maryland. *Merchants' Nat. Bank v. Williams*, 110 Md. 334, 72 Atl. 1114; *German Sav. Bank of Baltimore City v. Renshaw*, 78 Md. 475, 28 Atl. 281.

Nevada. *Bercich v. Marye*, 9 Nev. 312.

New York. *Anderson v. Nicholas*, 28 N. Y. 600; *Reichard v. Hutton*, 158 App. Div. 122, 142 N. Y. Supp. 935, 148 App. Div. 813, 133 N. Y. Supp. 44; *Kilmer v. Hutton*, 131 App. Div. 625, 116 N. Y. Supp. 127.

England. *Harrison v. Pryse, Barn.* Ch. 324; *Monk v. Graham*, 8 Mod. 9.

⁶⁵ *Davis v. Finch*, 236 Fed. 89. See also *German Sav. Bank of Baltimore City v. Renshaw*, 78 Md. 475, 28 Atl. 281.

See also § 3854, *infra*.

⁶⁶ *Hildyard v. South Sea Co.*, 2 P. Wms. 76.

The foregoing rules apply only to transferees of the original certificate. If the corporation issues new certificates to the transferee, the original owner has no remedy against persons who purchase them in good faith and for value even though the first transfer was unauthorized or forged.⁶⁷

§ 3846. Liability of transferee to corporation. When a person holding a certificate of stock under a forged or unauthorized transfer presents the same to the corporation, and induces it to register the same, and issue to him a new certificate, he impliedly represents that his title is good, and the transfer genuine or authorized, and the corporation may maintain an action against him for any damages which it may sustain by reason of its liability to the true owner. And in such a case, the fact that he acted in good faith, and in the belief that the transfer of the original certificate was genuine or authorized is immaterial.⁶⁸ "If one buys stock and takes a transfer," it was said in a Massachusetts case, "and presents the certificate to the corporation and demands a new one, he thereby impliedly represents that he is entitled to the new certificate. He demands it as his right; this implies that he is the owner and has a right to it. The corporation has the right to understand him as asserting this. It is not bound to question or investigate the genuineness of the transfer, and see if the purchaser has not been defrauded. When the purchaser presents his transfer and certificate, the transfer officer naturally understands that he claims the transfer to be valid, and to have a right to a certificate; he has the right to act as if this had been said in terms. And if, relying upon such tacit and implied representations, the corporation suffers a loss, the purchaser who misled it is liable."⁶⁹ Even if the corporation has been guilty of negligence in recognizing the transfer as genuine, this does not preclude it as against the transferee, unless its negligence was the proximate cause of the transferee's loss.⁷⁰

If the new certificate which the corporation has been induced to issue in reliance on the forged or unauthorized transfer is still in the hands of the person who procured its issuance, or is in the hands of

⁶⁷ See § 3848, *infra*.

⁶⁸ *Hambleton v. Central Ohio R. Co.*, 44 Md. 551; *Brown, Lancaster & Co. v. Howard Fire Ins. Co.*, 42 Md. 384, 20 Am. Rep. 90; *Boston & A. R. Co. v. Richardson*, 135 Mass. 473; *Simm v. Anglo-American Tel. Co.*, 5 Q. B. D. 188. *Contra*, *Ashby v. Blackwell*, *Ambler* 503, 2 *Eden* 299.

As to the measure of damages in such a case, see *Boston & A. R. Co. v. Richardson*, 135 Mass. 473.

⁶⁹ *Morton, C. J.*, in *Boston & A. R. Co. v. Richardson*, 135 Mass. 473.

⁷⁰ *Brown, Lancaster & Co. v. Howard Fire Ins. Co.*, 42 Md. 384, 20 Am. Rep. 90.

a transferee from him who does not occupy the position of a bona fide purchaser for value, the corporation may repudiate the certificate, and maintain a suit in equity to compel its surrender, or to cancel it. Issuing new certificates of stock on the faith of forged powers of transfer on the back of the original certificates creates no estoppel against the corporation in favor of the person presenting the forged power, and obtaining the new certificate.⁷¹

This does not apply, however, where the certificate has passed into the hands of a bona fide purchaser for value. Where a corporation recognizes and registers a forged or unauthorized transfer, and issues a new certificate, although it may act in the most perfect good faith, it has no remedy against subsequent bona fide purchasers of the new certificate, for as against them it is estopped to deny the validity of the certificate. In such a case, the purchaser does not claim under the original certificate, or under the forged or unauthorized transfer of it, but claims under the new certificate issued by the corporation, and the corporation, since it is estopped to deny the validity of this certificate, cannot maintain an action to cancel the same.⁷²

It has been held that the corporation cannot hold the person inducing the transfer liable where the defect in the transfer is patent.⁷³

⁷¹ *Hambleton v. Central Ohio R. Co.*, 44 Md. 551; *Brown, Lancaster & Co. v. Howard Fire Ins. Co.*, 42 Md. 384, 20 Am. Rep. 90; *Houston & T. Cent. R. Co. v. Van Alstyne*, 56 Tex. 439, 440; *Hildyard v. South Sea Co.*, 2 P. Wms. 76; *Simm v. Anglo-American Tel. Co.*, 5 Q. B. Div. 188. *Contra*, *Ashby v. Blackwell*, *Ambler* 503, 2 *Eden* 299.

⁷² *Louisiana. Factors' & Traders' Ins. Co. v. Marine Dry Dock & Shipyard Co.*, 31 La. Ann. 149.

Massachusetts. Machinist's Nat. Bank v. Field, 126 Mass. 345.

Michigan. Mandlebaum v. North American Min. Co., 4 Mich. 465.

New York. New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30.

England. In re Bahia & S. F. Ry. Co., L. R. 3 Q. B. 584.

Where A. presented to a bank a forged power of attorney to transfer to himself shares of stock standing in the name of another, and the bank issued a new certificate to him, and

he delivered the same to B. as collateral security for his indebtedness to the latter, and B. presented it to the bank for transfer to him under a power of attorney from A., and the bank issued a certificate to him, and afterwards, in aid of its claims against A., purchased his notes from B., taking a transfer of the stock as collateral, it was held that the bank could not hold B. liable on account of the forgery, of which he was ignorant. *Philadelphia Nat. Bank v. Smith*, 195 Pa. St. 38, 45 Atl. 655.

If the corporation issues a new certificate to the purchaser under such circumstances, it cannot compel him to surrender the same even though it is thereafter compelled to issue a new certificate to the original owner and as a result has more stock outstanding than is permitted by law. *Machinist's Nat. Bank v. Field*, 126 Mass. 345.

⁷³ As where a guardian procures a transfer of stock standing in the

And there is some authority to the effect that the mere presentation of the transfer, without more, does not amount to a representation that it is valid, but merely that it is valid in so far as the person presenting it knows, and that if such person acts in good faith and without knowledge of its invalidity the corporation cannot hold him liable.⁷⁴

§ 3847. Liability of corporation to transferee. A person who is defrauded by a forged or unauthorized transfer has his remedy, of course, against the transferrer. He also has a right of action against the corporation if there was collusion or fraud on its part, but not otherwise. In the absence of any fraud or collusion on the part of a corporation, the mere transfer of stock by it on its books to a purchaser by direction of the seller does not make the company liable as a guarantor of the seller's title to the stock.⁷⁵ So a purchaser or pledgee of a certificate of stock upon which an assignment by the true owner has been forged, and who has surrendered the certificate to the company, and received from it a new certificate in lieu thereof, has no remedy against the corporation upon the true owner's recovering the certificate from him. The corporation incurs no liability to him by reason of its permitting the transfer under the forged assignment, for it is his duty to see that the transfer is genuine.⁷⁶ On the con-

name of his ward, but fails to present an order of court authorizing the transfer, which is necessary to its validity. *Kempner v. Wallis*, 2 Tex. App. Civ. Cas. (Willson) § 584 et seq.

⁷⁴*Kempner v. Wallis*, 2 Tex. App. Civ. Cas. (Willson) § 584 et seq. See also opinion of Judge Lindley in *Telegraph Co. v. Spurling*, 5 Q. B. D. 188.

⁷⁵*Nutting v. Thomason*, 46 Ga. 34; *Central Railroad & Banking Co. v. Ward*, 37 Ga. 515.

⁷⁶*Hambleton v. Central Ohio R. Co.*, 44 Md. 551; *Brown, Lancaster & Co. v. Howard Fire Ins. Co.*, 42 Md. 384, 20 Am. Rep. 90; *Trimble v. Wollman*, 71 Mo. App. 467.

But where a new certificate is issued to the transferee of a forged certificate, and the transferee parts with value wholly on the faith of the new issue, the corporation may be liable on the new certificate. *Trimble v. Wollman*, 71 Mo. App. 467.

One to whom a corporation has transferred stock on its books, at his request, and on his statement that he had bought and paid for the same, cannot afterwards assert, as against the corporation, that he purchased the stock on the faith of the transfer on the books. *Trimble v. Wollman*, supra.

In *Moore v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385, it is said that the liability of the corporation to the person to whom the new certificate is issued "is a question upon which there appears to have been a difference of opinion in England. According to the decision of Lord Northington in *Ashby v. Blackwell*, 2 Eden 299; *S. C. Ambler* 503; it would seem that the corporation would be liable. According to the decision of Sir Joseph Jekyll in *Hildyard v. South Sea Company*, 2 P. Wms. 76, and the Court of Appeal in *Simm v. Anglo-American Telegraph*

trary he is liable to the corporation for breach of his implied representation that his title is good and that the transfer is genuine and authorized.⁷⁷ But the corporation must respond in damages to one who in good faith and for value purchases the new certificate from the person to whom it is issued, since he purchases on the faith of the certificate.⁷⁸

A corporation is not responsible for the act of one of its officers in forging an assignment of the stock of one of its stockholders, or of the act of another of its officers in witnessing such forged assignment, since such acts are not within the scope of their employment.⁷⁹

Where a certificate, indorsed in blank and pledged as collateral by the owner, is stolen and transferred by an employee of the pledgee, the transfer agent of the corporation, to whom it is presented for transfer on the books, is not liable, either in contract or tort, to the transferee for refusal to return the certificate to him or to issue a new one therefor.⁸⁰

§ 3848. Rights and liabilities of purchaser of new certificate. "A purchaser for value from the last registered stockholder and to whom new certificates have been issued, without notice, is not affected by the rights of holders back of the registry."⁸¹ The owner of shares which have been transferred by the corporation on its books under a forged power of attorney or without authority has no right of action against a bona fide purchaser of the shares who purchased, not the original certificates, but a new certificate issued by the corporation.⁸² And

Company, 5 Q. B. D. 188, it would seem that it would not, because the holder of the new certificate takes it, not on the faith of that or any other certificate of the corporation, but on the faith of the forged power of attorney."

⁷⁷ See § 3846, *supra*.

⁷⁸ See § 3848, *infra*.

⁷⁹ *Second Nat. Bank City of New York v. Curtiss*, 2 N. Y. App. Div. 508, 37 N. Y. Supp. 1028, *aff'd* 153 N. Y. 681, 48 N. E. 1107.

⁸⁰ *Barstow v. City Trust Co.*, 216 Mass. 330, 103 N. E. 911.

⁸¹ *Winter v. Montgomery Gas-Light Co.*, 89 Ala. 544, 7 So. 773.

"The purchaser looks to the genuineness of the certificates, and the indicia of ownership appearing on their

face; he is without means to ascertain the rights of his vendor. If the purchaser were required to look beyond the last registry on the books of the corporation to ascertain whether there are any equities or whether the stock was held in trust, facility in disposing of them would be greatly obstructed, if not destroyed." *Winter v. Montgomery Gas-Light Co.*, 89 Ala. 544, 7 So. 773.

⁸² *United States*. *Lowry v. Commercial & Farmers' Bank*, Taney 310, Fed. Cas. No. 8,581.

Alabama. *Winter v. Montgomery Gas-Light Co.*, 89 Ala. 544, 7 So. 773.

California. *Tafft v. Presidio & F. R. Co.*, 84 Cal. 131, 11 L. R. A. 125, 18 Am. St. Rep. 166, 24 Pac. 436.

Louisiana. *State v. Bank of Baton*

since the issuance by the corporation of the certificate is a declaration to the world that the person therein named is the owner of the stock called for by the certificate,⁸³ such a purchaser is entitled to have the corporation recognize him as a stockholder,⁸⁴ and may compel it to transfer the stock to him on its books and to issue a new certificate to

Rouge, 125 La. 138, 136 Am. St. Rep. 332, 51 So. 95.

Massachusetts. *Pratt v. Taunton Copper Mfg. Co.*, 123 Mass. 110, 25 Am. Rep. 37.

Pennsylvania. *Westinghouse v. German Nat. Bank*, 196 Pa. St. 249, 43 Atl. 380; *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232.

Texas. *Baker v. Wasson*, 53 Tex. 150, 59 Tex. 140.

Utah. See *Kimball v. Success Min. Co.*, 38 Utah 78, 110 Pac. 872.

Where a person in whose name stock stands as trustee transfers it, without authority, to a third person who surrenders the certificates to the company and procures new ones to be issued to himself, and then indorses them to the trustee individually and delivers them to him, and the trustee then pledges them, the pledgee will be protected as against the cestui que trust. *Winter v. Montgomery Gas-Light Co.*, 89 Ala. 544, 7 So. 773.

Where certificates of stock were taken without the owner's knowledge, and, with a forged power of attorney, delivered to auctioneers for sale, and they sold the shares, delivering to the purchaser a new certificate in their own name issued to them by the corporation, and the purchaser presented this certificate to the corporation, and received a new certificate in his own name, it was held, in a suit by the owner of the original certificates against the corporation and the purchaser, that he was entitled to a decree against the corporation requiring it to issue to him a new certificate, and for dividends on the shares, but not to a decree against

the purchaser. In this case the purchaser did not take the original certificates, but took the new certificates issued by the corporation to the auctioneers, and his rights against the corporation depended upon the effect of this certificate, which could only be determined in a suit between them. The question was one with which the plaintiff was not in any way concerned. *Pratt v. Taunton Copper Mfg. Co.*, 123 Mass. 110, 25 Am. Rep. 37.

Where stock indorsed in blank is delivered by the owner to a broker as collateral security, and the broker surrenders the certificate to the corporation and a new one is issued to him in his own name, which he pledges for his own debt with a person who has no knowledge of the fact that the ownership is in another, the pledgee's rights are superior to those of the true owner. *Westinghouse v. German Nat. Bank*, 196 Pa. St. 249, 46 Atl. 380.

⁸³ See §§ 3483, 3487, *supra*.

⁸⁴ A bona fide purchaser of the stock for value to whom the certificate properly indorsed is delivered is entitled to be recognized by the corporation as the owner of the stock, and cannot be required as a condition precedent to such recognition to litigate his title with a third person who claims under a certificate which had previously been surrendered and canceled, the question whether the cancellation and the issuance of the new certificate were authorized being one which the corporation and such third person must settle between themselves. *State v. Bank of Baton Rouge*,

him,⁸⁵ or may compel it to respond to him in damages,⁸⁶ especially where the certificate is absolutely void because it is in excess of the amount of stock which the corporation is authorized to issue.⁸⁷ Nor, as we have seen, can the corporation maintain an action against him to cancel the certificate.⁸⁸

Generally the foregoing rules apply only where the transferee of the new certificates is a bona fide purchaser for value.⁸⁹ "The corporation is not liable to any one taking with notice of the forgery in the transfer, or of any other fact tending to show that the new certificate has been irregularly issued, unless the corporation has ratified, or received some benefit from, the transaction."⁹⁰ And, as we have seen, it may repudiate the certificate as to him, and may maintain a suit in equity to compel its surrender or to cancel it.⁹¹ The original owner has a remedy against the purchaser for damages if the latter takes with notice of the facts,⁹² or where the new certificates are issued as a result of a fraudulent combination between the purchaser and the corpora-

125 La. 138, 136 Am. St. Rep. 332, 51 So. 95.

⁸⁵ *Winter v. Montgomery Gas-Light Co.*, 89 Ala. 544, 7 So. 773.

⁸⁶ *United States. Moores v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385.

Colorado. Supply Ditch Co. v. Elliott, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691.

Louisiana. State v. New Orleans Cotton Exchange, 114 La. 324, 38 So. 204.

Mississippi. People's Bank v. Lamar County Bank, 107 Miss. 852, 67 So. 961, 66 So. 219.

West Virginia. La Belle Iron Works v. Quarter Sav. Bank, 74 W. Va. 569, 82 S. E. 614.

"The corporation is obliged, if not to recognize the last purchaser as a stockholder also, at least to respond to him in damages for the value of the stock, because he has taken it for value without notice of any defect, and on the faith of the new certificate issued by the corporation." *Moores v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385.

⁸⁷ See § 3467 et seq., supra.

⁸⁸ See § 3846, supra.

⁸⁹ One who accepts stock in payment of a debt due him is a purchaser for value. *People's Bank v. Lamar County Bank*, 107 Miss. 852, 67 So. 961, 66 So. 219.

⁹⁰ *Moores v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385.

⁹¹ See § 3846, supra.

⁹² *Baker v. Wasson*, 59 Tex. 140, 53 Tex. 150.

While the nonproduction of the original certificate by the purchaser is not necessarily fatal to his title, the fact that it is not produced may be sufficient to put him upon inquiry as to its ownership. *Baker v. Wasson*, 59 Tex. 140, 53 Tex. 150. In this case the new certificate was issued by the secretary of the corporation to himself, and it was held that the nonproduction of the original certificate was sufficient to put him upon inquiry, since a transfer without its production was in violation of a by-law of which he could not be presumed to be ignorant, in view of his relationship to the company.

tion, with the purpose of defeating the just rights of the true owner and under circumstances which would make the corporation liable.⁹³ Nor is the person to whom the new certificate is issued relieved from liability under such circumstances by reason of the fact that he was acting as agent for a third person.⁹⁴ But it has been held that if a corporation, with full knowledge that a certificate of stock indorsed in blank has been lost or stolen, and after having been notified by the owner not to recognize any transfer of the same, recognizes and registers a transfer, and issues a new certificate to the transferee, contrary to such instructions, subsequent purchasers of the certificate, even though they may have notice of the circumstances under which it was issued, have a right to rely on the act of the corporation in issuing it, and to assume that it is valid and binding, and that such a purchaser may recover damages from the corporation if it refuses to register the transfer to him.⁹⁵

§ 3849. Liability of person selling stock as broker or agent. It is a general principle that a person who acts as agent in selling property for one who has no title, although he acts in good faith, is guilty of a conversion. "It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrongdoer, the agent is a wrongdoer also. A person is guilty of a conversion who sells the property of another, without authority from the owner, notwithstanding he acts under the authority of one claiming to be the

⁹³ If the secretary of the company cancels stock standing on the books, without the consent of the owner, and issues a certificate therefor to himself, through which the stock passes into the hands of an innocent purchaser, he is liable to the owner for his resulting damage. In such case the owner has a remedy against both the corporation and the purchaser for damages. Nor will the fact that he may have a better right to the stock than the purchaser preclude him from abandoning his right to it and suing for damages as for a conversion. *Baker v. Wasson*, 59 Tex. 140, 53 Tex. 150.

⁹⁴ *Baker v. Wasson*, 59 Tex. 140, 53 Tex. 150.

⁹⁵ *Mandlebaum v. North American*

Min. Co., 4 Mich. 465. In this case a certificate of stock, having upon it a blank power of attorney to transfer the same, having been lost or stolen, the corporation was notified of the loss, and requested not to make any transfer on its books. It instructed the loser how to proceed to obtain a new certificate by giving a bond of indemnity, but he neglected to do so. Four months afterwards the certificate was bought by a person in good faith, and the corporation transferred the stock to him on its books, and issued to him a new certificate, which he afterwards sold. It was held that, although the purchaser of the certificate purchased with notice of all the facts, the corporation was estopped to deny his

owner, and is ignorant of such person's want of title."⁹⁶ It follows that a stockbroker or other agent, who sells certificates of stock received by him for sale from one who has stolen them, is guilty of a conversion of the stock, and liable therefore to the true owner, although the thief may have represented himself to be the owner, and the broker or agent may have acted in good faith, and may have paid the proceeds over to the thief.⁹⁷ But a broker who in good faith sells stock at the instance of a person other than the true owner is not liable to the latter where the circumstances are such as to estop such owner from asserting title as against the purchaser.⁹⁸

§ 3850. Liability of bailee for conversion. If a bailee sells or pledges the property intrusted to him, without authority, or if he delivers it to the wrong person, he is liable to the bailor for conversion; and this is just as true of a pledgee or other bailee of a certificate of stock as a bailee of any other property.⁹⁹ The fact that he is a gratuitous bailee is immaterial. A gratuitous bailee of stock is liable for conversion if, without authority from the owner, he delivers the certificate to the officers of the corporation, and induces them to cancel the same and issue a new certificate to another person, although he may have acted in good faith, and on a forged transfer.¹

§ 3851. Liability of vendor for conversion after sale. A seller of shares of stock may be guilty of a conversion after the sale, and liable therefor to the purchaser. So where the holder of a certificate of stock

ownership, or refuse to transfer the stock to him.

⁹⁶ *Kimball v. Billings*, 55 Me. 147, 92 Am. Dec. 581, quoted with approval in *Swim v. Wilson*, 90 Cal. 126, 13 L. R. A. 605, 25 Am. St. Rep. 110, 27 Pac. 33; *Bercich v. Marye*, 9 Nev. 312.

See standard works on agency.

⁹⁷ *Swim v. Wilson*, 90 Cal. 126, 13 L. R. A. 605, 25 Am. St. Rep. 110, 27 Pac. 33; *Bercich v. Marye*, 9 Nev. 312; *Jennie Clarkson Home for Children v. Chesapeake & O. R. Co.*, 41 N. Y. Misc. 214, 83 N. Y. Supp. 913, aff'd 92 N. Y. App. Div. 491, 87 N. Y. Supp. 348, 182 N. Y. 508, 74 N. E. 1118.

⁹⁸ *National Safe Deposit, Savings & Trust Co. v. Hibbs*, 229 U. S. 391,

57 L. Ed. 1241, aff'g 32 App. Cas. (D. C.) 459.

"The principles which underlie equitable estoppel place the loss upon him whose misplaced confidence has made the wrong possible." *National Safe Deposit, Savings & Trust Co. v. Hibbs*, 229 U. S. 391, 57 L. Ed. 1241, aff'g 32 App. Cas. (D. C.) 459.

⁹⁹ *Chew v. Louchheim*, 80 Fed. 500; *Hubbell v. Blandy*, 87 Mich. 209, 24 Am. St. Rep. 154, 49 N. W. 502; *Wright v. Bank of Metropolis*, 110 N. Y. 237, 1 L. R. A. 289, 6 Am. St. Rep. 356, 18 N. E. 79.

See standard works on bailments.

¹ *Hubbell v. Blandy*, 87 Mich. 209, 24 Am. St. Rep. 154, 49 N. W. 502.

See standard works on bailments.

transferred part of the shares by an instrument in writing, and afterwards, before the transfer was registered on the books of the corporation, transferred all of the shares to another, it was held that he was guilty of a conversion of the shares first transferred.²

§ 3852. Liability of witnesses. One who signs an assignment of stock as a witness thereby, in effect, represents that the purported assignor signed it, or acknowledged the signature thereto as his signature, in his presence, and that he thereupon wrote his name as witness thereto at the assignor's request. And where the witness signs at the instance of a person who he knows is not the assignor, and knowing that the assignment is to be used by such person for the purpose of securing a loan, he is liable in an action for deceit to a person who takes the stock as security, in case the assignor's signature is forged.³

Where a rule of the stock exchange provides that an indorsement by a member of the exchange on a certificate is considered a guaranty of the correctness of the signature of the party in whose name the stocks stand, a broker belonging to the exchange who witnesses a forged power of attorney to transfer stock is liable to the corporation for any damages which it sustains by reason of the forgery, although he acts innocently and in good faith.⁴

§ 3853. Estoppel of true owner to assert title as against transferee—**In general.** The doctrine that a bona fide purchaser of shares under a forged or unauthorized transfer acquires no title as against the true owner does not apply where the circumstances are such as to estop the latter from asserting his title. Such an estoppel may arise either from acts or from negligence. It is a well-settled principle that, where the owner of property clothes another with apparent title to the same, or apparent authority to dispose of the same, he will be estopped to deny such apparent title or authority as against third persons dealing with the other party on the faith thereof. And in accordance with this principle, it has repeatedly been held that the owner of shares is

² *Mahaney v. Walsh*, 16 N. Y. App. Div. 601, 44 N. Y. Supp. 969.

See also § 3448, *supra*.

As to the effect of unregistered transfers as against purchasers or pledgees from the apparent owner, see § 3815, *supra*.

³ *Second Nat. Bank City of New York v. Curtiss*, 2 N. Y. App. Div. 508,

37 N. Y. Supp. 1028, *aff'd* 153 N. Y. 681, 48 N. E. 1107.

⁴ *Jennie Clarkson Home for Children v. Chesapeake & O. R. Co.*, 92 N. Y. App. Div. 491, 87 N. Y. Supp. 348, *aff'g* 41 N. Y. Misc. 214, 83 N. Y. Supp. 913, *aff'd* 182 N. Y. 508, 74 N. E. 1118 (where this rule was applied to a transfer of bonds).

estopped from asserting his title as against a bona fide purchaser or pledgee of the shares from one whom he has intentionally or through negligence clothed with apparent title thereto, or with apparent authority to transfer the same. In the case of stock, the estoppel generally arises from the fact that the owner has delivered his certificate to a third person, together with an assignment and power of attorney to transfer the same on the corporate books executed in blank.⁵ "It

5 United States. National Safe Deposit, Savings & Trust Co. v. Hibbs, 229 U. S. 391, 57 L. Ed. 1241, aff'g 32 App. Cas. (D. C.) 459. See also Cowdrey v. Vandenberg, 101 U. S. 572, 25 L. Ed. 923; National City Bank of Chicago v. Wagner, 216 Fed. 473; Wolf v. American Trust & Savings Bank, 214 Fed. 761; O'Neil v. Wolcott Min. Co., 174 Fed. 527, 27 L. R. A. (N. S.) 200; Elliott v. E. C. Miller & Co., 158 Fed. 868.

Alabama. Nelson v. Owen, 113 Ala. 372, 21 So. 75.

California. Northwestern Portland Cement Co. v. Atlantic Portland Cement Co., 163 Pac. 47; Brittan v. Oakland Bank of Savings, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84; Barstow v. Savage Min. Co., 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; Winter v. Belmont Min. Co., 53 Cal. 428; Brewster v. Sime, 42 Cal. 139; Mortgage v. National Bank of California, 24 Cal. App. 103, 140 Pac. 300.

Colorado. O'Mara v. Newcomb, 38 Colo. 275, 88 Pac. 167; Supply Ditch Co. v. Elliott, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691.

District of Columbia. National Safe Deposit, Savings & Trust Co. v. Hibbs, 32 App. Cas. 459, aff'd 229 U. S. 391, 57 L. Ed. 1241; National Safe Deposit, Savings & Trust Co. v. Gray, 12 App. Cas. 276.

Illinois. McCarthy v. Crawford, 238 Ill. 38, 86 N. E. 750; Otis v. Gardner, 105 Ill. 436.

Iowa. Mudge v. Railway Mail Equipment Co., 167 Iowa 656, 149 N. W. 867.

Maryland. See Merchants' Nat. Bank v. Williams, 110 Md. 334, 72 Atl. 1114.

Massachusetts. Baker v. Davie, 211 Mass. 429, 37 L. R. A. (N. S.) 944, 97 N. E. 1094; Furber v. Dane, 203 Mass. 108, 89 N. E. 227; Jarvis v. Rogers, 15 Mass. 389, 13 Mass. 105.

Michigan. Austin v. Hayden, 171 Mich. 38, Ann. Cas. 1915 B 894, 137 N. W. 317; Goodwin v. Hampton Transp. Co., 133 Mich. 229, 94 N. W. 729; Walker v. Detroit Transit Ry. Co., 47 Mich. 338, 11 N. W. 187.

Minnesota. Schumacher v. Greene Cananea Copper Co., 117 Minn. 124, 38 L. R. A. (N. S.) 180, Ann. Cas. 1913 C 1115, 134 N. W. 510.

Nevada. Gass v. Hampton, 16 Nev. 185; Stone v. Marye, 14 Nev. 362.

New Jersey. Prall v. Tilt, 28 N. J. Eq. 479; Mt. Holly, L. & M. Turnpike Co. v. Ferree, 17 N. J. Eq. 117.

New York. Knox v. Eden Musee American Co., 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; Smith v. Savin, 141 N. Y. 315, 36 N. E. 338; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Mitchell v. Boyer, 160 App. Div. 565, 145 N. Y. Supp. 715; Talcott v. Standard Oil Co., 149 App. Div. 694, 134 N. Y. Supp. 617; Brady v. Mt. Morris Bank, 65 App. Div. 212, 73 N. Y. Supp. 532; Fatman v. Lobach, 1 Duer 354; Commercial Bank v. Kortright, 22 Wend. 348, 34 Am. Dec. 317. See also Treadwell v. Clark, 114 App. Div. 493, 100 N. Y. Supp. 1, aff'd 190 N. Y. 51, 82 N. E. 505.

Ohio. See Farmers' Bank v. Die-

must be conceded," said the court in a leading New York case, "that as a general rule, applicable to property other than negotiable securi-

bold Safe & Lock Co., 66 Ohio St. 367, 58 L. R. A. 620, 90 Am. St. Rep. 586, 64 N. E. 518.

Oregon. Gray v. Fankhauser, 58 Ore. 423, 115 Pac. 146; Beekwith v. Galice Mines Co., 50 Ore. 542, 16 L. R. A. (N. S.) 723, 93 Pac. 453.

Pennsylvania. Colonial Trust Co. v. Central Trust Co., 243 Pa. 268, 90 Atl. 189; King v. Mellon Nat. Bank of Pittsburgh, 227 Pa. 22, 75 Atl. 832; Shattuck v. American Cement Co., 205 Pa. 197, 97 Am. St. Rep. 735, 54 Atl. 785; Westinghouse v. German Nat. Bank, 196 Pa. St. 249, 46 Atl. 380; Westinghouse v. German Nat. Bank, 188 Pa. St. 630, 41 Atl. 734; McMannus v. Laughlin, 186 Pa. St. 498, 40 Atl. 992; Clemens v. Heckscher, 185 Pa. St. 476, 40 Atl. 80; Gilbert v. Erie Bldg. Ass'n, 184 Pa. St. 554, 39 Atl. 291; Burton's Appeal, 93 Pa. St. 214; In re Pennsylvania R. Co.'s Appeal, 86 Pa. St. 80; Burton v. Peterson, 12 Phila. 397.

South Carolina. State Bank v. Cox & Co., 11 Rich. Eq. 344, 78 Am. Dec. 458.

Tennessee. Cherry v. Frost, 7 Lea 1.

Texas. Strange v. Houston & T. C. R. Co., 53 Tex. 162.

England. Colonial Bank v. Cady, 15 App. Cas. 267; Ex parte Swan, 7 C. B. (N. S.) 400; Swan v. North British Australasian Co., 7 H. & N. 603; Id., 2 H. & C. 175.

"A blank assignment and power of attorney to transfer stock indorsed upon the certificate thereof estops the transferor from claiming any further title to or interest in the stock as against subsequent bona fide transferees thereof." O'Neil v. Wolcott Min. Co., 174 Fed. 527, 27 L. R. A. (N. S.) 200.

A certificate with a power of at-

torney to transfer the same executed in blank "is in the position of merchandise ready for market. That is the way sales and transfers of stock are usually made, and the presumable intent of executing the power to transfer, is to put the holder in position to complete a sale by delivery of the certificates and transfer of the stock. Such transfer carries prima facie good title." Shattuck v. American Cement Co., 205 Pa. 197, 97 Am. St. Rep. 735, 54 Atl. 785.

Under such circumstances a bona fide transferee is entitled "to the same measure of protection extended to a bona fide taker of negotiable or commercial paper." Nelson v. Owen, 113 Ala. 372, 21 So. 75.

The fact that the transfer and, power of attorney is not indorsed on the certificate, but is contained in a separate paper, is immaterial. Smith v. Savin, 141 N. Y. 315, 36 N. E. 338; Mitchell v. Boyer, 160 N. Y. App. Div. 565, 145 N. Y. Supp. 715.

And this is true even though the assignment does not identify by description or otherwise the property intended to be assigned. Talcott v. Standard Oil Co., 149 N. Y. App. Div. 694, 134 N. Y. Supp. 617.

Persons who intrust their stock certificates indorsed in blank to brokers, either by delivery or by authorizing their purchase for them through the usual channels of trade, invest them with the indicia of ownership, and are estopped from asserting paramount title against innocent purchasers or pledgees who acquire the stock from the brokers in the usual course of trade, for value, without notice, and in good faith. Austin v. Hayden, 171 Mich. 38, Ann. Cas. 1915 B 894, 137 N. W. 317.

Under the South Carolina Code the

ties, the vendor or pledgor can convey no greater right or title than he has. But this is a truism, predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle, that where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance. * * * Simply intrusting the possession of a chattel to another as depositary, pledgee or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so intrusted.⁶ * * * But if the owner intrusts to another, not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of an unconditional power of disposition over it, the case is vastly different. There can be no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary, or under contingencies to arise. If the conditions upon which this apparent right of control is to be exercised, are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary,

assignee may show acts of negligence, not known by him though known by his assignor, which estop the rightful owner from the assertion of his title. *Maxwell v. Foster*, 67 S. C. 377, 45 S. E. 927.

⁶ *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341. Citing *Ballard v. Burgett*, 40 N. Y. 314; *Covill v. Hill & Sanford*, 4 Den. (N. Y.) 323, quoted in whole or in part with approval in *Cowdrey v. Vandenburg*, 101 U. S. 572, 25 L. Ed. 923; *Nelson v. Owen*, 113 Ala. 372, 21 So. 75; *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84; *National Safe Deposit, Savings & Trust Co. v. Gray*, 12 App.

Cas. (D. C.) 276; *Gass v. Hampton*, 16 Nev. 185; *Treadwell v. Clark*, 114 N. Y. App. Div. 493, 100 N. Y. Supp. 1, *aff'd* 190 N. Y. 51, 82 N. E. 505; *Hall v. Wagner*, 111 N. Y. App. Div. 70, 97 N. Y. Supp. 570.

The rights of innocent transferees under such circumstances "do not depend upon the actual authority of the person with whom they deal, but upon the apparent authority with which the confidence or negligence of the true owner has invested him." *Gray v. Fankhauser*, 58 Ore. 423, 115 Pac. 146.

And see to the same effect, *Stone v. Marye*, 14 Nev. 362.

the case cannot be distinguished in principle from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power."⁷ A reason often given for the rule is that it is a case for the application of the maxim that where one of two innocent parties must suffer by reason of a wrongful or unauthorized act, the loss must fall on the one who first trusted the wrongdoer and put in his hands the means of inflicting such loss.⁸ "Negligence which will work an estoppel of this kind must be a proximate cause of the purchase or advancement of money by the holder of the property, and must enter into the transaction itself."⁹ "To establish this estoppel

⁷ *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, quoted in *Treadwell v. Clark*, 114 N. Y. App. Div. 493, 100 N. Y. Supp. 1, aff'd 190 N. Y. 51, 82 N. E. 505; *Hall v. Wagner*, 111 N. Y. App. Div. 70, 97 N. Y. Supp. 570.

One reason for the rule is that the purchase is made upon the faith of the title which the owner has apparently given, "and that it would be contrary to justice and good conscience to permit him to assert his real title against an innocent purchaser from one clothed by him with all the indicia of ownership and power of disposition." *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 46, 14 Am. Rep. 173, quoted with approval in *Talcott v. Standard Oil Co.*, 149 N. Y. App. Div. 694, 134 N. Y. Supp. 617.

⁸ **United States.** *National Safe Deposit, Savings & Trust Co. v. Hibbs*, 229 U. S. 391, 57 L. Ed. 1241, aff'g 32 App. Cas. (D. C.) 459.

Illinois. *McCarthy v. Crawford*, 238 Ill. 38, 86 N. E. 750; *Otis v. Gardner*, 105 Ill. 436.

Minnesota. *Schumacher v. Greene Cananea Copper Co.*, 117 Minn. 124, 38 L. R. A. (N. S.) 180, Ann. Cas. 1913 C 1115, 134 N. W. 510.

Nevada. *Gass v. Hampton*, 16 Nev. 185.

New York. *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 46, 14 Am. Rep. 173; *Talcott v. Standard Oil*

Co., 149 App. Div. 694, 134 N. Y. Supp. 617.

Ohio. See *Farmers' Bank v. Diebold Safe & Lock Co.*, 66 Ohio St. 367, 58 L. R. A. 620, 90 Am. St. Rep. 586, 64 N. E. 518.

Oregon. *Beckwith v. Galice Mines Co.*, 50 Ore. 542, 16 L. R. A. (N. S.) 723, 93 Pac. 453.

Pennsylvania. *Shattuck v. American Cement Co.*, 205 Pa. 197, 97 Am. St. Rep. 735, 54 Atl. 785; *In re Pennsylvania R. Co.'s Appeal*, 86 Pa. St. 80.

South Carolina. *State Bank v. Cox & Co.*, 11 Rich. Eq. 344, 78 Am. Dec. 458.

⁹ *O'Herron v. Gray*, 168 Mass. 573, 40 L. R. A. 498, 60 Am. St. Rep. 411, 47 N. E. 429. And see to the same effect, *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; *Farmers' Bank v. Diebold Safe & Lock Co.*, 66 Ohio St. 367, 58 L. R. A. 620, 90 Am. St. Rep. 586, 64 N. E. 518; *Swan v. North British Australasian Co.*, 7 H. & N. 603, 2 H. & C. 175. See also *Scollans v. Rollins*, 173 Mass. 275, 73 Am. St. Rep. 284, 53 N. E. 863.

"If the purchaser from one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit." *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349.

it must appear that the true owner had conferred upon the person who has diverted the security the indicia of ownership, or an apparent title or authority to transfer the title."¹⁰ So the owner is not guilty of negligence in merely intrusting another with the possession of his certificate of stock, if he does not, by assignment or otherwise, clothe him with the apparent title.¹¹ Nor is he deprived of his title or his remedy against the corporation because he intrusts a third person with the key of a box in which the certificates are kept, where the latter takes them from the box and by forging the owner's name to a power of attorney procures their transfer on the corporate books.¹² Nor is the mere indorsement of an assignment and power of attorney in blank on a certificate of stock, which is afterwards lost or stolen, such negligence as will estop the owner from asserting his title as against a bona

¹⁰ *Hall v. Wagner*, 111 N. Y. App. Div. 70, 97 N. Y. Supp. 570, quoted with approval in *Kilmer v. Hutton*, 131 N. Y. App. Div. 625, 116 N. Y. Supp. 127. See also to the same effect, *Treadwell v. Clark*, 114 N. Y. App. Div. 493, 100 N. Y. Supp. 1, aff'd 190 N. Y. 51, 82 N. E. 505; *Farmers' Bank v. Diebold Safe & Lock Co.*, 66 Ohio St. 367, 58 L. R. A. 620, 90 Am. St. Rep. 586, 64 N. E. 518.

¹¹ *Western Union Telegraph Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 1 Am. Rep. 341; *Kilmer v. Hutton*, 131 N. Y. App. Div. 625, 116 N. Y. Supp. 127; *Treadwell v. Clark*, 114 N. Y. App. Div. 493, 100 N. Y. Supp. 1, aff'd 190 N. Y. 51, 82 N. E. 505; *Shattuck v. American Cement Co.*, 205 Pa. 197, 97 Am. St. Rep. 735, 54 Atl. 785; *Colonial Bank v. Cady*, 15 App. Cas. 267. See also *Reichard v. Hutton*, 158 N. Y. App. Div. 122, 142 N. Y. Supp. 935.

An assignee of stock certificates having them, with the assignments unrecorded, in the assignor's possession, is not estopped, on the ground of negligence, to set up his title against one claiming title through the assignor's forged alteration of the assignments. *Eaton v. New England Tel. Co.*, 68 Me. 63.

Where the pledgor of stock sent a check for the amount of the loan to the pledgee by a messenger, and the pledgee delivered the stock indorsed in blank to the messenger, and the latter converted it, it was held that the pledgor was not deprived of his title, since even if the pledgee was authorized to deliver the certificate to the messenger, he had no express or implied authority to deliver it to him in such a condition that he would be invested with the apparent ownership or authority to transfer it, and since the pledgor had in no way conferred upon the messenger any such ownership or authority. *Hall v. Wagner*, 111 N. Y. App. Div. 70, 97 N. Y. Supp. 570.

¹² *Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Franklin Fire Ins. Co.*, 181 Pa. St. 40, 37 L. R. A. 780, 37 Atl. 191.

This has been held to be true although the owner knew that the person intrusted with the key was insolvent, and had previously misappropriated funds, and although after the forgery, she had the box in her possession, and failed to examine its contents. *Western U. Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047.

fide purchaser from the finder or thief, or from holding the corporation liable for allowing a transfer on its books, where the loss or theft of the certificate was not due to any negligence on the part of the owner.¹³ So it has been held that the fact that stock pledged to a bank is indorsed in blank by the owner does not estop him from asserting title thereto as against a bona fide purchaser for value who derives his title from one who stole the certificate from the pledgee.¹⁴ And this has also been held to be true though the thief was an officer of the pledgee, since his act in wrongfully appropriating the certificate cannot be regarded as a misappropriation by the bank to whose custody the certificate was intrusted by the owner, even though the bank may be liable to the pledgor.¹⁵ The rule that the real owner is protected when the certificate is stolen "is not based upon the name of the agent's crime, but upon the fact that in the ordinary and typical case of theft the owner has not entrusted the agent with the document and therefore is not considered to have done enough to be estopped as against a purchaser in good faith."¹⁶ A person is not guilty of negli-

¹³ **United States.** Bangor Elec. Light & Power Co. v. Robinson, 52 Fed. 520.

Alabama. East Birmingham Land Co. v. Dennis, 85 Ala. 565, 2 L. R. A. 836, 7 Am. St. Rep. 73, 5 So. 317.

California. Barstow v. Savage Min. Co., 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; Sherwood v. Meadow Valley Min. Co., 50 Cal. 412.

District of Columbia. National Safe Deposit, Savings & Trust Co. v. Hibbs, 32 App. Cas. 459, aff'd 229 U. S. 391, 57 L. Ed. 1241.

Massachusetts. O'Herron v. Gray, 168 Mass. 573, 40 L. R. A. 498, 60 Am. St. Rep. 411, 47 N. E. 429.

Minnesota. Schumacher v. Greene Cananea Copper Co., 117 Minn. 124, 38 L. R. A. (N. S.) 180, Ann. Cas. 1913 C 1115, 134 N. W. 510.

New York. Knox v. Eden Musee American Co., 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988. See also Treadwell v. Clark, 190 N. Y. 51, 82 N. E. 505, aff'g 114 App. Div. 493, 100 N. Y. Supp. 1.

Pennsylvania. Biddle v. Bayard, 13 Pa. St. 150.

¹⁴ **O'Herron v. Gray**, 168 Mass. 573, 40 L. R. A. 498, 60 Am. St. Rep. 411, 47 N. E. 429; **Schumacher v. Greene Cananea Copper Co.**, 117 Minn. 124, 38 L. R. A. (N. S.) 180, Ann. Cas. 1913 C 1115, 134 N. W. 510.

As where the owner of stock indorses it in blank and pledges it to a bank as security for a loan, and the cashier of the bank embezzles and appropriates it to his own use. **Barstow v. City Trust Co.**, 216 Mass. 330, 103 N. E. 911.

¹⁵ **Barstow v. City Trust Co.**, 216 Mass. 330, 103 N. E. 911; **Schumacher v. Greene Cananea Copper Co.**, 117 Minn. 124, 38 L. R. A. (N. S.) 180, Ann. Cas. 1913 C 1115, 134 N. W. 510.

¹⁶ **Russell v. American Bell Tel. Co.**, 180 Mass. 467, 62 N. E. 751, quoted with approval in **National Safe Deposit, Savings & Trust Co. v. Hibbs**, 229 U. S. 391, 57 L. Ed. 1241, aff'g 32 App. Cas. (D. C.) 459.

"He certainly has not done enough if the estoppel is based upon the principle that when one of two innocent persons is to suffer, the sufferer should

gence in leaving a certificate of stock indorsed in blank in a safe deposit box used by himself and another jointly, so as to be estopped from asserting his title after the certificate has been stolen by the other, and sold or pledged to a bona fide purchaser or pledgee.¹⁷ Nor is he negligent in placing a certificate so indorsed in a drawer of his safe to which an employee has access, where he has no reason to doubt the latter's honesty.¹⁸

It has been held in effect that intrusting a servant or agent with the custody of certificates of stock assigned in blank, without any authority to deal with the same, is not such negligence as to estop the owner from reclaiming the same from a bona fide purchaser from the agent or servant, since an employer or master is not to be deemed guilty of negligence because he does not anticipate and provide against possible criminal acts of his servants or employees.¹⁹ So it has been held that the owner is not negligent in intrusting a certificate so indorsed to a third person merely for safe-keeping, even though such person is a banker and broker whose business it is to sell securities.²⁰ Other courts, however, hold that even though the bare custody of the certificates is intrusted to another who, in complete breach of his duty, disposes of them to an innocent purchaser, the title of the original owner is lost.²¹ This has been held to be true, for example, where the

be the one whose confidence put into the hands of the wrongdoer the means of doing the wrong." *Russell v. American Bell Tel. Co.*, 180 Mass. 467, 62 N. E. 751, quoted with approval in *National Safe Deposit, Savings & Trust Co. v. Hibbs*, 229 U. S. 391, 57 L. Ed. 1241, aff'g 32 App. Cas. (D. C.) 459.

¹⁷ *Bangor Elec. Light & Power Co. v. Robinson*, 52 Fed. 520; *Doran v. Miller*, 124 Ill. App. 551, 151 Ill. App. 527, aff'd 245 Ill. 200, 91 N. E. 1039.

¹⁸ The secretary of a corporation which owned stock therein, pledged it to the company, indorsing the certificate in blank and delivering it to the company. The president placed it in his drawer in the company's safe. Later the secretary sold the stock to the president and paid his debt to the company with the proceeds. In the meantime the certificate had become mislaid, and in the belief that it had

been lost, a new one was issued to the president. Thereafter the secretary found the old one, and fraudulently abstracted it and pledged it to an innocent third person as security for his private debt. It was held that the pledgee took no title. *Farmers' Bank v. Diebold Safe & Lock Co.*, 66 Ohio St. 367, 58 L. R. A. 620, 90 Am. St. Rep. 586, 64 N. E. 518.

¹⁹ *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; *Hall v. Wagner*, 111 N. Y. App. Div. 70, 97 N. Y. Supp. 570.

²⁰ *Scollans v. Rollins*, 173 Mass. 275, 73 Am. St. Rep. 284, 53 N. E. 863, 179 Mass. 346, 88 Am. St. Rep. 386, 60 N. E. 983.

²¹ *National City Bank of Chicago v. Wagner*, 216 Fed. 473.

"If the owner of the stock voluntarily gives certificates with blank assignments and power to make trans-

certificates are intrusted by the owner to his attorney,²² or to brokers,²³ merely for safe-keeping, and without any authority to dispose of them. Where this rule obtains it is held that an owner or holder of stock indorsed in blank who intrusts it to an agent or servant under the circumstances stated, cannot recover it or its value from a bona fide purchaser from such agent or servant,²⁴ or recover damages as for a conversion from the corporation for transferring the stock on its books,²⁵ even though such agent or servant has no authority, and it is not part of his employment, to dispose of, by sale, pledge or otherwise, any stock owned or held by his employer. And it has been held that this is true even though the wrongful act of the agent may amount to an infraction of the criminal law.²⁶

Generally, if a certificate indorsed in blank is intrusted to an agent for a particular purpose only, and in violation of his instructions he sells or pledges it to another, the latter will take title as against the original owner.²⁷ This is true, for example, where a certificate so

fers, to his brokers, who betray the confidence reposed in them, such owner must suffer the loss, rather than innocent strangers whose money the brokers were thereby enabled to obtain." *Shattuck v. American Cement Co.*, 205 Pa. 197, 97 Am. St. Rep. 735, 54 Atl. 785.

²² *In re Pennsylvania R. Co.'s Appeal*, 86 Pa. St. 80.

²³ *O'Mara v. Newcomb*, 38 Colo. 275, 88 Pac. 167; *Shattuck v. American Cement Co.*, 205 Pa. 197, 97 Am. St. Rep. 735, 54 Atl. 785.

²⁴ *National City Bank of Chicago v. Wagner*, 216 Fed. 473; *O'Mara v. Newcomb*, 38 Colo. 275, 88 Pac. 167; *Shattuck v. American Cement Co.*, 205 Pa. 197, 97 Am. St. Rep. 735, 54 Atl. 785. See also *Davis v. Finch*, 236 Fed. 89.

²⁵ See § 3844, *supra*.

²⁶ *Davis v. Finch*, 236 Fed. 89.

²⁷ *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84; *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; *McNeil v. Tenth Nat. Bank*, 46

N. Y. 325, 7 Am. Rep. 341; *Talcott v. Standard Oil Co.*, 149 N. Y. App. Div. 694, 134 N. Y. Supp. 617; *State Bank v. Cox & Co.*, 11 Rich. Eq. (S. C.) 344, 78 Am. Dec. 458.

Where stock indorsed in blank is loaned to another and the latter pledges it to a third person, the pledgee's title is superior to that of the owner. *Otis v. Gardner*, 105 Ill. 436.

One who, in good faith, takes from a husband, as security for a loan to him, stock standing in his wife's name, for the transfer of which proper powers have been executed by her, is protected, although the husband obtained it from her for the purpose of loaning it to brokers, and agreed not to use it in his own speculations. *McManus v. Laughlin*, 186 Pa. St. 498, 40 Atl. 992.

Plaintiff, pursuant to a contract to purchase stock owned by him, sent the certificates, with an assignment and power to transfer signed in blank, to a bank designated by the purchaser, with directions to turn over the stock on payment of the purchase price.

indorsed is delivered to a broker or other person as security for a loan,²⁸ or as a margin,²⁹ or to be sold³⁰ or pledged³¹ by him for the benefit of the owner, and the person to whom it is so delivered sells or pledges it as his own; or where the certificate is pledged with authority to repledge it to the extent of the pledgor's indebtedness,

The bank, which was a mere pretended institution organized to aid the purchaser in perpetrating frauds, without authority turned the certificate over to the purchaser without payment of the purchase price, and the latter sold it to an innocent purchaser for value. It was held that such purchaser took good title. *Beckwith v. Galice Mines Co.*, 50 Ore. 542, 16 L. R. A. (N. S.) 723, 93 Pac. 453.

"It is well-established law that where a named owner of a stock certificate executes a transfer thereof in blank, and delivers it to a broker or an agent for certain limited purposes, and that broker or agent, in violation of his duty and obligation to the depositor, delivers it to another person without notice and for a valuable consideration, the purchaser takes good title." *National Safe Deposit, Savings & Trust Co. v. Hibbs*, 32 App. Cas. (D. C.) 459, aff'd 229 U. S. 391, 57 L. Ed. 1241.

²⁸ *Nelson v. Owen*, 113 Ala. 372, 21 So. 75; *Gass v. Hampton*, 16 Nev. 185; *Stone v. Marye*, 14 Nev. 362; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Westinghouse v. German Nat. Bank*, 196 Pa. St. 249, 46 Atl. 380; *Gilbert v. Erie Bldg. Ass'n*, 184 Pa. St. 554, 39 Atl. 291.

"The principle applies to pledges of stock, and one who purchases from the pledgee may hold against the pledgor. And if the pledgee pledge it to secure payment of his own debt, the second pledgee may hold it as security until his debt is paid." *Shattuck v. American Cement Co.*, 205 Pa. 197, 97 Am. St. Rep. 735, 54 Atl. 785.

"Equitable estoppel may be successfully invoked by an innocent subpledgee against the owner for a loan greater in amount than the original debt, and unauthorized as between the original parties." *Austin v. Hayden*, 171 Mich. 38, Ann. Cas. 1915 B 894, 137 N. W. 317.

Where a certificate indorsed in blank was left by the owner with the cashier of a bank as security for a loan made to him by the cashier personally, or for use in connection with a transaction whereby the cashier discounted certain notes for the owner which were never paid, and the cashier pledged the stock to the bank as security for a loan to him, it was held that the bank took good title as against the owner. *Brady v. Mt. Morris Bank*, 65 N. Y. App. Div. 212, 73 N. Y. Supp. 532.

²⁹ *Furber v. Dane*, 203 Mass. 108, 89 N. E. 227.

³⁰ *United States. Elliott v. E. C. Miller & Co.*, 158 Fed. 868.

California. *Morgage v. National Bank of California*, 24 Cal. App. 103, 140 Pac. 300.

Illinois. *McCarthy v. Crawford*, 238 Ill. 38, 86 N. E. 750.

Oregon. *Gray v. Fankhauser*, 58 Ore. 423, 115 Pac. 146.

Pennsylvania. *Colonial Trust Co. v. Central Trust Co.*, 243 Pa. 268, 90 Atl. 189; *King v. Mellon Nat. Bank of Pittsburgh*, 227 Pa. 22, 75 Atl. 832.

Texas. *Strange v. Houston & T. C. R. Co.*, 53 Tex. 162.

³¹ *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84.

and is repledged as security for a larger amount than so specified.³² And the rule is especially applicable where there is a custom among bankers and brokers in the locality where the transaction takes place for certificates so indorsed to pass from hand to hand without inquiry as to the title of the party in possession, unless some special cause for suspicion exists.³³ It has been held to apply under such circumstances even though the agent intended a fraud from the first,³⁴ and though in making the transfer he has been guilty of violating the criminal law,³⁵ and though the original owner did not know of the custom.³⁶ But to enable a transferee to take advantage of such a custom it must appear that the original transaction took place in a jurisdiction where the custom is shown to have prevailed,³⁷ and he must also bring himself strictly within its terms.³⁸ Nor can it apply where the original indorsement took place under such circumstances as to preclude any inference that the owner had reason to anticipate a subsequent wrongful transfer to a bona fide transferee.³⁹

In Maryland it is held that a blank assignment and power of attorney to sell, assign and set over the owner's interest in the stock does

³² Wolf v. American Trust & Savings Bank, 214 Fed. 761.

³³ National Safe Deposit, Savings & Trust Co. v. Hibbs, 32 App. Cas. (D. C.) 459, aff'd on other grounds 229 U. S. 391, 57 L. Ed. 1241; Baker v. Davie, 211 Mass. 429, 37 L. R. A. (N. S.) 944, 97 N. E. 1094; Russell v. American Bell Tel. Co., 180 Mass. 467, 62 N. E. 751. See also Barstow v. City Trust Co., 216 Mass. 330, 103 N. E. 911; Scollans v. Rollins, 179 Mass. 346, 88 Am. St. Rep. 386, 60 N. E. 983, 173 Mass. 275, 73 Am. St. Rep. 284, 53 N. E. 863.

Such a usage "rather follows the established law than sets up a new and independent rule governing such transactions." National Safe Deposit, Savings & Trust Co. v. Hibbs, 32 App. Cas. (D. C.) 459, aff'd on other grounds 229 U. S. 391, 57 L. Ed. 1241.

³⁴ National Safe Deposit, Savings & Trust Co. v. Hibbs, 229 U. S. 391, 57 L. Ed. 1241, aff'g 32 App. Cas. (D. C.) 459; Russell v. American Bell Tel. Co., 180 Mass. 467, 62 N. E. 751.

³⁵ National Safe Deposit, Savings & Trust Co. v. Hibbs, 229 U. S. 391, 57 L. Ed. 1241, aff'g 32 App. Cas. (D. C.) 459; Russell v. American Bell Tel. Co., 180 Mass. 467, 62 N. E. 751.

This rule has been applied where stock indorsed in blank was pledged to a bank, and one of its employees, whose duty it was to deliver pledged certificates to their owners when the loans secured thereby were paid, obtained possession of the certificate by falsely representing that he wished to deliver it to the owner, and sold it through a broker and kept the proceeds. National Safe Deposit, Savings & Trust Co. v. Hibbs, 229 U. S. 391, 57 L. Ed. 1241, aff'g 32 App. Cas. (D. C.) 459.

³⁶ Russell v. American Bell Tel. Co., 180 Mass. 467, 62 N. E. 751.

³⁷ Barstow v. City Trust Co., 216 Mass. 330, 103 N. E. 911.

³⁸ Baker v. Davie, 211 Mass. 429, 37 L. R. A. (N. S.) 944, 97 N. E. 1094.

³⁹ Barstow v. City Trust Co., 216 Mass. 330, 103 N. E. 911.

not clothe the person to whom it is given with the indicia of absolute ownership or give him any right to pledge the same for his own debt, and that any one who accepts it as security for such a debt is chargeable with notice of the rights of the real owner. Under this rule, if stock having such a blank assignment and power of attorney indorsed thereon is pledged by the owner with a broker, and the latter is given no express power of rehypothecation, but nevertheless repledges it to secure his personal debt, the second pledgee acquires no title as against the original owner.⁴⁰

Where a broker pledges stock to which he has title and stock belonging to a third person to secure the same indebtedness, and by reason of his having clothed the broker with the apparent title the third person is estopped to question the validity of the pledge, the pledgee will be required to resort first to the stock to which the broker had title.⁴¹

§ 3854. — Purchasers or pledgees with notice. The doctrine that the owner of shares is estopped to assert his title as against a purchaser or pledgee from one whom he has clothed with apparent title or authority clearly does not apply in favor of purchasers or pledgees who have actual notice that the apparent title or authority is not real.⁴² Nor does the doctrine apply where the form or terms of the

⁴⁰ *Merchants' Nat. Bank v. Williams*, 110 Md. 334, 72 Atl. 1114; *German Sav. Bank of Baltimore City v. Renshaw*, 78 Md. 475, 28 Atl. 281.

This rule was first laid down in *Taliaferro v. First Nat. Bank of Baltimore*, 71 Md. 200, 17 Atl. 1036, 72 Md. 164, 19 Atl. 364, which was a case involving a pledge of registered state bonds.

⁴¹ *Baker v. Davie*, 211 Mass. 429, 37 L. R. A. (N. S.) 944, 97 N. E. 1094.

⁴² *United States. Davis v. Finch*, 236 Fed. 89.

Iowa. *Mudge v. Railway Mail Equipment Co.*, 167 Iowa 656, 149 N. W. 867.

Michigan. *Austin v. Hayden*, 171 Mich. 38, Ann. Cas. 1915 B 894, 137 N. W. 317; *Goodwin v. Hampton Transp. Co.*, 133 Mich. 229, 94 N. W. 729.

New York. *Hannahs v. Hammond*

Typewriter Co., 158 App. Div. 620, 143 N. Y. Supp. 939.

Texas. *Strange v. Houston & T. C. R. Co.*, 53 Tex. 162.

A bank which accepts a pledge of stock from a broker, with knowledge that its ownership is in another, by whom it has been hypothecated to the broker, and without inquiry as to the broker's right to pledge the same, cannot hold the stock as against the owner. *Westinghouse v. German Nat. Bank*, 188 Pa. St. 630, 41 Atl. 734. See also *Westinghouse v. German Nat. Bank*, 196 Pa. St. 249, 46 Atl. 380.

One who knows that stock was indorsed in blank and placed in the hands of a third person to be used as collateral for a loan to the corporation, and who purchases the same at a sale in bankruptcy proceedings as the property of such third person, is not a bona fide purchaser. *Goodwin*

indorsement on the certificate or the other circumstances are sufficient to put the purchaser or pledgee upon inquiry.⁴³ So, where certificates

v. *Hampton Transp. Co.*, 133 Mich. 229, 94 N. W. 729.

⁴³ *United States. Davis v. Finch*, 236 Fed. 89.

Alabama. Johnson v. Amberson, 140 Ala. 342, 37 So. 273.

California. Northwestern Portland Cement Co. v. Atlantic Portland Cement Co., 163 Pac. 47.

Iowa. Mudge v. Railway Mail Equipment Co., 167 Iowa 656, 149 N. W. 867.

Michigan. Austin v. Hayden, 171 Mich. 38, Ann. Cas. 1915 B 894, 137 N. W. 317.

New York. Treadwell v. Clark, 190 N. Y. 51, 82 N. E. 505, aff'g 114 App. Div. 493, 100 N. Y. Supp. 1; *Anderson v. Nicholas*, 28 N. Y. 600; *Reichard v. Hutton*, 158 App. Div. 122, 142 N. Y. Supp. 935; *Kilmer v. Hutton*, 131 App. Div. 625, 116 N. Y. Supp. 127.

England. Colonial Bank v. Cady, 15 App. Cas. 267.

"Facts sufficient to put a party on inquiry which if pursued with due diligence would have led to knowledge of other facts, are equivalent to notice of the facts that would have been disclosed by the inquiry." *Maxwell v. Foster*, 67 S. C. 377, 45 S. E. 927.

Where the assignor of stock which had been transferred to him in blank by the plaintiff informed the assignee at the time of the sale that such transfer had not been entered on the corporate books in compliance with the plaintiff's request, and that the reason for such request was that the plaintiff wanted an opportunity to redeem the stock, it was held that this was sufficient to put the assignee on inquiry as to the plaintiff's rights, so that it could not be regarded as a bona fide purchaser without notice of

them. *Maxwell v. Foster*, 67 S. C. 377, 45 S. E. 927.

Whether a party has notice of circumstances sufficient to put him upon inquiry, and whether by prosecuting such inquiry he might have learned the truth, are questions of fact for the jury or the trial court. *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, — Cal. —, 163 Pac. 47.

In an English case, the executors of a deceased stockholder, in order to get themselves registered in the books of the company as the holders of the shares, executed in blank on the certificates an assignment and power of attorney to transfer the same, and delivered them to a stock broker with instructions to have the transfers registered. The broker, in fraud of the trust reposed in him, pledged the certificates to secure a loan to himself, and the pledgees resisted the claim of the executors to the shares on the ground that they were estopped by reason of their having clothed the broker with the apparent title and authority to dispose of the shares. It was held, however, that there was no estoppel, because such an indorsement might mean either one of two things, — either that the executors were going to sell the shares, and transfer them to some one else, or that they were signing in order that they might be themselves registered in the books of the corporation as the legal representatives of the deceased holder, and because, for a further reason, certificates of stock thus indorsed by executors of the registered owner were not, under the rules of the stock exchange, regarded as being in order, nor a delivery thereof as a good delivery. *Colonial Bank v. Cady*, 15 App. Cas. 267.

of stock were stolen from the owner by a boy of sixteen, and sold to a person for one-third of their value, and the latter immediately sold the same for more than twice the amount he paid for them, it was held that he could not be deemed a bona fide purchaser.⁴⁴ And where a purchaser of stock knows that shares are under pledge, that the pledgee is dead, and that the person assuming to sell the stock does not represent the estate of the pledgee as executor or administrator or otherwise, and does not represent the pledgor, the mere fact that the purchaser pays value does not give him title under a mere physical delivery of the certificates indorsed by a blank power of attorney to transfer signed by the person to whom they were originally issued.⁴⁵

Where the owner of stock executes and delivers a power of attorney authorizing the person named therein as attorney to transfer the stock to a person the place for whose name is left blank, with the understanding that it is to be pledged as collateral security to a particular creditor of the person for whose benefit the power of attorney is executed, and the name of such creditor is afterwards inserted in the blank, and the transfer made, the authority of the attorney is exhausted; and when that debt is paid, the owner of the stock is entitled to its return, notwithstanding the fact that the attorney has transferred it as security for other debts by erasing the name of the creditor first inserted, and inserting another.⁴⁶

A purchaser is not obliged to look beyond the certificate to ascertain the ownership of the stock when dealing with the person named therein.⁴⁷ Nor is he under any obligation to examine the books of the company to ascertain the validity of the transfer, and hence he is not chargeable with what they disclose in regard to the ownership of the stock.⁴⁸

A purchaser or pledgee is not put upon inquiry by reason of the fact that the assignment and power to transfer are not indorsed upon the certificate but are upon a separate piece of paper,⁴⁹ nor because

⁴⁴ *Anderson v. Nicholas*, 28 N. Y. 600.

⁴⁵ *New Jersey Trust & Safe Deposit Co. v. Bodine* (N. J. Eq.), 60 Atl. 387.

⁴⁶ *Denny v. Lyon*, 38 Pa. 98, 80 Am. Dec. 463.

⁴⁷ *Lowry v. Commercial & Farmers' Bank*, Taney 310, Fed. Cas. No. 8,581; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Strange v. Houston & T. C. R. Co.*, 53 Tex. 162; *Brown v.*

Wright, 48 Utah 633, 161 Pac. 448; *Kimball v. Success Min. Co.*, 38 Utah 78, 110 Pac. 872.

⁴⁸ *Lowry v. Commercial & Farmers' Bank*, Taney 310, Fed. Cas. No. 8,581; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Strange v. Houston & T. C. R. Co.*, 53 Tex. 162; *Brown v. Wright*, 48 Utah 633, 161 Pac. 448; *Kimball v. Success Min. Co.*, 38 Utah 78, 110 Pac. 872.

⁴⁹ *Smith v. Savin*, 141 N. Y. 315,

he knows of previous limitations on the transferrer's authority in respect to the certificate where he has an absolute assignment thereof in blank with an irrevocable power of attorney,⁵⁰ nor because of a failure to comply with some rule of the stock exchange in regard to delivery,⁵¹ nor because the transferrer requests that the transaction be kept secret,⁵² or objects to a transfer on the books of the company.⁵³

The treasurer of the corporation in purchasing stock from a transferee is not, by reason of his position as treasurer, charged with constructive notice of transfers of the stock prior to the time when he became treasurer.⁵⁴ And a bank to which stock is pledged by its cashier as security for money loaned to him individually is not chargeable with his knowledge as to the state of the title, since in making the pledge he is acting in his own interest and not in the interest of the bank.⁵⁵

As in other cases, to constitute one a bona fide holder there must have been a valuable consideration for the transfer to him.⁵⁶ It has been held that a pledgee of stock may be a bona fide holder although

36 N. E. 338; *Mitchell v. Boyer*, 160 N. Y. App. Div. 565, 145 N. Y. Supp. 715.

This is true although they do not identify the property intended to be assigned. *Talcott v. Standard Oil Co.*, 149 N. Y. App. Div. 694, 134 N. Y. Supp. 617.

⁵⁰ A bank refused to loan money to a broker on stock indorsed to him in such a way as to show that he held it merely as collateral security. The broker thereafter obtained from the pledgor an absolute assignment of the stock with an irrevocable power of attorney, and the bank then made the loan taking the stock so indorsed as security. It was held that, in view of the unrestricted assignment, the bank was not obliged to inquire into the state of the account between the broker and his pledgor, although it knew of the previous restriction on the broker's authority to pledge the stock. *Wolf v. American Trust & Savings Bank*, 214 Fed. 761.

⁵¹ "A failure to comply with some rule of the stock exchange, in order to constitute a good delivery of the

stock under the rule, has no significance on the question of the good faith of the pledgee, and constitutes no notice to him which should put him upon inquiry as to the right or title of the pledgor." *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338.

⁵² *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, — Cal. —, 163 Pac. 47.

⁵³ *Brown v. Wright*, 48 Utah 633, 161 Pac. 448.

⁵⁴ *Noyes v. Woodruff*, — Vt. —, 100 Atl. 759.

⁵⁵ *Brady v. Mt. Morris Bank*, 65 N. Y. App. Div. 212, 73 N. Y. Supp. 532.

⁵⁶ *Hannahs v. Hammond Typewriter Co.*, 158 N. Y. App. Div. 620, 143 N. Y. Supp. 939; *Strange v. Houston & T. C. R. Co.*, 53 Tex. 162.

A bona fide purchaser entitled to protection against the prior right of the owner, is one who gives value, or yields up an existing right, or changes his condition for the worse, trusting to the apparent ownership created by the owner. *Nelson v. Owen*, 113 Ala. 372, 21 So. 75.

he takes the same as security for a pre-existing debt,⁵⁷ or as security in exchange for other collateral.⁵⁸ But, on the other hand, there is authority to the effect that one who takes the stock as security for a pre-existing debt will not be protected as against the true owner, unless he can show that he changed his position to his prejudice in relation to such indebtedness on the faith that his pledgor was the owner of the stock.⁵⁹

Generally the rule protecting bona fide purchasers applies only where the later claimant has acquired a legal, as distinguished from a mere equitable, title.⁶⁰

If the purchaser has knowledge or is chargeable with notice of the facts, the owner is not obliged to tender him the amount out of which he has been defrauded in order to recover the stock or to hold the purchaser liable for its conversion.⁶¹

§ 3855. — Effect of nonregistration of transfer to apparent owner. The fact that no transfer is registered on the books of the corporation to the person whom the owner of shares has clothed with apparent title does not prevent an estoppel from arising against the owner in favor of a bona fide transferee. This is clearly so in those jurisdictions in which an unregistered transfer passes the legal title as between the transferor and transferee. It was said in such a case by the New York Court of Appeals: "By omitting to register his transfer, the holder of the certificate and power fails to obtain the right to vote, and may lose his stock by a fraudulent transfer on the books of the company, by the registered holder, to a bona fide purchaser. But in this respect he is in a condition analogous to that of the holder of an unrecorded deed of land, and possesses a no less perfect title as against the assignor and others. And he would have an action against the corporation, for allowing such a transfer in violation of his rights. He also takes the risk of the collection of dividends by his assignor, or of any lien the corporation may have on the shares. But in other respects his title is complete. The holder of such a certificate and power possesses all the external indicia of title to the stock, and an

⁵⁷ This is true in Illinois. *National City Bank of Chicago v. Wagner*, 216 Fed. 473.

⁵⁸ *Elliott v. E. C. Miller & Co.*, 158 Fed. 868; *King v. Mellon Nat. Bank of Pittsburgh*, 227 Pa. 22, 75 Atl. 832.

⁵⁹ *National Safe Deposit, Savings & Trust Co. v. Gray*, 12 App. Cas. (D. C.) 276.

⁶⁰ A pledgee takes a special property, which is a legal interest within this rule. *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, — Cal. —, 163 Pac. 47.

⁶¹ *Davis v. Finch*, 236 Fed. 89.

apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities cited, concerning the assignee of a chose in action, a mere equitable interest, which is said to be notice to all persons dealing with him that they take subject to all equities, latent or otherwise, of third parties; but, apparently, the legal title, and the means of transferring such title in the most effectual manner."⁶²

The doctrine of estoppel of the true owner of shares to assert title as against a bona fide purchaser or pledgee from one clothed with apparent title or power of disposition has also been applied, notwithstanding nonregistration of the transfer to the apparent owner, in those jurisdictions in which an unregistered transfer is regarded as passing a mere equitable title.⁶³

§ 3856. — Negligence of guardian as affecting ward. Infant owners of stock which has been transferred on the books of the corporation under a forged assignment and power of attorney are not precluded from suing the corporation to compel it to replace the stock, or to recover a judgment for its value, by the fact that their guardian was negligent in allowing the forger to have access to the certificates of stock, where, under the statute of the state, shares of stock belonging to an infant under guardianship cannot be transferred without the sanction of the probate court.⁶⁴

XXV. CONTRACTS FOR THE SALE OF SHARES

§ 3857. Formation and validity of contract in general. "The same legal principles govern with regard to the elements of a contract for

⁶² McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341.

As to the effect of nonregistration as between the parties, see § 3794, *supra*.

⁶³ Otis v. Gardner, 105 Ill. 436.

"A blank assignment and power of attorney to transfer stock indorsed on the certificate thereof estops the transferor from claiming any further title to or interest in the stock as against subsequent bona fide transferees thereof, although the transfer is not recorded in the books of the corporation," O'Neil v. Wolcott Min.

Co., 174 Fed. 527, 27 L. R. A. (N. S.) 200.

As to the effect of nonregistration as between the parties, see § 3794, *supra*.

⁶⁴ Western U. Tel. Co. v. Davenport, 97 U. S. 369, 24 L. Ed. 1047.

The owners of certificates of stock are not estopped from reclaiming them by the fact that their guardian left them in the possession of one who sold them to a bona fide purchaser. O'Herron v. Gray, 168 Mass. 573, 40 L. R. A. 498, 60 Am. St. Rep. 411, 47 N. E. 429.

the sale of stock, as apply in the case of contracts generally";⁶⁵ and its formation is governed by precisely the same principles as the formation of any other contract. There must be mutual assent or offer and acceptance; and the minds of the parties must meet on all the essential elements of the contract.⁶⁶ An offer to buy or sell may be

⁶⁵ McGowin v. Dickson, 182 Ala. 161, 62 So. 685; Wheeler v. Ocker & Ford Mfg. Co., 162 Mich. 204, 127 N. W. 332.

The usual rules governing the modification of contracts apply. See Beeson v. Wright, 159 Cal. 133, 112 Pac. 1091.

⁶⁶ United States. Lucas v. Milliken, 139 Fed. 816.

Alabama. Feore v. Avent, 4 Ala. App. 551, 58 So. 727.

Arizona. Hurley v. Wilky, 18 Ariz. 270, 158 Pac. 639, 18 Ariz. 45, 156 Pac. 83.

Arkansas. Eustice v. Meytrott, 100 Ark. 510, 140 S. W. 590.

Connecticut. Patterson v. Farmington St. R. Co., 76 Conn. 628, 57 Atl. 853.

District of Columbia. Stubblefield v. Stubblefield, 32 App. Cas. 535.

Indiana. Atkins v. Kattman, 50 Ind. App. 233, 97 N. E. 174.

Louisiana. Blanks v. Sutcliffe, 122 La. 448, 47 So. 765.

Massachusetts. Park v. Whitney, 148 Mass. 278, 19 N. E. 161.

Michigan. Sprague v. Hosie, 155 Mich. 30, 19 L. R. A. (N. S.) 874, 130 Am. St. Rep. 558, 118 N. W. 497.

Montana. Parberry v. Woodson Sheep Co., 18 Mont. 317, 45 Pac. 278.

New Jersey. Ridgley v. Walker, 81 N. J. L. 176, 80 Atl. 108; McCracken v. Harned, 66 N. J. L. 37, 48 Atl. 513.

New York. Cameron v. Wright, 21 App. Div. 395, 47 N. Y. Supp. 571.

Pennsylvania. Corser v. Hale, 149 Pa. St. 274, 24 Atl. 285.

Wisconsin. See Holyoke v. Mill-

mann, 151 Wis. 551, 43 L. R. A. (N. S.) 790, 139 N. W. 392.

There must be an agreement in the minds of the parties that one of them is to purchase and the other is to sell the stock. Parberry v. Woodson Sheep Co., 18 Mont. 317, 45 Pac. 278.

The refusal of an offer to sell ends the negotiations unless it is renewed. Sprague v. Hosie, 155 Mich. 30, 19 L. R. A. (N. S.) 874, 130 Am. St. Rep. 558, 118 N. W. 497.

There is no meeting of the minds and hence no contract, where the purchaser believes he is buying stock of one corporation and the seller believes he is selling stock of another corporation. Hurley v. Wilky, 18 Ariz. 270, 158 Pac. 639, 18 Ariz. 45, 156 Pac. 83.

The purchaser cannot recover on a contract for the sale of stock providing that the terms and conditions of the sale have not yet been agreed upon, but are to be agreed upon in the future, without showing that they were so agreed upon, or that the seller had fraudulently refused to agree upon any terms and conditions of sale. Ridgley v. Walker, 81 N. J. L. 176, 80 Atl. 108.

There is mutuality of assent where both parties definitely agree that the defendant will repurchase stock sold to the plaintiff if the plaintiff elects to sell it within the prescribed time. First Nat. Bank of Hastings v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

Whether or not a corporate creditor agreed to take stock in satisfaction of his claim is a question for the jury where the evidence is conflicting

revoked at any time prior to its acceptance.⁶⁷ But when such offer is accepted according to its terms there is a valid contract.⁶⁸ Such an offer must be accepted within the time, if any, specified in the offer, or it will lapse; and if no time for acceptance is specified, it must be

Reid v. Detroit Ideal Paint Co., 132 Mich. 528, 94 N. W. 3.

In **Morgan v. Bartlett**, 75 W. Va. 293, L. R. A. 1915 D 300, 83 S. E. 1001, the evidence was held to show a contract of sale.

In **Teague v. Abbot**, 51 Ind. App. 604, 100 N. E. 27, the facts were held to warrant an inference of a sale of stock in consideration of the satisfaction by the buyer of a claim for services rendered by him to the seller.

⁶⁷ **United States**. **Lucas v. Milliken**, 139 Fed. 816.

California. **Russ v. Tuttle**, 158 Cal. 226, 110 Pac. 813.

Colorado. **Frue v. Houghton**, 6 Colo. 318.

Connecticut. **Patterson v. Farmington St. R. Co.**, 76 Conn. 628, 57 Atl. 853.

District of Columbia. **Stubblefield v. Stubblefield**, 32 App. Cas. 535.

Louisiana. **Blanks v. Sutcliffe**, 122 La. 448, 47 So. 765.

Montana. **Raiche v. Morrison**, 47 Mont. 127, 130 Pac. 1074.

New York. **Worthington v. Herrmann**, 89 App. Div. 627, 88 N. Y. Supp. 76, aff'd 180 N. Y. 559, 73 N. E. 1134.

Ohio. **Davis Laundry & Cleaning Co. v. Whitmore**, 92 Ohio St. 44, Ann. Cas. 1917 C 988, 110 N. E. 518.

Utah. **Clark v. Campbell**, 23 Utah 569, 54 L. R. A. 508, 90 Am. St. Rep. 716, 65 Pac. 496.

Virginia. **Watkins v. Robertson**, 105 Va. 269, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33.

Washington. **Malloy v. Drumheller**, 68 Wash. 106, 122 Pac. 1005; **Herrin v. Scandinavian-American Bank**, 65 Wash. 569, 118 Pac. 648.

⁶⁸ **California**. **Russ v. Tuttle**, 158

Cal. 226, 110 Pac. 813; **Cuthill v. Peabody**, 19 Cal. App. 304, 125 Pac. 926.

Colorado. **Frue v. Houghton**, 6 Colo. 318.

Missouri. **Clubb v. Scullin**, 235 Mo. 585, 139 S. W. 420.

Montana. **Raiche v. Morrison**, 47 Mont. 127, 130 Pac. 1074.

Nebraska. **Jones v. Wattles**, 66 Neb. 533, 92 N. W. 765.

Ohio. **Davis Laundry & Cleaning Co. v. Whitmore**, 92 Ohio St. 44, Ann. Cas. 1917 C 988, 110 N. E. 518.

Utah. **Haarstick v. Fox**, 9 Utah 110, 33 Pac. 251.

Washington. **Malloy v. Drumheller**, 68 Wash. 106, 122 Pac. 1005.

The offer must be accepted according to its terms. If the conditions under which it is made are rejected, the whole offer is thereby rejected and there is no contract. Nor is a conditional or modified acceptance sufficient. **Cerro Cobre Development Co. v. Duvall**, 16 Ariz. 485, 147 Pac. 695, on rehearing 18 Ariz. 334, 160 Pac. 25; **Alexander v. Bosworth**, 26 Cal. App. 589, 147 Pac. 607; **Atkins v. Kattman**, 50 Ind. App. 233, 97 N. E. 174.

A single offer to sell a specified number of shares, to be paid for and delivered in parcels, is accepted as a whole by paying the first instalment and receiving the stock for it. **Obery v. Lander**, 179 Mass. 125, 60 N. E. 378.

Delivery of a written contract to purchase to the seller's agent, thence to the seller, and retention thereof by the latter and his bringing suit thereon, constitutes a sufficient acceptance by the seller. **Jelinek v. Baer**, 153 Wis. 426, 141 N. W. 271.

accepted within a time which is reasonable under the circumstances.⁶⁹

One who signs and delivers a contract for the sale of stock is bound by it although it is not signed by all the parties named in it, unless it appears that the parties signing it mutually intended that it should not take effect as a contract until signed by all of them.⁷⁰ And one who accepts and retains the benefits accruing to him under such a contract cannot thereafter repudiate it on the ground that it was not signed by all of those named in it.⁷¹

A corporation does not become a party to a contract whereby one of its stockholders sells his stock merely because it knows of the contract of sale and of its terms.⁷² Nor is it in any way concerned with the price to be paid for the stock under such a contract.⁷³

The contract may be void for uncertainty,⁷⁴ as, for example, where it does not fix the price to be paid for the stock, or provide any means for ascertaining it.⁷⁵

The validity of the contract is not affected by the motive of the purchaser.⁷⁶

⁶⁹ *Park v. Whitney*, 148 Mass. 278, 19 N. E. 161; *McCracken v. Harned*, 66 N. J. L. 37, 48 Atl. 513.

In order that an option to buy stock may ripen into a binding contract the person to whom it is given must elect to buy the stock within the time allowed by the option, and upon the terms offered. *Houston & T. C. R. Co. v. Conner*, 29 Tex. Civ. App. 259, 67 S. W. 773.

An option to buy stock to be paid for on demand lapses if payment is not made in accordance with its terms. *Hightower v. Ansley*, 126 Ga. 8, 7 Ann. Cas. 927, 54 S. E. 939.

⁷⁰ The contract presumptively takes effect and is binding upon those who sign it upon its delivery, and the burden is upon them to show the contrary. *State v. Regent Laundry Co.*, 196 Mo. App. 627, 190 S. W. 951.

⁷¹ *State v. Regent Laundry Co.*, 196 Mo. App. 627, 190 S. W. 951.

⁷² *First Nat. Bank of Louisville v. Armstrong*, 177 Ky. 807, 198 S. W. 226.

⁷³ This is true although the measurement of the price is to be affected

by the assets of the corporation. *First Nat. Bank of Louisville v. Armstrong*, 177 Ky. 807, 198 S. W. 226.

⁷⁴ *Henderson v. Phillips*, 178 Fed. 374; *Turley v. Thomas*, 31 Nev. 181, 135 Am. St. Rep. 667, 101 Pac. 568; *Ridgley v. Walker*, 81 N. J. L. 176, 80 Atl. 108.

A contract for the sale of stock, by which the seller undertakes that all debts of the company shall be paid on the day of the transfer, and the buyer is to retain enough of the price to assure him that the company is free from debt, is not void for uncertainty in not stating the debts, since, if default is made in the payment, the amounts to be deducted can be shown. *Northern Cent. Ry. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253.

That is certain which can be made certain. *Willett v. Smith*, 214 Mass. 494, 101 N. E. 1058; *Jelinek v. Baer*, 153 Wis. 426, 141 N. W. 271.

⁷⁵ *Huston v. Harrington*, 58 Wash. 51, 107 Pac. 874.

⁷⁶ The validity of the purchase of an amount of stock by a minority stock-

Stock may be pooled for sale by being placed in the hands of a trustee for that purpose, and this may be done, and the stock may be sold, in such a way that the transaction will be deemed to be a sale of the stock of the individual owners so that each may recover his share of the price from the purchaser, and not a joint sale of all the stock on joint account.⁷⁷ Nor is the validity of a sale by an agent acting within his authority affected by the fact that the purchaser was unaware of the fact of agency, where no fraud is shown.⁷⁸

Stock may be made the subject of an escrow agreement.⁷⁹ If it is deposited in escrow with instructions to deliver it on payment of a specified sum, the person depositing it may revoke the directions given to the depository and recall it at any time before the conditions of the deposit have been complied with, provided there was no money consideration for the escrow agreement, and no independent contract binding the seller to keep the offer to sell open for any particular time, or binding the other party to buy.⁸⁰ Title to the stock does not pass under such an agreement until the conditions are performed, or, perhaps, until delivery of the stock to the vendee, and does not relate back to the time when the stock was deposited.⁸¹ The same rule applies where the money is deposited in escrow by the purchaser to be paid over to the seller on delivery of the stock;⁸² and the depository cannot be held liable under such circumstances for failure to pay over the money where his authority to do so has been revoked by the purchaser before the seller has tendered the stock.⁸³ But it has been held that the sale is complete and cannot thereafter be retracted where the stock is delivered to a bank designated by the purchaser to be delivered to him upon payment of a note given for the purchase price, on the theory that under such circumstances the bank is the purchaser's agent.⁸⁴

holder sufficient to give such stockholder control does not depend upon the motive actuating the purchaser. *Jones v. Green*, 129 Mich. 203, 95 Am. St. Rep. 433, 88 N. W. 1047.

⁷⁷ *Dowling v. Wheeler*, 117 Mo. App. 169, 93 S. W. 924.

⁷⁸ *Jones v. Western Mfg. Co.*, 32 Wash. 375, 73 Pac. 359.

⁷⁹ *Obery v. Lander*, 179 Mass. 125, 60 N. E. 378; *Pounds v. Coburn*, 210 Mo. 115, 107 S. W. 1080; *Swift v. McAlester Trust Co.*, — Okla. —, 154 Pac. 1175; *Clark v. Campbell*, 23 Utah 569, 54 L. R. A. 508, 90 Am. St. Rep.

716, 65 Pac. 496. See *Fry v. Thorne*, 64 Wash. 479, 117 Pac. 230; *McMillen v. Strange*, 159 Wis. 271, 150 N. W. 434.

⁸⁰ *Clark v. Campbell*, 23 Utah 569, 54 L. R. A. 508, 90 Am. St. Rep. 716, 65 Pac. 496.

⁸¹ *Clark v. Campbell*, 23 Utah 569, 54 L. R. A. 508, 90 Am. St. Rep. 716, 65 Pac. 496.

⁸² *Herrin v. Scandinavian-American Bank*, 65 Wash. 569, 118 Pac. 648.

⁸³ *Herrin v. Scandinavian-American Bank*, 65 Wash. 569, 118 Pac. 648.

⁸⁴ *Botsford v. Heney*, 12 Cal. App. 380, 107 Pac. 593.

The validity of contracts for the purchase and sale of stocks depends upon the law of the state where the contract was made.⁸⁵

§ 3858. Consideration and mutuality. Of course there must be a consideration to render an agreement for the sale of stock a binding contract.⁸⁶ And there must also be mutuality of obligation. A

⁸⁵ *Bearse v. McLean*, 199 Mass. 242, 85 N. E. 462.

Where the contract is entered into in one state but the certificates are delivered in another state, its validity is to be determined by the laws of the latter state. *Dow v. Gould & Curry Silver Min. Co.*, 31 Cal. 629.

⁸⁶ *United States*. *Lucas v. Milliken*, 139 Fed. 816.

Colorado. *Griffin v. Knoblock*, 20 Colo. App. 153, 77 Pac. 370.

Georgia. *Hardin v. Case*, 134 Ga. 813, 68 S. E. 648.

Illinois. *Dickinson v. Griggsville Nat. Bank*, 209 Ill. 350, 70 N. E. 593.

Massachusetts. *Murdock v. Caldwell*, 8 Allen 309.

Minnesota. *Peavey v. Wells*, 165 N. W. 1063.

Missouri. *Fuller v. Tootle-Campbell Dry Goods Co.*, 189 Mo. App. 514, 176 S. W. 1091.

Texas. *Le Master v. Hailey*, — Tex. Civ. App. —, 176 S. W. 818.

Washington. *Clough v. Monro*, 86 Wash. 507, 150 Pac. 1190.

A supplemental agreement made after the original contract must be supported by a new consideration. *Dittenfuss v. Horsley*, 177 N. Y. App. Div. 143, 163 N. Y. Supp. 626.

The promise of one party to sell and the promise of the other to buy furnish a sufficient consideration, one for the other. *Van Dam v. Tapscott*, 40 N. Y. App. Div. 36, 57 N. Y. Supp. 534; *Davis Laundry & Cleaning Co. v. Whitmore*, 92 Ohio St. 44, Ann. Cas. 1917 C 988, 110 N. E. 518; *Flannery v. Wessels*, 244 Pa. 321, 90 Atl.

715; *Sherman v. Herr*, 220 Pa. 420, 69 Atl. 899; *Tuthill v. Sherman*, 36 S. D. 237, 154 N. W. 518; *Fourth Nat. Bank of Nashville v. Stahlman*, 132 Tenn. 367, L. R. A. 1916 A 568, 178 S. W. 942.

An agreement to transfer stock and to assign certificates therefor to the purchaser when they are issued is a valuable consideration for notes given for the purchase price. *Furber v. Fogler*, 97 Me. 585, 55 Atl. 514.

The discharge of an existing indebtedness is a sufficient consideration to support a transfer of stock. *Thaxter v. Thain*, 100 N. Y. App. Div. 488, 91 N. Y. Supp. 729.

A valid compromise is a sufficient consideration. *Wood v. Kansas City Home Tel. Co.*, 223 Mo. 537, 123 S. W. 6.

Services rendered and to be rendered are a sufficient consideration. *Johnston v. Frederick Stearns & Co.*, 160 Mich. 247, 125 N. W. 29.

Payment of a debt after the discharge of the debtor in bankruptcy is a sufficient consideration. *Hill v. Kerstetter*, 43 Ind. App. 1, 86 N. E. 858.

Under the statute of California a written instrument is presumed to be supported by a sufficient consideration, and the burden of showing a want of consideration is on the party asserting it. *Kennedy v. Lee*, 147 Cal. 596, 82 Pac. 257; *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926.

"A distinction is to be observed between want or failure of consideration, which is a defense or defense pro tanto to an action between the parties, and

promise to sell, without a corresponding promise to buy, or vice versa, is not binding if no consideration is paid in return for the promise, for in bilateral contracts both parties must be bound, or neither is bound.⁸⁷ But the owner of stock may give another an option to buy within a certain time, and if the other accepts and agrees to buy within the time limited, the offer not having been withdrawn, there is a

inadequacy of consideration which does not in law constitute a defense." *Furber v. Fogler*, 97 Me. 585, 55 Atl. 514. See also *McElhinney v. Harte*, 98 Neb. 229, 152 N. W. 367; *Guss v. Nelson*, 14 Okla. 296, 78 Pac. 170.

Where a transfer of stock has been executed and title has passed, equity will not set it aside for want of consideration alone. *Peavey v. Wells*, 136 Minn. 180, 161 N. W. 508.

The burden of proving want of consideration is on the party alleging it. *Marquardt v. Bartlett*, 173 Iowa 745, 155 N. W. 1014.

87 United States. *Henderson v. Phillips*, 178 Fed. 374.

Arkansas. *Eustice v. Meytrott*, 100 Ark. 510, 140 S. W. 590.

Georgia. *Hardin v. Case*, 134 Ga. 813, 68 S. E. 648.

Massachusetts. *Murdock v. Caldwell*, 8 Allen 309.

Minnesota. *First Nat. Bank of Hastings v. Corporation Securities Co.*, 120 Minn. 105, 139 N. W. 296.

Montana. *Raiche v. Morrison*, 47 Mont. 127, 130 Pac. 1074, 37 Mont. 244, 95 Pac. 1061.

Nebraska. *Jones v. Wattles*, 66 Neb. 533, 92 N. W. 765.

New York. *Joseph v. Sulzberger*, 136 App. Div. 499, 121 N. Y. Supp. 73.

Pennsylvania. *Sherman v. Herr*, 220 Pa. 420, 69 Atl. 899.

Washington. *Herrin v. Scandinavian-American Bank*, 65 Wash. 569, 118 Pac. 648.

"Where a unilateral contract has been performed by one party and the consideration for its execution has

been received by the other party, the party who has performed may insist on fulfillment of the contract." *Kincaid v. Overshiner*, 171 Ill. App. 37.

A contract for the sale of stock, which is to be binding upon the purchaser in case his examination of the books of the company shall be satisfactory, and prove the truth of a covenant as to its earnings, is not void for want of mutuality, as not being necessarily binding on the purchaser, since, if he should refuse to take the stock on tender by the seller, specific performance could be decreed against him. *Northern Cent. Ry. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253.

There is mutuality of obligation whether the holder of an option contract to sell stock agrees to sell it or not, where the option is supported by a sufficient consideration, and binds the other party to purchase if the plaintiff elects to sell within the time specified in the agreement. *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084.

In *McMillan v. Batten*, 52 Ore. 218, 96 Pac. 675, a contract for the sale of stock, when construed as a whole, was held to bind the purchaser to take and pay for certain shares which were to be delivered and paid for in the future, as well as those taken and paid for immediately, and not to be merely an option on his part to do so, although it did not contain language expressly binding him to do so.

binding contract;⁸⁸ and of course a contract giving an option to purchase stock within a certain time is binding if there is an independent consideration, as the payment of money for the option, for example.⁸⁹ Furthermore, a contract giving an option to purchase

⁸⁸ **California.** *Russ v. Tuttle*, 158 Cal. 226, 110 Pac. 813.

Connecticut. *Patterson v. Farmington St. R. Co.*, 76 Conn. 628, 57 Atl. 853.

Minnesota. *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084.

Montana. *Raiche v. Morrison*, 47 Mont. 127, 130 Pac. 1074.

New York. *Brinley v. Nevins*, 162 App. Div. 744, 147 N. Y. Supp. 985.

Virginia. *Seddon v. Rosenbaum*, 85 Va. 928, 3 L. R. A. 337, 9 S. E. 326.

An option is unilateral until it has been exercised by the other party. *Stay v. Tennille*, 159 Ala. 514, 49 So. 238.

An option not supported by a consideration may be withdrawn at any time before it is accepted. *Brinley v. Nevins*, 162 N. Y. App. Div. 744, 147 N. Y. Supp. 985.

A person who takes stock under a contract of sale, giving him an option to return the same within a certain time, is liable for the price if he does not return it within such time. *Stevens v. Hertzler*, 109 Ala. 423, 19 So. 838.

If a person is given an option to purchase stock on the happening of a certain contingency, he is not obliged to give explicit notice to the vendors of his election not to take it, but it is sufficient if he makes such election promptly and does some overt act which will bind him so that it may become properly known. *Randall v. Clafin*, 194 Mass. 560, 80 N. E. 594.

An agreement giving the purchaser an option to purchase stock at any time before it was sold to others, and permitting the seller to sell to others after giving notice to the buyer

of his desire to sell and the opportunity to buy it, was held to bind the purchaser unconditionally to take the stock if it was not so sold, and not to merely give him an option to do so. *Fourth Nat. Bank of Nashville v. Stahlman*, 132 Tenn. 367, L. R. A. 1916 A 568, 178 S. W. 942.

In *Fry v. Thorne*, 64 Wash. 479, 117 Pac. 230, an agreement was held to constitute an option to purchase stock, and not a contract for its sale.

In *Pratt v. Prouty*, 104 Iowa 419, 65 Am. St. Rep. 472, 73 N. W. 1035, an option contract was held to limit the amount of stock that could be purchased in any year, but not to require the purchase of that amount, so that those to whom it ran might elect to purchase a less amount.

⁸⁹ **Connecticut.** *Patterson v. Farmington St. R. Co.*, 76 Conn. 628, 57 Atl. 853.

Iowa. *Pratt v. Prouty*, 104 Iowa 419, 65 Am. St. Rep. 472, 73 N. W. 1035.

Minnesota. *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084.

Montana. *Raiche v. Morrison*, 47 Mont. 127, 130 Pac. 1074, 37 Mont. 244, 95 Pac. 1061.

North Carolina. See *Kuker v. Snow*, 149 N. C. 181, 62 S. E. 909.

A contract between persons holding the entire interest in a corporation by which each gives a first option on his stock at a specified price, with thirty days in which the party may exercise the option or decline so to do, there being a further agreement that in case of death of either of the parties the thirty days shall not begin to run until letters testamentary or of administration have issued, the

stock will be held binding where such option is under seal.⁹⁰

An option to purchase stock must be exercised, if at all, in accordance with its terms. If such an option is given to several persons jointly, one of them alone cannot exercise it.⁹¹

The fact that the stock turns out to be worthless,⁹² or has depreciated in value or become worthless since the contract was made,⁹³ does not amount to a failure of consideration. Nor does the fact that the stock was intrinsically worthless when sold, if it had a market value.⁹⁴ In order to sustain a plea of failure of consideration for a note given for the price of worthless stock, "the purchaser must show that the payee acted in bad faith, that the stock was worthless at the time the note was given, and that the payee knew this fact when the note was given."⁹⁵

The purchaser's liability to pay for the stock in accordance with his agreement cannot be made to depend upon the value placed upon it by him, nor upon his secret intentions as to taking it.⁹⁶ The frustration of an expectation or anticipation of the purchaser does not amount to a failure of consideration,⁹⁷ and he cannot escape liability for the purchase price merely because the venture turned out badly or was not as profitable as he expected it to be,⁹⁸ or because the stock

other parties to the agreement having the right to exercise the option in case the party to whom the members of the corporation gave the first option do not exercise it, is valid, the mutual covenants forming sufficient consideration to sustain the contract. *Seruggs v. Cotterill*, 67 N. Y. App. Div. 583, 73 N. Y. Supp. 882.

⁹⁰ *Hogg v. McGuffin*, 67 W. Va. 456, 31 L. R. A. (N. S.) 491, 68 S. E. 41.

An option contract for the sale of certain stock under seal reciting that one dollar has been paid constitutes a contract which may be enforced in equity. *Watkins v. Robertson*, 105 Va. 269, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33.

⁹¹ *Pratt v. Prouty*, 104 Iowa 419, 65 Am. St. Rep. 472, 73 N. W. 1035.

⁹² *Peck Colorado Co. v. Stratton*, 95 Fed. 741; *Crowther v. Bell*, 190 Ill. App. 49; *Leonard v. Draper*, 187 Mass. 536, 73 N. E. 644; *Renton v. Maryott*, 21 N. J. Eq. 123.

⁹³ *Goad v. Lewis*, 174 Ky. 394, 192

S. W. 30; *Furber v. Fogler*, 97 Me. 585, 55 Atl. 514; *Pittsburg Stove & Range Co. v. Pennsylvania Stove Co.*, 208 Pa. 37, 57 Atl. 77; *Moore v. Caldwell*, 8 Rich. Eq. (S. C.) 22.

⁹⁴ *Goad v. Lewis*, 174 Ky. 394, 192 S. W. 30; *Field v. Turley* (Ky.), 120 S. W. 338; *Kirtley's Adm'x v. Shinkle*, 24 Ky. L. Rep. 608, 69 S. W. 723.

⁹⁵ *McMillan v. First Nat. Bank of Valdosta*, 13 Ga. App. 23, 78 S. E. 734.

⁹⁶ Where a creditor takes stock to apply on his claim, the fact that he placed no value on the stock would be immaterial in an action by him to collect his claim against the corporation. *Reid v. Detroit Ideal Paint Co.*, 132 Mich. 528, 94 N. W. 3.

⁹⁷ *Harriman v. Northern Securities Co.*, 197 U. S. 244, 49 L. Ed. 739, aff'g 134 Fed. 331.

⁹⁸ *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32; *McMillan v. First Nat. Bank of Valdosta*, 13 Ga. App. 23, 78 S. E. 734.

was not as valuable as he thought it would be.⁹⁹ Nor does a mere failure by the other party to the contract to perform,¹ or the fact that certificates of stock had not been delivered before the suit was brought,² or have been retained as collateral security for notes given for the purchase price,³ amount to a failure of consideration.

Breach of warranty may amount to a failure of consideration.⁴ And the same is true of a breach of a collateral agreement without which the contract would not have been made, where it results in the stock becoming worthless.⁵

§ 3859. Oral contracts; statute of frauds—Necessity for writing.

A contract for the sale of shares in a corporation need not be in writing unless writing is expressly required by some statute.⁶ Whether such a contract is within the statute of frauds is a question upon which the courts have differed. As was shown in a former section, shares

The fact that the property of the corporation turns out to be of little value and the company's operations are unprofitable and result in a loss to the purchaser, does not amount to a failure of consideration. *Hill v. Dillon*, 176 Mo. App. 192, 161 S. W. 881.

⁹⁹ *Crowther v. Bell*, 190 Ill. App. 48.

¹ *State Bank of Indiana v. Gates*, 114 Iowa 323, 86 N. W. 311.

² *Crowther v. Bell*, 190 Ill. App. 48.

Failure to deliver the certificates is not a failure of consideration for a note given for the price, where they were not to be delivered until the note was paid, which has not been done. *Cowboy State Bank & Trust Co. v. Guinn*, — Tex. Civ. App. —, 160 S. W. 1103.

In *McLennan v. Plummer*, 34 N. D. 269, 158 N. W. 269, the refusal to execute a formal written assignment of an interest in the stock of a corporation which had issued no certificates was held not to amount to a failure of consideration, where the assignor did not claim any further interest in the stock, and the assignee

exercised full and complete dominion over it and was recognized as its owner by the corporation.

There is a failure of consideration for a note given for the purchase price of stock where the stock has never been delivered and the contract of sale has been rescinded. *Bloodworth v. Woodward*, — Ga. App. —, 93 S. E. 221.

³ *McVay v. Reese*, 62 Wash. 562, 114 Pac. 184.

⁴ *Cornish v. Friedman*, 94 Ark. 282, 126 S. W. 1079.

⁵ *Merchants' & Farmers' Bank v. Smith*, 107 Miss. 105, 64 So. 970.

Failure of the payee of a note given for stock to place certain money in the treasury of the corporation and to give an indemnity bond against the infringement of certain patents, as he agreed to do, was held to amount to a total failure of consideration where the stock was thereby rendered worthless. *McElhinney v. Harte*, 98 Neb. 229, 152 N. W. 367.

⁶ *Colfax Hotel Co. v. Lyon*, 69 Iowa 683, 29 N. W. 780; *Condit v. Galveston City Co.*, — Tex. Civ. App. —, 186 S. W. 395.

of stock are personal property, even though the corporation may own land, and even though all or the greater part of its assets may consist of land;⁷ and it is well settled, therefore, that a contract for the sale of shares in a corporation owning real estate is not within that section of the statute of frauds which provides that no action shall be brought whereby to charge any person "upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them," unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or his authorized agent.⁸

There is a difference of opinion as to whether a contract for the sale of shares is within that section of the statute of frauds which provides that "no contract for the sale of any goods, wares and merchandise" for more than a certain price shall be allowed to be good, "except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged," etc. In England it is well settled that, although shares of stock are personal property, they are not goods, wares or merchandise, within the meaning of this statute,⁹ since the statute only applies to goods, wares and merchandise which are capable of being in part delivered.¹⁰ And the English cases have been followed by some of the courts in this country.¹¹

Most of the courts in this country, however, in which the question has arisen, have taken a different view, and have held that a contract for the sale of shares is within this section of the statute, since it is within the policy of the statute, and the terms "goods" and "merchandise" are broad enough to cover shares of stock.¹² It is held

⁷ See § 3429, *supra*.

⁸ *Watson v. Molden*, 10 Idaho 570, 97 Pac. 503; *Humble v. Mitchell*, 11 A. & E. 205; *Bradley v. Holdsworth*, 3 M. & W. 422. And see *Walker v. Bartlett*, 18 C. B. 845, 2 Jur. (N. S.) 643; *Powell v. Jessopp*, 18 C. B. 336, 25 L. J. C. P. 199.

⁹ *Humble v. Mitchell*, 11 A. & E. 205; *Bowlby v. Bell*, 3 C. B. 284, 16 L. J. C. P. 18; *Watson v. Spratley*, 10 Exch. 222, 24 L. J. Exch. 53; *Duncuft v. Albrecht*, 12 Sim. 189. See also *Hightower v. Ansley*, 126 Ga. 8,

7 Ann. Cas. 927, 54 S. E. 939; *Sprague v. Hosie*, 155 Mich. 30, 19 L. R. A. (N. S.) 874, 130 Am. St. Rep. 558, 118 N. W. 497.

¹⁰ *Duncuft v. Albrecht*, 12 Sim. 189.

¹¹ *Webb v. Baltimore & E. S. R. Co.*, 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113, *limiting Colvin v. Williams*, 3 Harr. & J. (Md.) 38, 5 Am. Dec. 417. See *Clark v. Burnham*, 15 Fed. Cas. No. 2,816; *Vawter v. Griffin*, 40 Ind. 593.

¹² *United States. Snow Storm Min. Co. v. Johnson* 188 Fed. 745, 746.

that this construction is not inconsistent with the exception in the statute of cases in which the purchaser shall accept part of the goods.

lin v. Matoa Gold Min. Co., 158 Fed. 941, 16 L. R. A. (N. S.) 381, 14 Ann. Cas. 302. See also *Lucas v. Miliken*, 139 Fed. 816.

Arkansas. *Russell v. Betts*, 107 Ark. 629, 156 S. W. 457; *Stift v. Stiewel*, 91 Ark. 445, 18 Ann. Cas. 597, 125 S. W. 1008.

California. *Mayer v. Child*, 47 Cal. 142; *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926.

Colorado. *Snow Storm Min. Co. v. Johnson*, 186 Fed. 745; *Franklin v. Matoa Gold Min. Co.*, 158 Fed. 941, 16 L. R. A. (N. S.) 381, 14 Ann. Cas. 302, construing the Colorado statute.

Connecticut. *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323; *North v. Forest*, 15 Conn. 400.

Georgia. *Weatherly v. Cotter*, 142 Ga. 457, 83 S. E. 104; *Hightower v. Ansley*, 126 Ga. 8, 7 Ann. Cas. 927, 54 S. E. 939, overruling *Rogers v. Burr*, 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438; *Seaman v. Sweat*, — Ga. App. —, 95 S. E. 378; *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32. See also *Dinkler v. Baer*, 92 Ga. 432, 17 S. E. 953.

Maine. *Ford v. Howgate*, 106 Me. 517, 29 L. R. A. (N. S.) 734, 76 Atl. 939; *Pray v. Mitchell*, 60 Me. 430.

Massachusetts. *Willett v. Smith*, 214 Mass. 494, 101 N. E. 1058; *Boardman v. Cutter*, 128 Mass. 388; *Eastern R. Co. v. Benedict*, 10 Gray 212; *Tisdale v. Harris*, 20 Pick. 9.

Michigan. *Sprague v. Hosie*, 155 Mich. 30, 19 L. R. A. (N. S.) 874, 130 Am. St. Rep. 558, 118 N. W. 497. See also *Peninsula Leasing Co. v. Cody*, 161 Mich. 604, 126 N. W. 1053.

Missouri. *Fine v. Hornsby*, 2 Mo. App. 61. See *Bernhardt v. Walls*, 29 Mo. App. 206.

Nebraska. See *Jones v. Wattles*, 66 Neb. 533, 92 N. W. 765.

New York. *Tompkins v. Sheehan*, 158 N. Y. 617, 53 N. E. 502, rev'g judgment 9 App. Div. 623, 40 N. Y. Supp. 1150; *Mason v. Decker*, 72 N. Y. 595; *Baltzen v. Nicolay*, 53 N. Y. 467; *Leach v. Weil*, 129 App. Div. 688, 114 N. Y. Supp. 234; *Nichols v. Clark*, 40 Misc. 107, 81 N. Y. Supp. 262; *Ryers v. Tuska*, 39 N. Y. St. Rep. 103, 14 N. Y. Supp. 926 (holding that a rule of the stock exchange to the contrary is immaterial). See also *Cooper v. Bay State Gas Co.*, 127 Fed. 482; *Raymond v. Colton*, 104 Fed. 219.

Ohio. *Davis Laundry & Cleaning Co. v. Whitmore*, 92 Ohio St. 44, Ann. Cas. 1917 C 988, 110 N. E. 518.

South Carolina. See *Gadsden v. Lance*, 1 McMull. Eq. 87, 37 Am. Dec. 548.

Wisconsin. *Korrer v. Madden*, 152 Wis. 646; 140 N. W. 325; *Wiger v. Carr*, 131 Wis. 584, 11 L. R. A. (N. S.) 650, 11 Ann. Cas. 998, 111 N. W. 657; *Spear v. Bach*, 82 Wis. 192, 52 N. W. 97.

In Florida, where the statute uses the words "personal property," it has been held applicable to a sale of shares. *Southern Life Insurance & Trust Co. v. Cole*, 4 Fla. 359.

An agreement to deliver stock for services to be rendered in the future is within the statute. *Franklin v. Matoa Gold Min. Co.*, 158 Fed. 941, 16 L. R. A. (N. S.) 381, 14 Ann. Cas. 302.

A contract of agency authorizing one party to purchase stock from a third person for the other is not a contract for the sale of the stock within this provision. *Wiger v. Carr*, 131 Wis. 584, 11 L. R. A. (N. S.) 650, 11 Ann. Cas. 998, 111 N. W. 657.

An agreement by the promoter of a corporation formed to take over the

"The provision is general," said Chief Justice Shaw, "that no contract for the sale of goods, etc., shall be allowed to be good. The exception is, when part are delivered; but if part cannot be delivered, then the exception cannot exist to take the case out of the general prohibition."¹³

An agreement by the seller of stock to repurchase it at the option of the buyer has been held not to be within this provision, on the theory that the transaction does not constitute a sale.¹⁴ And it has also been held that the sale and agreement to repurchase constitute but a single original contract, and that delivery of the stock to the purchaser and payment therefor constitute sufficient part performance to take it out of the statute.¹⁵ But there is authority that such a contract is within this provision of the statute, and that the purchase of the shares by the buyer is merely preparatory and ancillary to the contract to repurchase, and is not, therefore, such performance as to take the latter contract out of the statute.¹⁶

business of a defunct corporation whereby stockholders of the latter are to have stock in the new company is not a contract for the sale of such stock, and is not within the statute. *Millen v. Potter*, 190 Mich. 262, 157 N. W. 101.

Some courts hold that this section of the statute of frauds does not apply where the goods contracted for are not in existence when the contract is made, or where some act remains to be done to put them in a condition to be delivered, and where this rule obtains the statute does not apply to a contract by which a person agrees to sell to another his right of subscription to certain shares of stock in a corporation when the subscription books shall be opened and the shares issued. *Gadsden v. Lance*, 1 McMull. Eq. (S. C.) 87, 37 Am. Dec. 548.

That a subscription for stock is not within this provision, see § 537, supra.

¹³ *Tisdale v. Harris*, 20 Pick. (Mass.) 9.

¹⁴ *Schaefer v. Streider*, 203 Mass. 467, 89 N. E. 618. See also *Johnston v. Trask*, 116 N. Y. 136, 5 L. R. A.

630, 15 Am. St. Rep. 394, 22 N. E. 377, where this rule was applied to such a provision in a contract for the sale of bonds.

¹⁵ **Colorado.** *Mulford v. Torrey Exploration Co.*, 45 Colo. 81, 100 Pac. 596.

Massachusetts. *Armstrong v. Orlor*, 220 Mass. 112, 107 N. E. 392.

Nebraska. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376.

Vermont. *Fay v. Wheeler*, 44 Vt. 292.

Wisconsin. *Korrer v. Madden*, 152 Wis. 646, 140 N. W. 325; *Hankwitz v. Barrett*, 143 Wis. 639, 128 N. W. 430; *Vohland v. Gelhaar*, 136 Wis. 75, 16 Ann. Cas. 781, 116 N. W. 869.

An agreement whereby in consideration of the purchase of stock from a corporation the company is to employ the purchaser and is to repurchase the stock if it discharges him is taken out of the statute where it is fully performed by the purchaser. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376.

¹⁶ *Bernhardt v. Wall*, 29 Mo. App. 206.

Some courts hold that an agreement by a third person to repurchase stock bought from an existing corporation, either at the buyer's option,¹⁷ or in case it does not pay dividends at a certain rate,¹⁸ or an agreement to find some one who will take the stock and pay a note given for the subscription price,¹⁹ is not within this provision. On the other hand, it has been held that a collateral independent agreement by a third person to purchase the stock of a subscriber to the stock of a corporation in process of being formed, made to induce him to subscribe, is within the statute, and is not taken out of it by the delivery of the stock to the subscriber.²⁰ And in at least one state the same has been held to be true of such an agreement in relation to stock bought from an existing corporation.²¹ It has also been held that an agreement that if a stockholder will not sell his stock to a certain person and the corporation thereafter becomes insolvent the promisor will pay him the par value of his stock with interest is within this provision, on the theory that it is a conditional sale.²²

Of course a contract for the sale of shares which is not to be performed within a year is within that clause of the statute of frauds which renders unenforceable agreements not to be performed within a year from the making thereof, but the statute does not apply when the agreement is to be performed on a contingency which may or may not happen within the year.²³ An agreement by the

¹⁷ *Schaefer v. Strieder*, 203 Mass. 467, 89 N. E. 618.

An agreement that if a person will subscribe for or purchase stock the other party to the contract will repurchase it from him if he is not satisfied with the investment is not within this provision of the statute. *Gurwell v. Morris*, 2 Cal. App. 451, 83 Pac. 578.

An agreement by an officer of the corporation to repurchase on demand stock bought from the corporation is not a contract to purchase goods, wares, merchandise or things in action. *Trenholm v. Kloepper*, 88 Neb. 236, 129 N. W. 436.

¹⁸ An agreement by a third person to pay the purchaser of stock from the corporation its par value with interest on surrender of the certificate to him, if it does not pay annual dividends

at a certain rate, is not within this provision. *Clement v. Rowe*, 33 S. D. 499, 146 N. W. 700.

¹⁹ *Green v. Brookins*, 23 Mich. 48, 9 Am. Rep. 74.

²⁰ *Weatherly v. Cotter*, 142 Ga. 457, 83 S. E. 104; *Seaman v. Sweat*,— Ga. App. —, 95 S. E. 378; *Boardman v. Cutter*, 128 Mass. 388.

²¹ *Korrer v. Madden*, 152 Wis. 646, 140 N. W. 325.

²² *Russell v. Betts*, 107 Ark. 629, 156 S. W. 457.

²³ *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926; *McIlroy v. Richards*, 148 Mich. 694, 112 N. W. 489; *Gadsden v. Lance*, 1 McMull. Eq. (S. C.) 87, 37 Am. Dec. 548; *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868; *Seddon v. Rosenbaum*, 85 Va. 928, 3 L. R. A. 337, 9 S. E. 326

seller to repurchase the stock if the buyer is dissatisfied,²⁴ or if the corporation fails to pay dividends on the stock,²⁵ or to pay the buyer a certain per cent annually on the par value of his stock,²⁶ is also within this provision.

It has been held that an agreement by a third person to purchase from the buyer stock bought from the corporation if the buyer desires to dispose of it,²⁷ or if the corporation fails to pay dividends thereon at a certain rate,²⁸ or guaranteeing that the corporation will pay dividends on the stock at a specified rate and agreeing to make up any deficiency,²⁹ or that the corporation will accept certain notes and mortgages in full payment for the stock, and to indemnify the purchaser against any action of the corporation to recover anything further by way of payment,³⁰ is not a promise to answer for the debt, default or miscarriage of another within the meaning of the statute. And the same has been held to be true of a guaranty by a

(where the statute was held inapplicable to a contract to sell shares within three years at the option of the other party). See also *Kutz v. Fleisher*, 67 Cal. 93, 7 Pac. 195.

For applications of this provision to subscriptions to stock, see § 537, *supra*.

²⁴ An agreement was made that if plaintiff would purchase certain stock and should become dissatisfied therewith at the end of a year defendant would buy same back at the price paid. Some six weeks later the plaintiff, relying on the agreement, bought certain shares of the stock, paying therefor. The court held the date of the purchase to be the date of the contract, and it was therefore a contract to be performed within a year and hence did not come within the statute of frauds. *Gurwell v. Morris*, 2 Cal. App. 451, 83 Pac. 578.

See *Vohland v. Gelhaar*, 136 Wis. 75, 16 Ann. Cas. 781, 116 N. W. 869, where it was held that the evidence sustained a finding that the agreement was to repurchase the stock within one year from the date of sale, so that the statute did not apply.

Such an agreement by a third person made to induce a purchase from

the corporation is taken out of the statute where the purchaser takes and pays for the stock within a year, since the contract is no longer executory on his part. *West v. King*, 163 Ky. 561, 174 S. W. 11.

²⁵ An agreement by an individual that if stock purchased from the company does not pay certain annual dividends the purchaser may, at the expiration of two years, surrender the stock to him, and that he will then pay the purchaser the par value thereof with interest, is within this provision. *Clement v. Rowe*, 33 S. D. 499, 146 N. W. 700.

²⁶ *Hubbard v. Hubbard*, 151 N. Y. App. Div. 174, 135 N. Y. Supp. 908.

Such an agreement is not taken out of the statute by part performance. *Hubbard v. Hubbard*, 151 N. Y. App. Div. 174, 135 N. Y. Supp. 908.

²⁷ *West v. King*, 163 Ky. 561, 174 S. W. 11; *Trenholm v. Kloepper*, 88 Neb. 236, 129 N. W. 436.

²⁸ *Clement v. Rowe*, 33 S. D. 499, 146 N. W. 700.

²⁹ *Crook v. Scott*, 65 N. Y. App. Div. 139, 72 N. Y. Supp. 516, *aff'd* 174 N. Y. 520, 66 N. E. 1106.

³⁰ *Patrick v. Barker*, 78 Neb. 823, 112 N. W. 358.

third person that the stock will pay dividends at a certain rate per annum.³¹ But the contrary has been held to be true of an agreement by a promoter made to induce a subscription to the stock of a proposed corporation that if the company fails the promoter will pay back to the subscriber all the money put in by him;³² and of a guaranty that the corporation will return the money invested with a specified profit on or before a certain date;³³ and of a promise to pay the notes of a third person as part of the purchase price of stock.³⁴

§ 3860. — Sufficiency of writing or memorandum; part performance. The rules for determining what is a sufficient writing or memorandum to satisfy the statute are those applicable to sales of personal property generally.³⁵ As in other cases it must contain the complete contract, leaving nothing to be supplied by parol.³⁶ Letters written between parties after an oral contract had been entered into, which disclose the full terms of the contract, afford a sufficient memorandum to satisfy the statute.³⁷ And the same is true of a written offer signed by the party making it although it is accepted by parol;³⁸ and of a memorandum signed by an agent of the seller, having written authority to make the sale.³⁹

Contracts within the statute are presumed to be in writing until the contrary appears, and hence, in declaring on such a contract, it need not be alleged that it was in writing, but the presumption that it was necessarily follows the allegation of its making.⁴⁰

³¹ West v. King, 163 Ky. 561, 174 S. W. 11; Moorehouse v. Crangle, 36 Ohio St. 130, 38 Am. Rep. 564.

³² Gansey v. Orr, 173 Mo. 532, 73 S. W. 477.

³³ Hunt v. Taylor, 27 Ky. L. Rep. 978, 87 S. W. 290.

³⁴ Beeson v. Wright, 159 Cal. 133, 112 Pac. 1091.

³⁵ See standard works on the subject.

³⁶ Hightower v. Ansley, 126 Ga. 8, 7 Ann. Cas. 927, 54 S. E. 939; Leach v. Weil, 129 N. Y. App. Div. 688, 114 N. Y. Supp. 234.

As to the sufficiency of the memorandum, see Willett v. Smith, 214 Mass. 494, 101 N. E. 1058.

But the situation of the parties and the circumstances under which the contract was made may be shown by parol

for the purpose of fixing the subject-matter of the agreement and showing the meaning which they put upon their words. Willett v. Smith, 214 Mass. 494, 101 N. E. 1058.

³⁷ Cooper v. Bay State Gas Co., 127 Fed. 482; Weymouth v. Goodwin, 105 Me. 510, 75 Atl. 61.

But the contrary is true of a letter which does not specify the shares of stock of any particular corporation, or the price to be paid, or when payment is to be made. Hightower v. Ansley, 126 Ga. 8, 7 Ann. Cas. 927, 54 S. E. 939.

³⁸ In re Pettingill & Co., 137 Fed. 143.

³⁹ Jones v. Wattles, 66 Neb. 533, 92 N. W. 765.

⁴⁰ Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926.

As in other cases, an oral contract for the sale of stock is taken out of the statute where it has been partly or fully performed by one of the parties,⁴¹ as where the stock has been delivered and paid for,⁴² or where the whole or a part of the purchase price has been paid,⁴³ or where the buyer receives and accepts the stock or a part of it.⁴⁴ Whether or not there has been such an acceptance is ordinarily a question of fact.⁴⁵

Both delivery and acceptance may be inferred from circumstances.⁴⁶ So if the purchaser does some act that is only reconcilable with the fact that he is the owner of the stock, such act is evidence that he has accepted the sale and that the contract is no longer executory.⁴⁷

⁴¹ *Hightower v. Ansley*, 126 Ga. 8, 7 Ann. Cas. 927, 54 S. E. 939; *Conger v. Lee*, 175 Iowa 423, 157 N. W. 240. See also *Lucas v. Milliken*, 139 Fed. 816.

A contract for the sale of stock is taken out of the statute where the owner has agreed to sell same at a specified price on condition that the vendee give up a lucrative position and enter the employ of the company at a stated salary, and the vendee has complied with the condition. *Hightower v. Ansley*, 126 Ga. 8, 7 Ann. Cas. 927, 54 S. E. 939.

⁴² *Lafountain & Woolson Co. v. Brown*, — Vt. —, 101 Atl. 36; *Wiger v. Carr*, 131 Wis. 584, 11 L. R. A. (N. S.) 650, 11 Ann. Cas. 998, 111 N. W. 657.

⁴³ *Cooper v. Bay State Gas Co.*, 127 Fed. 482. See also *White v. Drew*, 56 How. Pr. (N. Y.) 53.

Payment of a part of the purchase price to an agent who is expressly authorized to make the sale is a sufficient compliance with the statute. *Jones v. Wattles*, 66 Neb. 533, 92 N. W. 765.

Under some statutes to take the case out of the statute payment must have been made at the time of the making of the contract. *Franklin v. Matoa Gold Min. Co.*, 158 Fed. 941, 16 L. R. A. (N. S.) 381, 14 Ann. Cas. 302; *Raymond v. Colton*, 104 Fed. 219.

⁴⁴ *Connecticut*. *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323.

Georgia. *Dinkler v. Baer*, 92 Ga. 432, 17 S. E. 953.

Maine. *Ford v. Howgate*, 106 Me. 517, 29 L. R. A. (N. S.) 734, 76 Atl. 939.

Ohio. *Davis Laundry & Cleaning Co. v. Whitmore*, 92 Ohio St. 44, Ann. Cas. 1917 C 988, 110 N. E. 518.

Wisconsin. *Spear v. Bach*, 82 Wis. 192, 52 N. W. 97.

In *Tompkins v. Sheehan*, 158 N. Y. 617, 53 N. E. 502, rev'g 9 N. Y. App. Div. 623, 40 N. Y. Supp. 1150, it was held that a contract to sell shares of stock owned by a number of persons in severalty was a separate transaction as to each of them, and that therefore delivery of his stock by one of them would not take the contract out of the statute as to the others.

As to what constitutes an acceptance and receipt, see *De Nunzio v. De Nunzio*, 90 Conn. 342, 79 Atl. 323; *Spear v. Bach*, 82 Wis. 192, 52 N. W. 97.

⁴⁵ *Davis Laundry & Cleaning Co. v. Whitmore*, 92 Ohio St. 44, Ann. Cas. 1917 C 988, 110 N. E. 518.

⁴⁶ *Ford v. Howgate*, 106 Me. 517, 29 L. R. A. (N. S.) 734, 76 Atl. 939.

⁴⁷ *Ford v. Howgate*, 106 Me. 517, 29 L. R. A. (N. S.) 734, 76 Atl. 939.

§ 3861. Illegality; gambling contracts. A contract for the sale of stock may be illegal because it is contrary to public policy, or because it is in violation of an express statutory prohibition. In such a case, the effect of the contract is governed by the general principles in relation to illegal contracts. The contract itself is void, and, as a rule, no action can be maintained upon it by either party;⁴⁸ although, where it has been fully executed, the purchaser is sometimes permitted to recover what he has paid, if he purchased in good faith and in ignorance of the illegality.⁴⁹ Even if a statute providing that any person who shall transfer or put upon the market any stock of a corporation whose charter has been suspended for failure to pay its franchise tax shall be subject to a fine for the benefit of the state applies to sales of shares by individual stockholders in the ordinary course of private business dealings, it is penal in character and has no extraterritorial effect. Hence it does not invalidate a note given for the purchase price of stock sold by an individual stockholder, which is made, is payable, and is sought to be enforced in another state.⁵⁰

⁴⁸ *Rogers v. Gladiator Gold Mining & Milling Co.*, 21 S. D. 412, 113 N. W. 86.

Stock delivered under an illegal contract cannot be recovered back by any party in *pari delicto*. *Harriman v. Northern Securities Co.*, 197 U. S. 244, 49 L. Ed. 739, *aff'g* 134 Fed. 331.

Negotiable certificates of indebtedness issued by a corporation were purchased by one who had notice that the certificates were issued as payment for stock of another corporation, which the first corporation had power to buy. The court held that notice that the transaction violated the state anti-trust law could not be imputed to the purchaser, nor could he be deemed to have been put upon inquiry as to the legality of the transaction, and that as a defense to suit brought on the certificates the corporation could not be permitted to show such facts where there was an absence of actual proof of bad faith on the part of the purchaser in making the purchase. *National Salt Co. v. Ingraham*, 143 Fed. 805.

Where a contract has been made to transfer certain shares to plaintiff's

intestate, it is no defense to an action to enforce the contract that deceased was connected with a pool of which the shares were a part, or that he was a corporate officer, or that there had been an overissue of stock. *Cary v. Leszynsky*, 184 Mass. 44, 67 N. E. 637.

⁴⁹ One who purchases stock of a foreign corporation from the corporation may recover back what he paid for it where it is subsequently declared void because issued for less than par in violation of the statute, and where he was ignorant of the foreign statute, and the rights of creditors are not involved. *Hallett v. New England Roller-Grate Co.*, 105 Fed. 217, judgment reversed on other grounds, 119 Fed. 873.

But a party to an illegal contract is not exempt from the doctrine in *pari delicto* because he acted in good faith and in the mistaken belief that the statute which was held to invalidate it did not apply. *Harriman v. Northern Securities Co.*, 197 U. S. 244, 49 L. Ed. 739, *aff'g* 134 Fed. 331.

⁵⁰ *Long v. Symonds*, 216 Mass. 595, 104 N. E. 476.

In the absence of express statutory prohibition, a contract for the sale of stock to be delivered in the future is valid, although the seller does not own the stock at the time the contract is made, and has no other means of getting it than by going into the market and buying it, provided the parties really intend a delivery of the stock and payment of the price, and not a mere gambling on the rise or fall of prices.⁵¹

By the weight of authority, however, such a contract is contrary to public policy and void as a gambling contract, even at common law, where the real intent of the parties is merely to speculate in the rise or fall of price, and the stock is not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the stock at the date fixed for delivery.⁵² But it has

⁵¹ **United States.** *Irwin v. Williar*, 110 U. S. 499, 28 L. Ed. 225; *Clarke v. Foss*, 7 Biss. 540, Fed. Cas. No. 2,852.

Connecticut. *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154.

Illinois. *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 646; *Pixley v. Boynton*, 79 Ill. 351.

Indiana. *Whiteside v. Hunt*, 97 Ind. 191.

Louisiana. *Conner v. Robertson*, 37 La. Ann. 814, 55 Am. Rep. 521.

Maine. *Dillaway v. Alden*, 88 Me. 230, 33 Atl. 981.

New Hampshire. *Eastman v. Fiske*, 9 N. H. 182.

New Jersey. *Pratt v. Boody*, 55 N. J. Eq. 175, 35 Atl. 1113; *Flagg v. Baldwin*, 38 N. J. Eq. 219.

New York. *Wamsley v. Horton & Co.*, 77 Hun 317, 28 N. Y. Supp. 423.

Pennsylvania. *In re Taylor & Co.'s Estate*, 192 Pa. St. 304, 73 Am. St. Rep. 812, 43 Atl. 973; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Smith v. Bouvier*, 70 Pa. St. 325.

Option contracts are valid at common law. *Schneider v. Turner*, 130 Ill. 28, L. R. A. 164, 22 N. E. 497.

⁵² **United States.** *Irwin v. Williar*, 110 U. S. 499, 28 L. Ed. 225.

Illinois. *Jamieson v. Wallace*, 167

Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 762; *Schneider v. Turner*, 130 Ill. 28, 6 L. R. A. 164, 22 N. E. 497.

Indiana. *Whitesides v. Hunt*, 97 Ind. 191.

Maryland. *Cover v. Smith*, 82 Md. 586, 34 Atl. 465; *Billingslea v. Smith*, 77 Md. 504, 26 Atl. 1077; *Stewart v. Schall*, 65 Md. 299, 57 Am. Rep. 327, 4 Atl. 399.

Massachusetts. *Harvey v. Merrill*, 150 Mass. 1, 5 L. R. A. 200, 15 Am. St. Rep. 159, 22 N. E. 49.

Michigan. *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390.

New Jersey. *Flagg v. Baldwin*, 38 N. J. Eq. 219.

Pennsylvania. *Wagner v. Hildebrand*, 187 Pa. St. 136, 41 Atl. 34; *Gaw v. Bennett*, 153 Pa. St. 247, 34 Am. St. Rep. 699, 25 Atl. 1114; *Dickson's Ex'r v. Thomas*, 97 Pa. St. 278; *Ruchizky v. De Haven*, 97 Pa. St. 202; *North v. Phillips*, 89 Pa. St. 250; *Fareira v. Gabell*, 89 Pa. St. 89; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155.

"In order to invalidate the contract, it must appear that neither party has the intention to deliver the property, and that both parties have the intention of settling the differences only." *Jamieson v. Wallace*, 167 Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 762.

been held that, if it is agreed and understood by the parties that the contract shall be performed according to its terms if either party requires it, and that either party shall have the right to require it, the contract does not become a wagering contract because one or both of the parties, when the time for performance arrives, agrees not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price and the market price at that time.⁵³

In many jurisdictions this subject is covered by statutes expressly prohibiting contracts for the sale of stock where the parties do not intend an actual delivery, but a settlement by payment of the difference between the market and the contract price;⁵⁴ or prohibiting contracts for the sale of shares unless the seller owns them at the time of the contract;⁵⁵ or invalidating option contracts to sell or buy stock in the future, or on margin.⁵⁶

"The intention of the parties in this regard may be established, not merely by their assertions, but by all the attendant circumstances of the transaction. The question of intention is a question for the jury or for the court, to be determined by a consideration of all the evidence." *Jamieson v. Wallace*, 167 Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 762.

Buying and selling stock through a broker is not a gambling transaction where there is actual delivery to the broker, although there is no delivery by him to the principal. *Young v. Glendenning*, 194 Pa. St. 550, 45 Atl. 364.

See *In re Taylor & Co.'s Estate*, 192 Pa. St. 304, 73 Am. St. Rep. 812, 43 Atl. 973, to the effect that an agreement for an actual sale and purchase of stocks validates a transaction which originated in an intention merely to wager.

⁵³ *Harvey v. Merrill*, 150 Mass. 1, 5 L. R. A. 200, 15 Am. St. Rep. 159, 22 N. E. 49.

⁵⁴ *Hess v. Rau*, 95 N. Y. 359; *Harris v. Turnbridge*, 83 N. Y. 92; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Story v. Salomon*, 71 N. Y. 420; *Cameron v.*

Durkheim, 55 N. Y. 425; *White v. Smith*, 54 N. Y. 522; *Knowlton v. Fitch*, 52 N. Y. 288; *Universal Stock Exchange v. Strachan*, [1896] App. Cas. 166; *Thacker v. Hardy*, 4 Q. B. D. 685; *In re Gieve*, [1899] 1 Q. B. 794.

The California Const. art. IV, § 26, as amended Nov. 3, 1908, contains such a provision. *Willcox v. Edwards*, 162 Cal. 455, Ann. Cas. 1913 C 1392, 123 Pac. 276. See the third note following for cases construing this provision as it was before the adoption of the amendment.

⁵⁵ See *Barrett v. Mead*, 10 Allen (Mass.) 337; *Wyman v. Fiske*, 3 Allen (Mass.) 238, 80 Am. Dec. 66. Compare *Price v. Minot*, 107 Mass. 49.

This provision applies only to contracts made in the state. *Bearse v. McLean*, 199 Mass. 242, 85 N. E. 462.

⁵⁶ *Kantzler v. Benzinger*, 214 Ill. 589, 73 N. E. 874, rev'g 112 Ill. App. 293; *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869, aff'g 111 Ill. App. 606; *Ubben v. Binnian*, 182 Ill. 508, 55 N. E. 552, rev'g judgment 78 Ill. App. 330; *Wolf v. National Bank of Illinois*, 178 Ill. 85, 52 N. E. 896, rev'g judgment 77 Ill. App. 325; *Schneider v. Turner*, 130 Ill. 28, 6 L. R. A. 164, 22

The purpose of provisions of this character is to prohibit wagering contracts in regard to the future market value of stocks, or "dealing

N. E. 497; *Clews v. Jamieson*, 96 Fed. 648, aff'g 89 Fed. 63; *Richter v. Frank*, 41 Fed. 859, construing the Illinois statute.

The statute is not confined in its operation to such option contracts as contemplate a settlement by the payment of differences. *Schneider v. Turner*, 130 Ill. 28, 6 L. R. A. 164, 22 N. E. 497.

A contract whereby in consideration of one dollar and other valuable considerations, a person agrees to sell certain stock to certain persons for an agreed price if taken on or before a certain day is within the inhibition of the statute and void. *Schneider v. Turner*, 130 Ill. 28, 6 L. R. A. 164, 22 N. E. 497.

The California Const. art. IV, § 26, formerly provided: "All contracts for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." *Willcox v. Edwards*, 162 Cal. 455, Ann. Cas. 1913 C 1392, 123 Pac. 276; *Stillwell v. Cutter*, 146 Cal. 657, 80 Pac. 1071; *Parker v. Otis*, 130 Cal. 322, 92 Am. St. Rep. 56, 62 Pac. 571, 927, aff'd 187 U. S. 606, 47 L. Ed. 323; *Maurer v. King*, 127 Cal. 114, 59 Pac. 290; *Kullman v. Simmens*, 104 Cal. 595, 38 Pac. 362; *Baldwin v. Zadig*, 104 Cal. 594, 38 Pac. 363, 722; *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393; *Wetmore v. Barrett*, 103 Cal. 246, 37 Pac. 140; *Cashman v. Root*, 89 Cal. 373, 12 L. R. A. 511, 23 Am. St. Rep. 482, 26 Pac. 883.

This provision was held not be in conflict with § 1 of the Fourteenth Amendment to the Federal Constitution, but to be a valid exercise of the

police power. *Otis v. Parker*, 187 U. S. 606, 47 L. Ed. 323, aff'g 130 Cal. 322, 92 Am. St. Rep. 56, 62 Pac. 571, 927.

It was also held to be self-executing, and to need no act of the legislature to give it its intended effect. *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393.

The meaning of the terms "on margin" and "future delivery" is to be determined by the court as a matter of law, and does not depend on the evidence of witnesses in particular cases. *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393.

"An agreement between vendor and vendee, for the sale of stock upon payment of a part of the agreed price, the stock to be retained by the vendor as security for the balance, and only to be delivered upon full payment, with the right in the vendor to sell it at any time, without notice to the vendee, if it should so depreciate in the market as to be worth less than three times the unpaid balance, is a sale of stock on margin for future delivery." *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393.

When the purchaser of stock pays to the vendor, or to his broker, a percentage of the purchase price upon an agreement that the stock shall be held as security for the balance, the amount so paid is "margin" within the meaning of this provision. *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393.

This provision applies although the stock is purchased through a broker who pays for it and then holds it as security for the money advanced, and though the broker acts merely as the agent of the purchaser, if the latter is thereby enabled to purchase the stock on margin. *Cashman v. Root*, 89 Cal. 373, 12 L. R. A. 511, 23 Am. St. Rep. 482, 26 Pac. 883.

in futures," as it is called,⁵⁸ and not to prevent legitimate transfers or pledges of stock;⁵⁹ and hence they are generally held to apply only to transactions which are in the nature of gambling contracts.⁶⁰

"Whether a transaction or series of transactions between a broker and his customer for the purchase of stocks that are not immediately delivered, or of which an immediate delivery is not contemplated, is in contravention of this provision of the constitution, is a question of fact to be determined in each particular case, and the circumstances under which the transaction is had, and the conduct of the parties in reference thereto, will naturally have great influence in determining this fact." *Kullman v. Simmens*, 104 Cal. 595, 38 Pac. 362.

The broker cannot evade this provision by going through the form of buying the stock from a third party for the account of the purchaser, when his contract with the latter provides that the title to the shares shall remain in him until full payment is made. *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393.

An agreement whereby one broker purchases and sells stocks for another broker, advancing money for the purpose and paying assessments on the stock purchased, is not within this provision. *Kutz v. Fleisher*, 67 Cal. 93, 7 Pac. 195.

This provision was amended Nov. 3, 1908, and now provides that all contracts for the purchase or sale of stock without any intention to deliver and receive the same, and contemplating merely the payment of differences, shall be void, and that neither party shall be entitled to recover any damages for failure to perform the same, or any money paid thereon. *Willcox v. Edwards*, 162 Cal. 455, Ann. Cas. 1913 C 1392, 123 Pac. 276.

⁵⁸ *Maurer v. King*, 127 Cal. 114, 59 Pac. 290; *Kullman v. Simmens*, 104 Cal. 595, 38 Pac. 362; *Cashman v.*

Root, 89 Cal. 373, 12 L. R. A. 511, 23 Am. St. Rep. 482, 26 Pac. 883; *Schneider v. Turner*, 130 Ill. 28, 6 L. R. A. 174, 22 N. E. 497.

⁵⁹ In speaking of the former provision of the California Constitution prohibiting sales on margin, it was said that it "will not prevent any legitimate transfer of stock, whether through the agency of a broker or otherwise, nor will it prevent any legitimate or bona fide pledge of stock certificates as security for borrowed money, whether borrowed for the purpose of paying for the stock or any other purpose. Where such is not only the form, but the substance, of the transaction, the inhibition of the constitution does not apply." *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393.

It was also said in another case: "It is not the purpose of this provision of the constitution to interfere with legitimate business, or to make void all time contracts for the purchase of shares in incorporated companies." *Kullman v. Simmens*, 104 Cal. 595, 38 Pac. 362.

And in still another case: "If the provision on its face fails to distinguish between bona fide contracts and gambling contracts * * *, it is none the less a proper police regulation, for the question remains to be determined in each case whether the transaction is in contravention of the constitution. The court will always see that legitimate business transactions are not brought under the ban." *Parker v. Otis*, 130 Cal. 322, 92 Am. St. Rep. 56, 62 Pac. 571, 927, judgment aff'd 187 U. S. 606, 47 L. Ed. 323.

⁶⁰ *Kantzler v. Benzinger*, 214 Ill. 589, 73 N. E. 874, rev'g 112 Ill. App. 293; *Osgood v. Skinner*, 211 Ill. 229,

So they have been held not to invalidate an agreement by one who purchases a controlling interest in the stock of a corporation that he will purchase the balance of the stock owned by the seller after a certain number of years, if the latter wishes to sell it,⁶¹ nor an agreement by one who sells stock to repurchase the same at the election of the purchaser.⁶²

The substance of the transaction rather than its form, or the name given it by the parties, controls in determining whether it comes within the inhibition.⁶³ If the contract is void by the law in force

71 N. E. 869, aff'g 111 Ill. App. 606; *Ubben v. Binnian*, 182 Ill. 508, 55 N. E. 552, rev'g 78 Ill. App. 330; *Wolf v. National Bank of Illinois*, 178 Ill. 85, 52 N. E. 896, rev'g 77 Ill. App. 325; *Skinner v. Osgood*, 83 Ill. App. 454; *Richter v. Frank*, 41 Fed. 859, construing the Illinois statute.

"In order to invalidate a contract as a wagering one, both parties must intend that instead of the delivery of the article there shall be a mere payment of the difference between the contract and the market price." *Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1183, rev'g judgment 96 Fed. 648.

A contract for the sale of stock with a provision for future delivery is valid on its face, and the burden of proving that it is invalid as being a mere cover for the settlement of differences rests with the party making the assertion. *Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1183, rev'g judgment 96 Fed. 648.

"The fact that at the time of making a contract for future delivery the party binding himself to sell has not the goods in his possession and has no means of obtaining them for delivery, otherwise than by purchasing them after the contract is made, does not invalidate the contract." *Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1183, rev'g judgment 96 Fed. 648.

The statute "was not intended to and does not make it a crime for one who is engaged in an ordinary and

legitimate business transaction to obtain a price on stocks as a part of such transaction or incident thereto and where there is no attempt to use the contract as a cover for a wager on the price of stocks." *Bawden v. Taylor*, 254 Ill. 464, 98 N. E. 941, aff'g 166 Ill. App. 443.

⁶¹ *Kantzler v. Benzinger*, 214 Ill. 589, 73 N. E. 874, rev'g 112 Ill. App. 293.

⁶² *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869, aff'g 111 Ill. App. 606; *Ubben v. Binnian*, 182 Ill. 508, 55 N. E. 552, rev'g 78 Ill. App. 330; *Shultz v. Miller-Hamilton*, 189 Ill. App. 396; *Skinner v. Osgood*, 83 Ill. App. 454; *Richter v. Frank*, 41 Fed. 859, construing the Illinois statute.

See also *Wolf v. National Bank of Illinois*, 178 Ill. 85, 52 N. E. 896, rev'g 77 Ill. App. 325, where the same was held to be true of an agreement to repurchase bonds.

A guaranty by the seller of stock that it will be worth a certain price within a certain time, and an agreement to take it back at that price at the end of that time if the buyer then holds the stock and so requests, is not within a prohibition against contracts for the sale of stock for future delivery. *Maurer v. King*, 127 Cal. 114, 59 Pac. 290.

⁶³ *Kullman v. Simmens*, 104 Cal. 595, 38 Pac. 362; *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393.

The provision "cannot be evaded

when it is made, a subsequent repeal of the law will not validate it.⁶⁴

Statutes and constitutional provisions sometimes expressly permit the recovery of money paid under contracts of this character.⁶⁵ Such a provision applies only to contracts made in the state of its enactment.⁶⁶ The right to sue under it in respect to previous transactions does not survive the repeal of the provision giving the right of action.⁶⁷

by varying the form of the contract. If it be in reality a wagering contract of the character denounced, it is void." *Maurer v. King*, 127 Cal. 114, 59 Pac. 290.

⁶⁴ *Willcox v. Edwards*, 162 Cal. 455, Ann. Cas. 1913 C 1392, 123 Pac. 276.

⁶⁵ Art. IV, § 26 of the Constitution of California formerly contained such a provision. *Willcox v. Edwards*, 162 Cal. 455, Ann. Cas. 1913 C 1392, 123 Pac. 276. Under this provision it was held that the money paid might be recovered from brokers to whom the plaintiff gave his orders for the purchase of the stock even though they were the agents of the plaintiff and executed the orders to purchase through other brokers, where the plaintiff did not know from whom they obtained the stock or who made the purchase. *Stillwell v. Cutter*, 146 Cal. 657, 80 Pac. 1071. And also that money paid on such a contract by an agent for an undisclosed principal may be recovered by the principal. *Parker v. Otis*, 130 Cal. 322, 92 Am. St. Rep. 56, 62 Pac. 571, 927, judgment aff'd 187 U. S. 606, 47 L. Ed. 323.

It was also held that the purchaser might recover property conveyed to the broker in trust to secure advances made by the latter pursuant to the illegal contract without accounting for such advances. *Cashman v. Root*, 89 Cal. 373, 12 L. R. A. 511, 23 Am. St. Rep. 482, 26 Pac. 883. And also that brokers purchasing stock on margin were not entitled to have the amount of assessments paid by them while

they held the stock as security deducted from the amount recovered, where the customer did not request such payment. Since the transaction was void, the brokers were not deemed to have held the stock for the customer, or as security for a debt due from him, and hence the law would not imply a request to pay such assessments nor a promise to repay. *Wetmore v. Barrett*, 103 Cal. 246, 37 Pac. 140.

The action to recover money paid on such a contract was held not to be an action to recover a statutory penalty within the meaning of the statute of limitations; but one for money had and received, and hence recovery could not be had except after demand and refusal. *Parker v. Otis*, 130 Cal. 322, 92 Am. St. Rep. 56, 62 Pac. 571, 927, judgment aff'd 187 U. S. 606, 47 L. Ed. 323.

Interest could not be recovered on the money so paid. *Parker v. Otis*, 130 Cal. 322, 92 Am. St. Rep. 56, 62 Pac. 571, 927, judgment aff'd 187 U. S. 606, 47 L. Ed. 323; *Baldwin v. Zedig*, 104 Cal. 594, 38 Pac. 363, 722.

The amendment to this section, which took effect Nov. 3, 1908, not only eliminates this provision, but expressly provides that money paid on contracts which violate its provisions cannot be recovered. *Willcox v. Edwards*, 162 Cal. 455, Ann. Cas. 1913 C 1392, 123 Pac. 276.

⁶⁶ *Bearse v. McLean*, 199 Mass. 242, 85 N. E. 462.

⁶⁷ *Willcox v. Edwards*, 162 Cal. 455, Ann. Cas. 1913 C 1392, 123 Pac. 276.

§ 3862. Effect of fraud and false representations—Scope of subdivision. In determining what constitutes fraud in the sale of stock, the general principles on the subject of fraud are to be applied. These have already been considered in treating of subscriptions for stock induced by fraud, and the cases there referred to are generally applicable to sales of stock.⁶⁸ The question whether officers and directors are trustees for, and stand in a confidential relation to, individual stockholders in dealing with them in respect to their stock, so as to preclude them from taking advantage of their superior knowledge in respect to the corporate affairs,⁶⁹ the liability of corporate officers and directors for fraudulent representations as to the financial condition of the company to persons who are induced to purchase or sell stock in reliance thereon,⁷⁰ and the responsibility of the corporation for the false representations of its officers, directors and agents,⁷¹ has been fully considered in a previous chapter.

§ 3863. — What amounts to fraud in general. The general rule is that any false representation of a material past or existing fact by either party to a contract for the sale of stock constitutes fraud, if it is made with knowledge that it is false, or recklessly, without any belief in its truth, with intent that it shall be acted upon by the other party, and if it is relied upon by the other party to his injury.⁷² Fraudulent representations may be effected by acts or conduct as well

⁶⁸ See § 610 et seq., *supra*.

⁶⁹ See § 2563 et seq., *supra*.

⁷⁰ See § 2544 et seq., *supra*.

⁷¹ See § 2159 et seq., *supra*.

⁷² **Colorado.** *Moore v. Carrick*, 26 Colo. App. 97, 140 Pac. 485.

Kentucky. *Head v. Oglesby*, 175 Ky. 613, 194 S. W. 793.

Missouri. *Flood v. Busch*, 165 Mo. App. 142, 146 S. W. 73.

New York. *Potts v. Lambie*, 157 App. Div. 800, 142 N. Y. Supp. 795, 138 App. Div. 144, 122 N. Y. Supp. 935; *Thayer v. Schley*, 137 App. Div. 166, 121 N. Y. Supp. 1064.

Oregon. *Joplin v. Nunnally*, 67 Ore. 566, 134 Pac. 1177.

Utah. *Hancock v. Luke*, 46 Utah 26, 148 Pac. 452.

In *McLennan v. Plummer*, 34 N. D. 269, 158 N. W. 269, the refusal to ex-

ecute a formal written assignment of an interest in the stock of a corporation which had issued no certificates was held not to be a fraud warranting rescission.

In *Paul v. Bialy*, 256 Pa. 590, 100 Atl. 1000, a judgment refusing to cancel a sale on the ground that no fraud had been shown was sustained.

A technical breach of duty on the part of the directors of a bank in denying a transfer of stock on the books of the bank, by which the purchaser failed to secure a sale of his stock prior to the time of the bank's insolvency, did not necessarily show fraud as against the purchaser. *Penfold v. Charlevoix Sav. Bank*, 140 Mich. 126, 103 N. W. 572.

See also the cases cited in the notes following.

as by words,⁷³ and concealment or the nondisclosure of facts may amount to fraud when there is a duty to speak.⁷⁴

Where a fiduciary relation exists between the parties, the person in whom the trust and confidence is imposed is bound to exercise the utmost good faith in the premises,⁷⁵ and to refrain from doing anything or making any representation to mislead or deceive the other party for the purpose of advancing his own interests,⁷⁶ and the burden of showing such good faith rests upon him.⁷⁷

The representations need not have been made directly to the defrauded party, but it is sufficient if they are made to a third person with the intent that they shall be used by him to induce the sale of the stock, and they are by him communicated to the plaintiff,⁷⁸ or if they are addressed to the public,⁷⁹ as in the case of false statements in prospectuses, reports, or other statements issued by the corporation or its officers.⁸⁰

⁷³ Dissenting opinion in *Ottinger v. Bennett*, 144 N. Y. App. Div. 525, 129 N. Y. Supp. 819, adopted by the Court of Appeals in reversing the judgment of the Appellate Division, 203 N. Y. 554, 96 N. E. 1123.

⁷⁴ See § 3872, *infra*.

⁷⁵ *Iowa*. *Dawson v. National Life Ins. Co. of America*, 176 Iowa 362, L. R. A. 1916 E 878, 157 N. W. 929.

Kansas. *Stewart v. Harris*, 69 Kan. 498, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873, 77 Pac. 277.

Minnesota. See *Peavey v. Wells*, 165 N. W. 1063.

New York. *Spier v. Hyde*, 92 App. Div. 467, 87 N. Y. Supp. 285.

Washington. *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000.

West Virginia. *Stalnaker v. Janes*, 68 W. Va. 176, 69 S. E. 651.

Wisconsin. *McMillen v. Strange*, 159 Wis. 271, 150 N. W. 434.

The fact that the seller is an attorney at law and a stockholder, and that he gives assurances of personal friendship for the buyer does not make the relation between them a confidential one. *Stalnaker v. Janes*, 68 W. Va. 176, 69 S. E. 651.

Where owners of stock enter into

a pooling agreement for the sale of same, each party will be held to make due accounting to the other parties interested. *Spier v. Hyde*, 92 N. Y. App. Div. 467, 87 N. Y. Supp. 285.

That acquaintance and friendship between the parties does not destroy the rule of caveat emptor, see *Fisher v. Seitz*, 172 Mo. App. 162, 157 S. W. 883.

⁷⁶ *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924.

⁷⁷ *Gillett v. Bowen*, 23 Fed. 625; *Dawson v. National Life Ins. Co. of America*, 176 Iowa 362, L. R. A. 1916 E 878, 157 N. W. 929; *Stewart v. Harris*, 69 Kan. 498, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873, 77 Pac. 277; *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000.

⁷⁸ *Diel v. Kellogg*, 163 Mich. 162, 128 N. W. 420.

⁷⁹ Dissenting opinion in *Ottinger v. Bennett*, 144 N. Y. App. Div. 525, 129 N. Y. Supp. 819, adopted by the Court of Appeals in reversing the judgment of the Appellate Division, 203 N. Y. 554, 96 N. E. 1123.

⁸⁰ *United States*. *Cheney v. Dickinson*, 172 Fed. 109, 28 L. R. A. (N. S.) 359.

In a leading New York case it was said: "If the plaintiff purchased his stock relying upon the truth of the prospectus, he has a right of action for deceit against the persons who, with knowledge of the fraud and with intent to deceive, put it in circulation. The representation was made to each person comprehended within the class of persons who were designed to be influenced by the prospectus; and when a prospectus of this character has been issued no other relation or privity between the parties need be shown, except that created by the wrongful and fraudulent act of the defendants in issuing or circulating the prospectus, and the resulting injury to the plaintiff."⁸¹ False representations in stock certificates also address themselves to whoever may subsequently purchase them.⁸²

Iowa. Faville v. Shehan, 68 Iowa 241, 26 N. W. 131.

Kentucky. Ligon v. Minton, 125 S. W. 304; Ward v. Trimble, 19 Ky. L. Rep. 1801, 44 S. W. 450; Trimble v. Reid, 19 Ky. L. Rep. 604, 41 S. W. 319.

Massachusetts. Cole v. Cassidy, 138 Mass. 437, 52 Am. Rep. 284.

New Jersey. Bingham v. Fish, 86 N. J. L. 316, 90 Atl. 1106.

New York. Downey v. Finucane, 205 N. Y. 251, 40 L. R. A. (N. S.) 307, 98 N. E. 391, aff'g 146 App. Div. 209, 130 N. Y. Supp. 988; Morgan v. Skiddy, 62 N. Y. 319; Cross v. Sackett, 6 Abb. Pr. 247, 2 Bosw. 617, 16 How. Pr. 62; Cazeaux v. Mali, 25 Barb. 578. See also Willetts v. Poor, 141 App. Div. 743, 126 N. Y. Supp. 926.

Texas. Foix v. Moeller, — Tex. Civ. App. —, 159 S. W. 1048.

England. Clarke v. Dickson, 6 C. B. (N. S.) 453; Gerhard v. Bates, 2 E. & B. 476; Bedford v. Bagshaw, 4 H. & N. 538; Davidson v. Tulloch, 3 Macq. H. L. 783. In a later case in England, some of the above cases were overruled and others distinguished, and it was held that the responsibility of directors who issue a false prospectus does not, as of course, follow shares on their transfer from an allottee to his vendee; and that in order that this third person, the ven-

dee, may hold the directors responsible for losses occasioned by his reliance on the prospectus and purchase of shares, he must show some direct connection between them and himself in the communication of the prospectus. Peek v. Gurney, L. R. 6 H. L. 377.

"While the sponsors of false prospectuses that are issued to bring in money to the common treasury are justly made to respond to all persons who take the invited action, yet the law recognizes no right of action in one who relies without invitation on a statement addressed to a particular class which he stays out of." So officers and directors who issue a false prospectus to induce the purchase of treasury stock are not liable to one who purchases stock in the market through a broker, although he relies on the statements in the prospectus. Cheney v. Dickinson, 172 Fed. 109, 28 L. R. A. (N. S.) 359.

The liability of officers and directors to persons who have been induced to purchase or sell stock in reliance on such representations has been fully considered in a previous chapter. See § 2544 et seq., supra.

⁸¹ Morgan v. Skiddy, 62 N. Y. 319.

⁸² Sykes v. Pure Food Cider Co., 157 Iowa 601, 138 N. W. 544.

In all cases, of course, the facts concerning which the misrepresentations are made must be material to the contract.⁸³

§ 3864. — Representations as to corporate property and assets. False representations as to the location, condition or value of the property of the corporation may constitute actionable fraud,⁸⁴ unless

⁸³ **United States.** *Farwell v. Colonial Trust Co.*, 147 Fed. 480.

Arkansas. *Hunt v. Davis*, 98 Ark. 44, 135 S. W. 458; *Evatt v. Hudson*, 97 Ark. 265, 133 S. W. 1023.

Nebraska. *Jakway v. Proudfit*, 76 Neb. 62, 14 Ann. Cas. 258, 109 N. W. 388, 106 N. W. 1039.

Washington. *Shores v. Hutchinson*, 69 Wash. 329, 125 Pac. 142; *Sather v. Home Security Sav. Bank*, 49 Wash. 672, 96 Pac. 229.

Wisconsin. *Jelinek v. Baer*, 153 Wis. 426, 141 N. W. 271.

The failure of one to whom the seller has referred the purchaser for information to disclose certain facts in regard to the property of the company does not render such person liable in damages, where the failure of the company and consequent loss to the purchaser were in no way due to the existence of such facts. *Sather v. Home Security Sav. Bank*, 49 Wash. 672, 96 Pac. 229.

⁸⁴ **Arkansas.** *Richey v. Brinks*, 100 Ark. 629, 140 S. W. 129; *Hunt v. Davis*, 98 Ark. 44, 135 S. W. 458.

Illinois. *Booth v. Smith*, 117 Ill. 370, 7 N. E. 610.

Massachusetts. *Bradley v. Poole*, 98 Mass. 169, 93 Am. Dec. 144.

Minnesota. *Martin v. Hill*, 41 Minn. 337, 43 N. W. 337.

New York. *Miller v. Barber*, 66 N. Y. 558; *Morgan v. Skiddy*, 62 N. Y. 319.

Wisconsin. *Barndt v. Frederick*, 78 Wis. 1, 11 L. R. A. 199, 47 N. W. 6.

Representations that the corporation owns a certain patent and that the

patented device is a novel one, are representations as to matters of fact, and not mere expressions of opinion. *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011.

As to the character of its assets, and the mechanical fitness and productive capacity of a machine which constitutes its sole means of income. *Sheer v. Hoyt*, 13 Cal. App. 662, 110 Pac. 477; *Neher v. Hansen*, 12 Cal. App. 370, 107 Pac. 565; *Geraghty v. Randall*, 18 Colo. App. 194, 70 Pac. 767. See *Gutheil v. Goodrich*, 160 Ind. 92, 66 N. E. 446; *Farmers' & Merchants' State Bank v. Shaffer* (Iowa), 147 N. W. 851; *Campbell v. Park*, 128 Iowa 181, 104 N. W. 799, 101 N. W. 861; *Lufkin v. Cutting*, 225 Mass. 599, 114 N. E. 822.

As to the amount of ore in the corporation's mine, the cost of mining it, etc. *Ginn v. Almy*, 212 Mass. 486, 99 N. E. 276; *Loud v. Solomon*, 188 Mich. 7, 154 N. W. 73; *Hubbard v. Oliver*, 173 Mich. 337, 139 N. W. 77.

As to quantity and quality of ore in mine, etc. *Hill v. Dillon*, 151 Mo. App. 86, 131 S. W. 728; *Id.* 176 Mo. App. 192, 161 S. W. 881. See *Gerardi v. Gardner*, 255 Mo. 538, 164 S. W. 568; *Stern v. Stern*, 122 N. Y. App. Div. 821, 107 N. Y. Supp. 900.

That it had orders for the manufacture of a specified number of articles. *Tarara v. Novelty Elec. Mfg. Co.*, 136 Minn. 216, 161 N. W. 409.

That the corporation owned a certain patent under which the articles manufactured by it were protected. *Tarara v. Novelty Elec. Mfg. Co.*, 136 Minn. 216, 161 N. W. 409.

the statements are mere expressions of opinion, or what is known as mere "puffing."⁸⁵

§ 3865. — Representations as to financial condition of the corporation. False representations as to the financial condition of the corporation may constitute actionable fraud,⁸⁶ as, for example, rep-

That it had large and substantial assets. *Potts v. Lambie*, 138 N. Y. App. Div. 144, 122 N. Y. Supp. 935; *Id.* 157 N. Y. App. Div. 800, 142 N. Y. Supp. 795; *High v. Berret*, 148 Pa. St. 261, 23 Atl. 1004; *Barnard v. Tidrick*, 35 S. D. 403, 152 N. W. 690.

The rule applies also to representations that mines, etc., belong to company. *Foix v. Moeller*, — Tex. Civ. App. —, 159 S. W. 1048; as to value of assets, *Reed v. Holloway* (Tex. Civ. App.), 127 S. W. 1189; as to value of property, *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 Pac. 687.

Evidence as to the actual value of the property is admissible on the issue as to the falsity of a representation as to its value. *Hancock v. Luke*, 46 Utah 26, 148 Pac. 452; *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 Pac. 687; *S. R. McGowan Co. v. Carlson*, 79 Wash. 92, 139 Pac. 869; *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172; *McFeron v. Shoemaker*, 73 Wash. 450, 131 Pac. 1126; *Gray v. Reeves*, 69 Wash. 374, 125 Pac. 162; *Breese v. Hunt*, 67 Wash. 398, 121 Pac. 853; *Cunningham v. Morris*, 56 Wash. 341, 105 Pac. 839.

Such representations are as to matters of fact, and not as to matters of opinion. *S. R. McGowan Co. v. Carlson*, 79 Wash. 92, 139 Pac. 869; *Breese v. Hunt*, 67 Wash. 398, 121 Pac. 853.

⁸⁵ *Illinois*. *Crocker v. Manley*, 164 Ill. 282, 56 Am. St. Rep. 196, 45 N. E. 577.

Maryland. *Boulden v. Stilwell*, 100 Md. 543, 1 L. R. A. (N. S.) 258, 60 Atl. 609.

Missouri. *Union Nat. Bank v. Hunt*, 76 Mo. 439.

New York. *Ellis v. Andrews*, 56 N. Y. 83, 15 Am. Rep. 379.

Rhode Island. *Handy v. Waldron*, 18 R. I. 567, 49 Am. St. Rep. 794, 29 Atl. 143.

Compare Nysewander v. Lowman, 124 Ind. 584, 24 N. E. 355.

Puffing mining claims, or making glowing predictions as to how they will pan out, does not amount to fraud where the parties are compos mentis and deal at arm's length. *Burwash v. Ballou*, 230 Ill. 34, 15 L. R. A. (N. S.) 409, 82 N. E. 355.

Mere opinions as to the value of corporate assets are not ground for rescission. *Templeton v. Warner*, 89 Wash. 584, 157 Pac. 458, 154 Pac. 1081.

⁸⁶ *United States*. *Merrill v. Florida Land & Improvement Co.*, 60 Fed. 17.

Arkansas. *Porter v. Morris*, 199 S. W. 106; *Grant v. Ledwidge*, 109 Ark. 297, 160 S. W. 200; *Haldiman v. Taft*, 102 Ark. 45, 143 S. W. 112; *Hunt v. Davis*, 98 Ark. 44, 135 S. W. 458; *Evatt v. Hudson*, 97 Ark. 265, 133 S. W. 1023.

District of Columbia. *Magruder v. Montgomery*, 33 App. Cas. 133.

Florida. See *Florida Cigar & Tobacco Co. v. Baker & Holmes Co.*, 62 Fla. 487, 57 So. 174.

Illinois. *Arnold v. Dodson*, 272 Ill. 377, 112 N. E. 70; *Murray v. Tolman*, 162 Ill. 417, 44 N. E. 748, rev'g 54 Ill. App. 420.

Iowa. *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801; *Campbell v. Park*, 128 Iowa 181, 104 N. W. 799, 101 N. W. 861.

representations that it is solvent,⁸⁷ or as to the condition of its business,⁸⁸ or as to its previous net earnings,⁸⁹ or that it is not indebted at all,

Kentucky. Head v. Oglesby, 175 Ky. 613, 194 S. W. 793; Gooch v. Collins, 156 Ky. 282, 160 S. W. 1038.

Michigan. Loud v. Solomon, 188 Mich. 7, 154 N. W. 73.

Minnesota. Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965.

Mississippi. Jones v. Barnes, 107 Miss. 800, 66 So. 212.

Nebraska. Carruth v. Harris, 41 Neb. 789, 60 N. W. 106.

New Hampshire. Lawton v. Kitteredge, 30 N. H. 500.

New Jersey. Bingham v. Fish, 86 N. J. L. 316, 90 Atl. 1106.

New York. Townsend v. Felt-housen, 156 N. Y. 618, 51 N. E. 279, aff'g 90 Hun 89, 35 N. Y. Supp. 538; Canadian Agency v. Assets Realization Co., 165 App. Div. 96, 150 N. Y. Supp. 758; Schafuss v. Betts, 94 Misc. 463, 157 N. Y. Supp. 608, aff'd 175 App. Div. 893, 160 N. Y. Supp. 1145; Cazeaux v. Mali, 25 Barb. 578; Miller v. Curtiss, 59 N. Y. Super. Ct. 127. See also Thayer v. Schley, 137 App. Div. 166, 121 N. Y. Supp. 1064.

North Carolina. Blacknall v. Rowland, 116 N. C. 389, 21 S. E. 296.

Texas. Cherry v. First Texas Chemical Mfg. Co., 103 Tex. 82, 123 S. W. 689, rev'g judgment (Tex. Civ. App.), 115 S. W. 81; Pridham v. Weddington, 74 Tex. 354, 12 S. W. 49; Robinson v. Aldredge, — Tex. Civ. App. —, 198 S. W. 413; Foix v. Moeller, — Tex. Civ. App. —, 159 S. W. 1048; Collins v. Chipman, 41 Tex. Civ. App. 563, 95 S. W. 666; Hume v. Steele (Tex. Civ. App.), 59 S. W. 812.

Utah. Hancock v. Luke, 46 Utah 26, 148 Pac. 452; Morrison v. Snow, 26 Utah 247, 72 Pac. 924.

Virginia. Jordan v. Walker, 115 Va. 109, 78 S. E. 643.

Washington. Gates v. Gregory, 91 Wash. 151, 157 Pac. 470; Boehme v.

Broadway Theater Co., 91 Wash. 104, 157 Pac. 218; Cunningham v. Morris, 56 Wash. 341, 105 Pac. 839.

Wisconsin. Warner v. Benjamin, 89 Wis. 290, 62 N. W. 179.

See also § 614, supra.

⁸⁷In an action for false representations inducing the purchase of stock, the representation being that the corporation was perfectly solvent, evidence was admissible that within two or three years after the representations were made the corporate assets had disappeared and the corporation was in process of liquidation; that during the time referred to the earnings of the corporation had been insufficient to pay off a purchase money debt on part of the plant; that just prior to the time the stock was sold the corporation was indebted to its officers and employees for a large amount; that at the time of the purchase of the stock plaintiff believed the corporation would pay 20 per cent dividends. Collins v. Chipman, 41 Tex. Civ. App. 563, 95 S. W. 666.

⁸⁸Lufkin v. Cutting, 225 Mass. 599, 114 N. E. 822; Massey v. Luce, 158 Mich. 128, 122 N. W. 514; Boehme v. Broadway Theater Co., 91 Wash. 104, 157 Pac. 218.

That its business is being conducted at a profit. Moyses v. Schendorf, 142 Ill. App. 293, aff'd 238 Ill. 232, 87 N. E. 401.

That its affairs are on a paying basis. Ogden Valley Trout & Resort Co. v. Lewis, 41 Utah 183, 125 Pac. 687.

That it has an established business, which is paying at a specified rate. Diel v. Kellogg, 163 Mich. 162, 128 N. W. 420.

⁸⁹Magruder v. Montgomery, 33 App. Cas. (D. C.) 133; Canadian Agency v. Assets Realization Co., 165

or is indebted to a certain extent only,⁹⁰ or that its property is unincumbered or incumbered to a certain extent only.⁹¹

It has been held that a representation by the purchaser that the company will be put into the hands of a receiver unless the stockholder sells his stock is not actionable unless it involves an actual misrepresentation as to the value of the stock, or possibly a showing that it became more valuable because of existing facts which the purchaser was bound to disclose.⁹²

§ 3866. — Representations as to dividends. False representations that certain dividends have been paid on the stock,⁹³ or are about to

N. Y. App. Div. 96, 150 N. Y. Supp. 758; *Rumsey v. Shaw*, 212 Pa. 576, 61 Atl. 1109; *Jackson v. Stockert*, 75 W. Va. 482, 89 S. E. 359, 84 S. E. 919.

⁹⁰ *Alabama*. *Merritt v. Ehrman*, 116 Ala. 278, 22 So. 514.

Arkansas. *Richey v. Brinks*, 100 Ark. 629, 140 S. W. 129.

California. *Davis v. Butler*, 154 Cal. 623, 98 Pac. 1047.

Colorado. *Gregg v. Hayes*, 27 Colo. App. 412, 149 Pac. 1055.

Delaware. *Williams v. Beltz*, — Del. Super. Ct. —, 101 Atl. 905.

Iowa. *Farmers' & Merchants' State Bank v. Shaffer*, 147 N. W. 851; *Campbell v. Park*, 128 Iowa 181, 104 N. W. 799, 101 N. W. 861; *Faville v. Shehan*, 68 Iowa 241, 26 N. W. 131.

Kentucky. *Drake v. Holbrook*, 28 Ky. L. Rep. 1319, 92 S. W. 297, 25 Ky. L. Rep. 1489, 78 S. W. 158, 23 Ky. L. Rep. 1941, 66 S. W. 512.

Michigan. *Massey v. Luce*, 158 Mich. 128, 122 N. W. 514.

Minnesota. *Ludowese v. Amidon*, 124 Minn. 288, 144 N. W. 965; *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056.

New York. *Lambert v. Elmendorf*, 124 App. Div. 758, 109 N. Y. Supp. 574.

Pennsylvania. *McElwee v. Chandler*, 198 Pa. 575, 48 Atl. 475.

Virginia. *Jordan v. Walker*, 115 Va. 109, 78 S. E. 643.

Washington. *Mills v. Knudson*, 54 Wash. 614, 103 Pac. 1123.

A seller of stock who falsely represents that the corporation has no debts is not thereby estopped to assert an indebtedness of the corporation to him, and hence the purchaser may rescind for such representation. *Merritt v. Ehrman*, 116 Ala. 278, 22 So. 514.

As to the effect of a representation by the seller that there are no outstanding obligations against the corporation on his right to enforce such an obligation running to himself, see *Clarke v. Marks*, 111 Me. 218, 88 Atl. 718.

⁹¹ *Stevenson v. Marble*, 84 Fed. 23; *Southwestern R. Co. v. Papot*, 67 Ga. 675; *Lambert v. Elmendorf*, 124 N. Y. App. Div. 758, 109 N. Y. Supp. 574.

⁹² *Haverland v. Lane*, 89 Wash. 557, 154 Pac. 1118.

⁹³ *Hunt v. Davis*, 98 Ark. 44, 135 S. W. 458; *Handy v. Waldron*, 18 R. I. 567, 49 Am. St. Rep. 794, 29 Atl. 143; *Barnard v. Tidrick*, 35 S. D. 403, 152 N. W. 690; *Breese v. Hunt*, 67 Wash. 398, 121 Pac. 853.

That it had earned, declared and paid dividends at a certain rate during specified years. *Potts v. Lambie*, 138 N. Y. App. Div. 144, 122 N. Y. Supp. 935.

See also § 616, *supra*.

be paid,⁹⁴ or have been declared,⁹⁵ may constitute actionable fraud. And the acts of directors of a corporation in declaring a dividend and in publishing the fact of its declaration for the purpose of inducing the public to purchase the stock of the company in the belief that the dividend has been earned, when in fact it had not been earned will sustain an action for deceit where the other elements of actionable fraud are shown.⁹⁶ But representations as to future dividends are mere predictions or expressions of opinion, and hence are not actionable.⁹⁷

§ 3867. — Representations as to capital stock. False representations as to the amount of the capitalization of the corporation may constitute actionable fraud.⁹⁸ And the same has been held to be true of false representations that certain other persons are stockholders in the corporation;⁹⁹ or have invested a certain amount in the business;¹ or that the stock is valid,² and of representations that the stock is non-

⁹⁴ *Lawton v. Kittredge*, 30 N. H. 500.

Positive statements by the president and general manager of a corporation having an established business as to the value of its stock and the dividends which it will yield are not mere expressions of opinion. *Gilluly v. Hosford*, 45 Wash. 594, 88 Pac. 1027.

⁹⁵ That an accruing dividend on preferred stock has been declared. *Irvine v. Koehler*, 230 Fed. 795.

⁹⁶ Dissenting opinion in *Ottinger v. Bennett*, 144 N. Y. App. Div. 525, 129 N. Y. Supp. 819, adopted by the Court of Appeals in reversing the judgment of the Appellate Division, 203 N. Y. 554, 96 N. E. 1123.

⁹⁷ *Alabama*. *Armstrong v. Walker*, 76 So. 280.

Georgia. *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32.

Iowa. *Gamet v. Haas*, 165 Iowa 565, 146 N. W. 465.

Maryland. *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411.

New York. *Eagle Savings & Loan Co. v. Beakey*, 163 App. Div. 860, 147 N. Y. Supp. 127.

West Virginia. *Stalnaker v. Janes*, 68 W. Va. 176, 69 S. E. 651.

Wisconsin. *Warner v. Benjamin*, 89 Wis. 290, 62 N. W. 179.

⁹⁸ *Armstrong v. Walker*, — Ala. —, 76 So. 280; *Le Master v. Hailey*, — Tex. Civ. App. —, 176 S. W. 818.

Where one contracts to sell 60 per cent of the common stock of a corporation, a false representation that its entire capital stock consists of 500 shares of common stock, when in fact it has issued 39 shares of preferred stock in addition thereto, is material. *Kain v. Angle*, 111 Va. 415, 69 S. E. 355.

See also § 615, *supra*.

⁹⁹ *Miller v. Barber*, 66 N. Y. 558; *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 Pac. 687.

¹ *Massey v. Luce*, 158 Mich. 128, 122 N. W. 514.

That the seller and certain of his relations have an interest in the company to a certain amount. *Gillies v. Linscott*, 98 Kan. 78, 157 Pac. 423.

² *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074, rev'g 96 Ill. App. 17.

assessable, where they are not merely expressions of opinion as to the law.³

False representations that the stock is full paid are actionable.⁴

³Joplin v. Nunnally, 67 Ore. 566, 134 Pac. 1177.

Such a representation is actionable where the statute provides that fully paid stock is nonassessable unless made assessable by the articles of incorporation. Smith v. Gilbert, — Utah —, 164 Pac. 1026.

Where the corporation may, under the law, contract with subscribers that the stock shall be nonassessable, a representation that stock sold is nonassessable is not an expression of opinion as to the law regulating the matter of assessments, but is rather an assurance that the corporation has taken whatever steps are necessary to effectually waive its statutory right to levy assessments thereon, which is a representation of fact. Browne v. San Gabriel River Rock Co., 22 Cal. App. 682, 136 Pac. 542, 544.

A representation that the stock of a foreign corporation is nonassessable is actionable where the stock is assessable for failure to comply with a mandate of the statute requisite to give it immunity from assessment, but the contrary is true if it appears that it involved merely the expression of an opinion as to its liability to assessment under the foreign law. Van Slochem v. Villard, 207 N. Y. 587, 101 N. E. 467, aff'g 154 N. Y. App. Div. 161, 138 N. Y. Supp. 852.

An allegation that such a representation was made, and that it was false, and that the defendant knew it to be false, is sufficient on demurrer, since the foreign law is a question of fact, and the court cannot say that it is impossible that the stock can be assessed under the law of the state where the corporation was organized. Van Slochem v. Villard, 207 N. Y. 587, 101 N. E. 467, aff'g 154 N. Y. App.

Div. 161, 138 N. Y. Supp. 852.

In Peters v. Lohman, 171 Mo. App. 465, 156 S. W. 783, a representation that the stock was fully paid and nonassessable was held to refer to the character of the stock and the liability of the stockholders to the corporation, and to mean that when the purchaser paid whatever price was agreed upon in the purchase of the stock, then it would be as between him and the company, fully paid and nonassessable, and not to mean that any stockholder had paid full par value for his stock.

⁴Sykes v. Pure Food Cider Co., 157 Iowa 601, 138 N. W. 554; Joplin v. Nunnally, 67 Ore. 566, 134 Pac. 1177.

This is true of a false representation that the seller has paid for his stock in full. Jackson v. Stockert, 75 W. Va. 482, 89 S. E. 359, 84 S. E. 919.

An assertion by the seller that the stock sold was fully paid, and that the entire stock of the corporation had been paid for in cash to the corporation at its full face value, was held not to be an opinion by a representation as to facts, where he participated in its issuance and knew that such statement was untrue. Coolidge v. Rhodes, 199 Ill. 24, 64 N. E. 1074, rev'g judgment 96 Ill. App. 17.

A statement that stock is fully paid may constitute actionable fraud even if a representation that it is nonassessable is merely expressive of an opinion that under the law the shares or certificate cannot be taxed or assessed. Hinkley v. Sae Oil & Pipe Line Co., 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

A false representation that the stock of a foreign corporation is fully paid is actionable, since false repre-

And where the statute requires stock to be paid in full before it is issued, the mere issuance of certificates is a representation that the corporation has received par value therefor.⁵

Where stock is fraudulently issued as full paid, when it is not so in fact, or is issued for a worthless patent, or for other property at an intentional overvaluation,⁶ a subsequent purchaser of such stock may rescind on the ground of fraud, or maintain an action for damages, if the seller was a party to the fraudulent issue, or if he had knowledge of the fraud.⁷ And he may also maintain an action for damages against the promoters, directors or other officers of the corporation who were parties to the fraud.⁸

For a person to sell stock which he owns himself, representing that he is selling the stock of another,⁹ or that it is treasury stock¹⁰ is

sentations as to the cost of a thing are actionable. *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 467, aff'g 154 N. Y. App. Div. 161, 138 N. Y. Supp. 852.

⁵ *Sykes v. Pure Food Cider Co.*, 157 Iowa 601, 138 N. W. 554.

⁶ See § 3598, *supra*.

⁷ *United States. Sturges v. Stetson*, 1 Biss. 246, Fed. Cas. No. 13,568; *Fosdick v. Sturges*, 1 Biss. 255, Fed. Cas. No. 4,956.

California. *Perkins v. Cowles*, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711.

Maine. *Coolidge v. Goddard*, 77 Me. 579, 1 Atl. 831.

Massachusetts. *Reeve v. Dennett*, 145 Mass. 23, 11 N. E. 938.

Missouri. *Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co.*, 251 Mo. 553, 158 S. W. 359.

New York. *Barnes v. Brown*, 80 N. Y. 527; *Cross v. Sackett*, 2 Bosw. 617, 6 Abb. Pr. 247. See also *Ersfeld v. Exner*, 128 App. Div. 135, 112 N. Y. Supp. 561.

See also § 3467, *supra*.

⁸ *Windram v. French*, 151 Mass. 547, 8 L. R. A. 750, 24 N. E. 914; *Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co.*, 251 Mo. 553, 158 S. W. 359; *Cross v. Sackett*, 6 Abb. Pr. (N. Y.) 247.

See also § 2543, *supra*.

⁹ *Mayo v. Knowlton*, 134 N. Y. 250, 31 N. E. 985. See also *McDoel v. Ohio Valley Improvement & Contract Co.'s Assignee*, 18 Ky. L. Rep. 294, 36 S. W. 175; *Davis v. Forman*, 229 Mo. 27, 129 S. W. 213.

¹⁰ *Arkansas.* *Porter v. Morris*, 199 S. W. 106.

Kansas. *Gillies v. Linscott*, 98 Kan. 78, 157 Pac. 423.

Massachusetts. See *Lufkin v. Cutting*, 225 Mass. 599, 114 N. E. 822.

Minnesota. *Fawkes v. Knapp*, 165 N. W. 236.

Missouri. See *Fisher v. Seitz*, 172 Mo. App. 162, 157 S. W. 883.

Utah. *Smith v. Gilbert*, 164 Pac. 1026; *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 Pac. 687.

Washington. *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172; *Gray v. Reeves*, 69 Wash. 374, 125 Pac. 162.

The fact that one who purchases treasury stock from the corporation sells it by falsely representing that it is still treasury stock does not render him liable to account to the corporation as for sales of treasury stock. *Chilkat Gold & Copper Min. Co. v. Fos*, 42 Wash. 201, 84 Pac. 827.

actionable fraud. But the contrary has been held to be true of a representation by a person that he has sold his own stock.¹¹

§ 3868. — Representations as to value of stock. As a general rule statements as to the present or future value of the stock are mere matters of opinion, and do not constitute actionable fraud although they are false.¹² But the contrary may be true,¹³ as where they are accompanied by false statements of fact in respect to matters on which the value of the stock depends,¹⁴ or where the party making them has,

¹¹ *Boulden v. Stilwell*, 100 Md. 543, 1 L. R. A. (N. S.) 258, 60 Atl. 609.

¹² *Arizona*. *Hurley v. Wilky*, 18 Ariz. 270, 158 Pac. 639, 18 Ariz. 45, 156 Pac. 83.

Colorado. *Moore v. Carriek*, 26 Colo. App. 97, 140 Pac. 485.

Georgia. *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32.

Illinois. *Murray v. Tolman*, 162 Ill. 417, 44 N. E. 748, rev'g judgment 54 Ill. App. 420; *Auman v. McKibben*, 179 Ill. App. 425.

Iowa. *Stotts v. Fairfield*, 163 Iowa 726, 145 N. W. 61.

Kentucky. *Bowen v. Walton*, 142 Ky. 509, 134 S. W. 885; *Field v. Turley*, 120 S. W. 338.

Minnesota. *Columbia Elec. Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244.

Missouri. *Davis v. Forman*, 229 Mo. 27, 129 S. W. 213; *Rigler v. Reid*, 186 Mo. App. 111, 171 S. W. 952.

New York. *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 467, aff'g 154 App. Div. 161, 138 N. Y. Supp. 852; *Titus v. Poole*, 145 N. Y. 414, 40 N. E. 228.

Pennsylvania. *Edelman v. Latshaw*, 180 Pa. St. 419, 36 Atl. 926.

Rhode Island. *Handy v. Waldron*, 18 R. I. 567, 49 Am. St. Rep. 794, 29 Atl. 143.

Washington. *Shores v. Hutchinson*, 69 Wash. 329, 125 Pac. 142; *Sather v. Home Security Sav. Bank*, 49 Wash. 672, 96 Pac. 229.

West Virginia. *Poole v. Camden*, 92 S. E. 454.

Mere commendation, or false representations as to value, where the seller has an opportunity to ascertain its value by ordinary diligence and inquiry, does not constitute actionable fraud, even when made with intent to deceive. *German Nat. Bank's Receiver v. Nagel*, 26 Ky. L. Rep. 748, 82 S. W. 433.

Misrepresentations as to the seller's chances of selling his stock at a good price will not sustain an action for deceit where there are no confidential relations. *Fisher v. Budlong*, 10 R. I. 525.

See also § 618, *supra*.

¹³ *Illinois*. *Murray v. Tolman*, 162 Ill. 417, 44 N. E. 748, rev'g 54 Ill. App. 420.

Indiana. *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355.

Michigan. *Keyes v. Quinn*, 154 Mich. 668, 118 N. W. 615; *Maxted v. Fowler*, 94 Mich. 106, 53 N. W. 931.

New York. *Titus v. Poole*, 73 Hun 383, 26 N. Y. Supp. 451.

North Carolina. *Blacknall v. Rowland*, 116 N. C. 389, 21 S. E. 296.

Pennsylvania. *Weaver v. Cone*, 174 Pa. St. 104, 34 Atl. 551.

Rhode Island. *Handy v. Waldron*, 18 R. I. 567, 49 Am. St. Rep. 794, 29 Atl. 143.

¹⁴ See *Stotts v. Fairfield*, 163 Iowa 726, 145 N. W. 61; *Stern v. Stern*, 122

or assumes to have, special knowledge as to its value, and knows that the other party is ignorant of its value and is relying on his representations on the subject;¹⁵ or where the parties act on a basis of trust and confidence.¹⁶

False representations as to the price paid for the stock by the seller,¹⁷ or as to the price paid for other stock,¹⁸ or that other parties are purchasing stock from the seller at the same price,¹⁹ have been

N. Y. App. Div. 821, 107 N. Y. Supp. 900.

¹⁵ *Murray v. Tolman*, 162 Ill. 417, 44 N. E. 748, rev'g judgment 54 Ill. App. 420; *Auman v. McKibben*, 179 Ill. App. 425; *Ohlwine v. Pfaffman*, 52 Ind. App. 357, 100 N. E. 777; *Ludowese v. Amidon*, 124 Minn. 288, 144 N. W. 965; *Poole v. Camden*, — W. Va. —, 92 S. E. 454.

A representation by a director as to the book value of the stock made in response to an inquiry by one who purchases the stock from him may be actionable. *Long v. Douthitt*, 142 Ky. 427, 134 S. W. 453.

A false representation by the purchaser, a New York broker, as to the highest price of the stock in that city, is ground for rescission, where the seller lives in Kansas City and the stock is not listed. *Dawson v. Flinton*, 195 Mo. App. 75, 190 S. W. 972.

Positive statements by the president and general manager of a corporation having an established business as to the value of its stock and the dividends which it will yield are not mere expressions of opinion. *Gilluly v. Hosford*, 45 Wash. 594, 88 Pac. 1027.

"Where the seller purports to give his opinion, knowing the buyer relies on it, and at the same time conceals from the buyer a fact which he knows would cause the buyer to distrust or to place less confidence in the opinion given, the law does condemn the act and will relieve against it." *Da-*

vis v. Forman, 229 Mo. 27, 129 S. W. 213.

In *Stotts v. Fairfield*, 163 Iowa 726, 145 N. W. 61, statements by the seller, who was a director of the company, and who knew all the facts upon which the value of the stock depended, as to its present and future value, accompanied by a guaranty as to its value, and an intentional concealment of material facts as to the condition of the company, were held to constitute ground for rescission.

¹⁶ *Edelman v. Latshaw*, 180 Pa. St. 419, 36 Atl. 926; *Fisher v. Budlong*, 10 R. I. 525; *Poole v. Camden*, — W. Va. —, 92 S. E. 454.

¹⁷ A false statement that the vendor is selling the stock for what it cost him is actionable, especially where the parties contemplate future business relations to grow out of the sale of the stock. *Kohl v. Taylor*, 62 Wash. 678, 35 L. R. A. (N. S.) 174, 114 Pac. 874.

See also *Gilbert v. Seitz*, 170 Mo. App. 569, 157 S. W. 118.

¹⁸ See *Weaver v. Cone*, 174 Pa. St. 104, 34 Atl. 551.

A representation that the person making it paid par for his stock is a representation as to a material existing fact, and not the mere expression of an opinion as to value. *Ohlwine v. Pfaffman*, 52 Ind. App. 357, 100 N. E. 777.

¹⁹ *Kilgore v. Bruce*, 166 Mass. 136, 44 N. E. 108.

Where plaintiff was induced to purchase stock by a representation of the

held to be actionable. But some courts hold that false representations as to what the stock cost the seller do not constitute actionable fraud.²⁰

§ 3860. — Further illustrations. False representations that a particular person in whom the purchaser has confidence is a director of the corporation;²¹ or that the seller has arranged with the other stockholders and the directors that if the purchaser takes the stock he will be made a director and given a corporate office at a stated salary;²² or that the agent making the sale has the right to sell the stock;²³ have been held to be actionable. But a seller of stock cannot rescind or maintain an action for damages merely because of false representations by the purchaser as to his reason or purpose in making the purchase.²⁴

An exchange of stock of one corporation for stock of another corporation may be rescinded for false representations that it will result in giving the latter corporation control of the former.²⁵

§ 3870. — Expressions of opinion, promises or predictions. Mere expressions of opinion²⁶ or mere predictions, prophecies or promises

defendant that he would purchase an equal amount, which would give them a controlling interest, and at the time when plaintiff paid for his stock defendant gave his check to the seller for an equal amount, which was later returned to him, and the plaintiff's money was divided between the purchaser and the defendant, it was held that there was a fraud for which the plaintiff could rescind. *Seaver v. Snider*, 21 Colo. App. 431, 122 Pac. 402.

²⁰ *Gassett v. Glazier*, 165 Mass. 473, 43 N. E. 193.

In *Fisher v. Seitz*, 172 Mo. App. 162, 157 S. W. 883, it is said that the mere statement by the vendor of what the stock cost him will not ordinarily be regarded as matter on which a vendee should rely, or as fraud or deception in law.

²¹ *Gates v. Gregory*, 91 Wash. 151, 157 Pac. 470.

²² *Schwab v. Esbenshade*, 151 Wis. 513, 139 N. W. 420.

²³ *Le Master v. Hailey*, — Tex. Civ. App. —, 176 S. W. 818.

²⁴ *Byrd v. Rautman*, 85 Md. 414, 36 Atl. 1099. Compare *Edelman v. Latshaw*, 180 Pa. St. 419, 36 Atl. 926, where there were also false representations as to the value of the stock.

²⁵ *Jahn v. Reynolds*, 115 N. Y. App. Div. 647, 101 N. Y. Supp. 293.

²⁶ *United States. Farwell v. Colonial Trust Co.*, 147 Fed. 480.

Arizona. *Hurley v. Wilky*, 18 Ariz. 270, 158 Pac. 639, 18 Ariz. 45, 156 Pac. 83.

Georgia. *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32.

Illinois. *Arnold v. Dodson*, 272 Ill. 377, 112 N. E. 70.

Iowa. *Marquardt v. Bartlett*, 173 Iowa 745, 155 N. W. 1014.

Maryland. *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411.

Minnesota. *Columbia Elec. Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244.

Missouri. *Fisher v. Seitz*, 172 Mo. App. 162, 157 S. W. 883.

as to future events or conditions²⁷ do not ordinarily constitute actionable fraud. Representations as to the present or future value of the stock generally come within this rule.²⁸ And the same is generally true of representations as to future dividends, or as to the future earnings of the company,²⁹ or as to the future value of property owned by it,³⁰ or statements that stock not yet issued will be full paid and nonassessable.³¹ But a promise, which the person making it has no intention at the time of performing, may constitute fraud.³² And "matters which might otherwise be only expressions of opinion, when stated as accomplished facts by one of the parties to a contract and accepted and relied upon by the other as such, may, and often do, become the basis of actions for fraudulent misrepresentations."³³

§ 3871. — Representations as to the law. Generally false representations as to the law do not constitute actionable fraud,³⁴ although

Rhode Island. *Handy v. Waldron*, 18 R. I. 567, 49 Am. St. Rep. 794, 29 Atl. 143.

Wisconsin. *Warner v. Benjamin*, 89 Wis. 290, 62 N. W. 179.

²⁷**United States.** *Farwell v. Colonial Trust Co.*, 147 Fed. 480.

Alabama. *Southern Loan & Trust Co. v. Gissendaner*, 4 Ala. App. 523, 58 So. 737.

Florida. *Florida Cigar & Tobacco Co. v. Baker & Holmes Co.*, 62 Fla. 487, 57 So. 174.

Illinois. *Arnold v. Dodson*, 272 Ill. 377, 112 N. E. 70.

Indiana. *Smith v. Parker*, 148 Ind. 127, 45 N. E. 770.

Iowa. *Marquardt v. Bartlett*, 173 Iowa 745, 155 N. W. 1014; *State Bank of Indiana v. Gates*, 114 Iowa 323, 86 N. W. 311.

Maryland. *Boulden v. Stilwell*, 100 Md. 543, 1 L. R. A. (N. S.) 258, 60 Atl. 609; *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411.

Michigan. *Hubbard v. Long*, 105 Mich. 442, 63 N. W. 644.

Missouri. *Rigler v. Reid*, 186 Mo. App. 111, 171 S. W. 952.

Wisconsin. *Warner v. Benjamin*, 89 Wis. 290, 62 N. W. 179.

Representations as to future or contingent events, such as a prediction of the future insolvency of the company, or a representation that the person making it is going to sell his stock, or that the plaintiff will be voted out of the office which he holds, do not constitute actionable fraud. *Boulden v. Stilwell*, 100 Md. 543, 1 L. R. A. (N. S.) 258, 60 Atl. 609.

²⁸ See § 3868, *supra*.

²⁹ *Downes v. Self*, 28 Tex. Civ. App. 356, 67 S. W. 897.

³⁰ *Marquardt v. Bartlett*, 173 Iowa 745, 155 N. W. 1014.

³¹ *Farwell v. Colonial Trust Co.*, 147 Fed. 480.

³² *Southern Loan & Trust Co. v. Gissendaner*, 4 Ala. App. 523, 58 So. 737.

³³ *Sheer v. Hoyt*, 13 Cal. App. 662, 110 Pac. 477.

³⁴ *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445; *Murray v. Tolman*, 162 Ill. 417, 44 N. E. 748, *rev'g judgment* 54 Ill. App. 420; *Rogan v. Illinois Trust & Savings Bank*, 93 Ill. App. 39, *aff'd* 194 Ill. 600, 62 N. E. 834.

See also § 620, *supra*.

there are exceptions to this rule in equity.³⁵ It has been held that a representation that the corporation is legally organized is ground for rescission, where it has failed to comply with certain of the statutory requirements as a result of which the stockholders are individually liable for the corporate debts.³⁶ And false statements by the seller of stock as to the powers of the corporation under its charter, although they relate to matter of law, may constitute fraud if accompanied by false statements or concealment of facts bearing on the question, and which were known to the seller and not to the purchaser.³⁷ False statements that stock sold is nonassessable may also be actionable under some circumstances.³⁸

§ 3872. — Nondisclosure or concealment of facts. Where there is no relation of trust and confidence between the parties, and no duty to speak, failure of the buyer or seller of stock to disclose facts affecting its value does not constitute actionable fraud,³⁹ unless he makes

³⁵ See *Murray v. Tolman*, 162 Ill. 417, 44 N. E. 748, rev'g judgment 54 Ill. App. 420.

In *Bolton v. Prather*, 35 Tex. Civ. App. 295, 80 S. W. 666, a rescission was granted because of false representations that the company was incorporated, but both parties believed that such representations were true, and it does not clearly appear from the opinion whether relief was granted on the ground of fraud, or on the ground of a mutual mistake of fact.

³⁶ *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801.

³⁷ *Murray v. Tolman*, 162 Ill. 417, 44 N. E. 748, rev'g 54 Ill. App. 420.

³⁸ See § 3867, *supra*.

³⁹ *Arkansas*. See *McDonough v. Williams*, 77 Ark. 261, 8 L. R. A. (N. S.) 452, 7 Ann. Cas. 276, 92 S. W. 783.

California. *Wise Realty Co. v. Stewart*, 169 Cal. 176, 146 Pac. 534. See generally *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384.

Georgia. See *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232.

Illinois. *Bawden v. Taylor*, 254 Ill. 464, 98 N. E. 941, aff'g 166 Ill. App.

443; *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445.

Iowa. *Gamet v. Haas*, 165 Iowa 565, 146 N. W. 465; *Stotts v. Fairfield*, 163 Iowa 726, 145 N. W. 61.

Kentucky. See *Kirtley's Adm'x v. Shinkle*, 24 Ky. L. Rep. 608, 69 S. W. 723.

Maine. *Furber v. Fogler*, 97 Me. 585, 55 Atl. 514.

Massachusetts. *Watts v. Stevenson*, 165 Mass. 518, 43 N. E. 497.

Michigan. *Walsh v. Goulden*, 130 Mich. 531, 90 N. W. 406.

Missouri. *Bradbury v. Smith*, 181 S. W. 415.

New Jersey. *Crowell v. Jackson*, 53 N. J. L. 656, 23 Atl. 426.

New York. *Rothmiller v. Stein*, 143 N. Y. 581, 26 L. R. A. 148, 38 N. E. 718.

Pennsylvania. *Rose v. Barclay*, 191 Pa. St. 594, 45 L. R. A. 392, 43 Atl. 385.

Rhode Island. *Fisher v. Budlong*, 10 R. I. 525.

South Carolina. *Jones v. Garlington*, 44 S. C. 533, 22 S. E. 741.

Tennessee. *Shaw v. Cole Mfg. Co.*,

false representations, or induces the other party not to make inquiries.⁴⁰ So the sale of worthless stock, even though the seller may know that it is worthless, does not constitute fraud in the absence of false representations or a relation of trust and confidence imposing

132 Tenn. 210, L. R. A. 1916 B 706, 177 S. W. 479.

Utah. Haarstick v. Fox, 9 Utah 110, 33 Pac. 251.

Washington. Haverland v. Lane, 89 Wash. 557, 154 Pac. 1118; O'Neile v. Ternes, 32 Wash. 528, 73 Pac. 692.

Wisconsin. Cazier v. Hart, 158 Wis. 362, 148 N. W. 860.

"The mere silence of a person, in regard to facts which it is not his duty to disclose, does not, in itself, constitute fraud." Stotts v. Fairfield, 163 Iowa 726, 145 N. W. 61.

The fact that one who has sold stock, "including all dividends due or to become due thereon," did not know that a stock dividend had been declared, while the purchaser did know, but failed to disclose such fact, does not entitle the seller to rescind on the ground of fraud, where both parties were stockholders, and had abundant and equal opportunities of knowledge. Rose v. Barclay, 191 Pa. St. 594, 45 L. R. A. 392, 43 Atl. 385.

An attempt was made by a railroad company, through a trust company, to secure the majority of the stock of a ferry company. Upon the condition that a majority of the stock be so acquired, an offer was made to stockholders in the ferry company of a specified sum per share. The court held that the fact that certain of the shares were purchased by the trust company from outside parties at a higher price in order to secure the required number of shares, this fact not being made known to the other shareholders who accepted the proposition, did not render the transaction fraudulent. Newman v. Mercantile Trust Co., 189 Mo. 423, 88 S. W. 6.

See also § 621, supra.

⁴⁰ Richey v. Brinks, 100 Ark. 629, 140 S. W. 129; Edelman v. Latshaw, 180 Pa. St. 419, 36 Atl. 926. See also Nysewander v. Lowman, 124 Ind. 584, 24 N. E. 355.

"Where he has reason to believe that his silence misleads, where he purposely conceals material facts, which it was his duty to disclose, and where the disclosure would be a contradiction of or tend to show that the statements made by him were untrue, and he knows that the other party is relying upon his statements as true, then his silence may be an element of fraud." Stotts v. Fairfield, 163 Iowa 726, 145 N. W. 61.

It is ground for rescission where the seller misrepresents the value of the stock and at the same time fraudulently conceals from the purchaser facts that would cause the latter to distrust his statements as to value. Davis v. Forman, 229 Mo. 27, 129 S. W. 213.

The fact that promoters issue a misleading prospectus casts upon them the affirmative duty of informing prospective purchasers of the true financial condition of the corporation. Porter v. Morris, — Ark. —, 199 S. W. 106.

Where the president of a corporation induced a stockholder to sell his stock by falsely representing that a certain other person would take the same and complete the enterprise for which the corporation was organized, but in fact acquired part of the stock for himself, it was held that the stockholder could rescind and sue for cancellation of the contract. Simrall v. Williamson, 18 Ky. L. Rep. 135, 35 S. W. 632.

a duty to disclose the facts.⁴¹ Nor does the concealment by the purchaser of stock of the fact that it is being bought for the interest or account of another corporation constitute actionable fraud.⁴²

But "where silence would be misleading, a duty to speak may arise."⁴³ A suppression of the truth may amount to a suggestion of falsehood, and if, with intent to deceive either party to the contract conceals or suppresses a material fact which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation.⁴⁴

Where a fiduciary relation exists between the parties, the person in whom the trust and confidence is imposed, is bound to make a full disclosure of all the facts,⁴⁵ and will not be allowed to make any

⁴¹ Long v. Symonds, 216 Mass. 595, 104 N. E. 476; Hunting v. Downer, 151 Mass. 275, 23 N. E. 832.

⁴² Haverland v. Lane, 89 Wash. 557, 154 Pac. 1118.

⁴³ Stotts v. Fairfield, 163 Iowa 726, 145 N. W. 61.

⁴⁴ Strong v. Repide, 213 U. S. 419, 53 L. Ed. 853; King v. Livingston Mfg. Co., 192 Ala. 269, 68 So. 897; Southern Loan & Trust Co. v. Gissendaner, 4 Ala. App. 523, 58 So. 737; Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232; Ottinger v. Bennett, 203 N. Y. 554, 96 N. E. 1123, adopting dissenting opinion, 144 N. Y. App. Div. 525, 129 N. Y. Supp. 819, in reversing the judgment of the Appellate Division.

In estimating the probability of purchasers being misled by a prospectus the court may take into consideration the facts suppressed. Downey v. Finucane, 205 N. Y. 251, 40 L. R. A. (N. S.) 307, 98 N. E. 391, aff'g 146 N. Y. App. Div. 209, 130 N. Y. Supp. 988.

⁴⁵ United States. Barreda y Osma v. Brown, 180 Fed. 194, aff'd 184 Fed. 986 (mem. dec.).

Alabama. Spence's Adm'r v. Whitaker, 3 Port. 297; Southern Loan & Trust Co. v. Gissendaner, 4 Ala. App. 523, 58 So. 737.

Arkansas. Matthews v. Bordeaux, 97 Ark. 643, 133 S. W. 592. See also

McDonough v. Williams, 77 Ark. 261, 8 L. R. A. (N. S.) 452, 7 Ann. Cas. 276, 92 S. W. 783.

California. See Wise Realty Co. v. Stewart, 169 Cal. 176, 146 Pac. 534.

District of Columbia. George v. Ford, 36 App. Cas. 315.

Georgia. Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232.

Iowa. Dawson v. National Life Ins. Co. of America, 176 Iowa 362, L. R. A. 1916 E 878, 157 N. W. 929.

Kansas. Stewart v. Harris, 69 Kan. 498, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873, 77 Pac. 277.

Missouri. Clubb v. Scullin, 235 Mo. 585, 139 S. W. 420.

Rhode Island. Fisher v. Budlong, 10 R. I. 525.

Washington. Huston v. Harrington, 58 Wash. 51, 107 Pac. 874; Landis v. Wintermute, 40 Wash. 673, 82 Pac. 1000.

This rule does not apply to an agent whose duties are restricted to merely ministerial acts. Clubb v. Scullin, 235 Mo. 585, 139 S. W. 420.

There is no confidential relation between brothers-in-law solely by reason of the relationship within the meaning of this rule. Bawden v. Taylor, 254 Ill. 464, 98 N. E. 941, aff'g 166 Ill. App. 443.

An executor does not occupy a confidential relation towards a legatee

profits for himself out of the transaction without the knowledge and consent of the other party.⁴⁶ The duty of officers or directors in this respect when purchasing or selling stock of the corporation has been considered in a previous chapter.⁴⁷

§ 3873. — Falsity of statement. Of course a representation to amount to fraud must be false in fact.⁴⁸

under the will within the meaning of this rule, and a purchase by him of her stock will not be set aside merely because of his failure to disclose facts known to him concerning its value. *O'Neile v. Ternes*, 32 Wash. 528, 73 Pac. 692.

In *Edelman v. Latshaw*, 180 Pa. St. 419, 36 Atl. 926, a purchase of stock by an executor from one who had bought it at public sale was set aside, where the executor represented that it was of no value and gave a false reason for wanting to purchase it, but had found a letter written to his testator offering a large price for it, and afterwards sold it to the writer thereof at a large advance in price.

46 United States. *Primeau v. Granfield*, 180 Fed. 847; *Hornér v. Perry*, 112 Fed. 906.

Arkansas. See *McDonough v. Williams*, 77 Ark. 261, 8 L. R. A. (N. S.) 452, 7 Ann. Cas. 276, 92 S. W. 783.

California. *Smith v. Elderton*, 16 Cal. App. 424, 117 Pac. 563.

District of Columbia. *George v. Ford*, 36 App. Cas. 315.

Georgia. *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232.

Iowa. *Dawson v. National Life Ins. Co. of America*, 176 Iowa 362, L. R. A. 1916 E 878, 157 N. W. 929.

Nebraska. *Barber v. Martin*, 67 Neb. 445, 93 N. W. 722.

Rhode Island. *Fisher v. Budlong*, 10 R. I. 525.

Washington. *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000.

A sale of stock may be rescinded and the purchase money recovered

where such sale was made to the purchaser by an attorney in whom the purchaser reposed confidence, the sale price to the client purchaser being double that at which the corporation was selling its own stock, and the stock sold being that of the attorney. *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000.

⁴⁷ See § 2564 et seq., *supra*.

48 California. *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011; *Sheer v. Hoyt*, 13 Cal. App. 662, 110 Pac. 477.

Georgia. *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32.

Illinois. *Moyses v. Schendorf*, 142 Ill. App. 293, *aff'd* 238 Ill. 232, 87 N. E. 401.

Iowa. *Marquardt v. Bartlett*, 173 Iowa 745, 155 N. W. 1014.

Kentucky. *Bowen v. Walton*, 142 Ky. 509, 134 S. W. 885.

Maryland. *Weaver v. Shriver*, 79 Md. 530, 30 Atl. 189.

Massachusetts. *Childs v. Krey*, 199 Mass. 352, 85 N. E. 442.

Michigan. *Hubbard v. Oliver*, 173 Mich. 337, 139 N. W. 77.

Missouri. *Ryan v. Miller*, 236 Mo. 496, Ann. Cas. 1912 D 540, 139 S. W. 128; *Fisher v. Seitz*, 172 Mo. App. 162, 157 S. W. 883; *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783.

New Jersey. *Lams v. Fish*, 86 N. J. L. 321, 90 Atl. 1105.

New York. *Potts v. Lambie*, 157 App. Div. 800, 142 N. Y. Supp. 795; *L. D. Garrett Co. v. Astor*, 67 App. Div. 595, 73 N. Y. Supp. 966; *Gause v. Com-*

Equivocal statements in a prospectus may constitute fraud though they are susceptible of a construction which would make them accord with the real facts, where the apparent meaning is to the contrary.⁴⁹

§ 3874. — Knowledge of falsity and intent to deceive. Actual fraud is essential to sustain an action for deceit. The false representations must have been made with intent to deceive, and the person making them must have known them to be false, or must have made them recklessly, and without any knowledge as to their truth or falsity. Representations made in good faith and in the honest belief that they were true will not sustain such an action.⁵⁰ In some juris-

monwealth Trust Co., 44 Misc. 46, 89 N. Y. Supp. 723, judgment rev'd on other grounds 100 App. Div. 427, 91 N. Y. Supp. 847.

Oregon. McMillan v. Batten, 52 Ore. 218, 96 Pac. 675.

Pennsylvania. C. Jutte & Co. v. Pfeil, 219 Pa. 520, 69 Atl. 59.

Texas. Cowboy State Bank & Trust Co. v. Guinn, — Tex. Civ. App. —, 160 S. W. 1103; Downes v. Self, 28 Tex. Civ. App. 356, 67 S. W. 897.

Washington. Templeton v. Warner, 89 Wash. 584, 157 Pac. 458, 154 Pac. 1081.

West Virginia. Stalnaker v. Janes, 68 W. Va. 176, 69 S. E. 651.

Wisconsin. McMillen v. Strange, 159 Wis. 271, 150 N. W. 434.

Where fraud is set up as a defense to an action for the price, it is not sufficient to allege, by way of conclusion, that the representations were false, but the pleader must show wherein they were false. McMillan v. Batten, 52 Ore. 218, 96 Pac. 675.

See also § 622, supra.

⁴⁹ Bystrom v. Willard, 175 N. Y. App. Div. 433, 162 N. Y. Supp. 100, appeal dismissed 220 N. Y. 765, 116 N. E. 1038.

⁵⁰ **Alabama.** Southern Loan & Trust Co. v. Gissendaner, 4 Ala. App. 523, 58 So. 737.

District of Columbia. Magruder v. Montgomery, 33 App. Cas. 133.

Illinois. Cantwell v. Harding, 249 Ill. 354, 94 N. E. 488.

Iowa. Campbell v. Park, 128 Iowa 181, 104 N. W. 799, 101 N. W. 861.

Kentucky. Kirtley's Adm'x v. Shinkle, 24 Ky. L. Rep. 608, 69 S. W. 723; Foster v. Gibson, 18 Ky. L. Rep. 716, 38 S. W. 144.

Maryland. Boulden v. Stilwell, 100 Md. 543, 1 L. R. A. (N. S.) 258, 60 Atl. 609.

Massachusetts. Cole v. Cassidy, 138 Mass 437, 52 Am. Rep. 284.

Missouri. Wann v. Scullin, 210 Mo. 429, 109 S. W. 688; Peters v. Lohman, 171 Mo. App. 465, 156 S. W. 783.

New Jersey. Lams v. Fish, 86 N. J. L. 321, 90 Atl. 1105; Bingham v. Fish, 86 N. J. L. 316, 90 Atl. 1106.

New York. Kountze v. Kennedy, 147 N. Y. 124, 29 L. R. A. 360, 49 Am. St. Rep. 651, 41 N. E. 414; Bystrom v. Villard, 175 App. Div. 433, 162 N. Y. Supp. 100, appeal dismissed 220 N. Y. 765, 116 N. E. 1038; Canadian Agency v. Assets Realization Co., 165 App. Div. 96, 150 N. Y. Supp. 758; Potts v. Lambie, 157 App. Div. 800, 142 N. Y. Supp. 795; Thayer v. Schley, 137 App. Div. 166, 121 N. Y. Supp. 1064; Bell v. James, 128 App. Div. 241, 112 N. Y. Supp. 750, aff'd 198 N. Y. 513, 92 N. E. 1078; Lambert v. Elmendorf, 124 App. Div. 758, 109 N. Y. Supp. 574; Lyon v. James, 97 App. Div. 385, 90 N. Y. Supp. 28, aff'd 181 N. Y.

dictions the same rule is applied in suits to rescind, or where fraud is set up as a defense to an action on the contract.⁵¹ And of course

512, 73 N. E. 1126; *Worthington v. Herrmann*, 89 App. Div. 627, 88 N. Y. Supp. 76, aff'd 180 N. Y. 559, 73 N. E. 1134.

Pennsylvania. *High v. Berret*, 148 Pa. St. 261, 23 Atl. 1004.

Texas. *Foix v. Moeller*, — Tex. Civ. App. —, 159 S. W. 1048; *Collins v. Chipman*, 41 Tex. Civ. App. 563, 95 S. W. 666.

Utah. *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 Pac. 687.

Canada. *Parker v. McQuesten*, 32 Q. B. (U. C.) 273.

England. *Derry v. Peek*, 14 App. Cas. 337.

There must be proof of an intent to deceive, or of facts from which such an intent may be inferred. *Worthington v. Herrmann*, 89 N. Y. App. Div. 627, 88 N. Y. Supp. 76, aff'd 180 N. Y. 559, 73 N. E. 1134.

An intent to deceive will be inferred from the fact that the person making the representations knew them to be false. *Sykes v. Pure Food Cider Co.*, 157 Iowa 601, 138 N. W. 554.

A fraudulent intent on the part of the author and publisher of a prospectus may be inferred from the falsity of the statements therein contained and that alone. *Downey v. Finucane*, 205 N. Y. 251, 40 L. R. A. (N. S.) 307, 98 N. E. 391, aff'g 146 N. Y. App. Div. 209, 130 N. Y. Supp. 988.

"If one makes false representations as of his own knowledge and asserts them to be true when, indeed, he possessed no knowledge whatever on the subject, the law then implies the scienter because of the reckless conduct about such representation and for the reason that a positive statement of the fact implies knowledge

of such fact.'" *Snider v. McAtee*, 165 Mo. App. 260, 147 S. W. 136, aff'd (Mo.), 178 S. W. 484.

It is sufficient if he knows them to be false, or, believing them to be true, has no sufficient ground for such belief. Under such circumstances he cannot escape liability on the ground that he did not intend to deceive the other party. It is sufficient that he intended to induce him to enter into the contract. *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011.

One who makes affirmative representations of fact with the design that they shall be acted upon, is liable if they are so acted upon in the belief that they are true, regardless of the question of his knowledge of their falsity or intent to deceive. *Goodwin v. Daniel* (Tex. Civ. App.), 93 S. W. 534.

51 United States. *Farwell v. Colonial Trust Co.*, 147 Fed. 480.

Arkansas. *Hunt v. Davis*, 98 Ark. 44, 135 S. W. 458; *Evatt v. Hudson*, 97 Ark. 265, 133 S. W. 1023.

Illinois. *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074, rev'g 96 Ill. App. 17.

New York. *Willetts v. Poor*, 141 App. Div. 743, 126 N. Y. Supp. 926; *Lambert v. Elmendorf*, 124 App. Div. 758, 109 N. Y. Supp. 574; *L. D. Garrett Co. v. Clark*, 102 App. Div. 611, 92 N. Y. Supp. 1132, aff'd 184 N. Y. 557, 76 N. E. 1099; *L. D. Garrett & Co. v. Appleton*, 101 App. Div. 507, 92 N. Y. Supp. 136, aff'd 184 N. Y. 557, 76 N. E. 1099; *L. D. Garrett Co. v. Astor*, 67 App. Div. 595, 73 N. Y. Supp. 966. But see *Canadian Agency v. Assets Realization Co.*, 165 App. Div. 96, 150 N. Y. Supp. 758.

South Dakota. *Tuthill v. Sherman*, 165 N. W. 4.

"Actual or legal fraud is an essen-

fraud of this character will sustain such a suit.⁵² But in a number of jurisdictions it is held that actual fraud is not essential to rescission, and that scienter and a fraudulent intent need not be shown, but that it is sufficient if the representations were made by one upon whose statements the other party had a right to rely and were false, although they were made innocently and in the honest belief that they were true.⁵³

tial element of those misstatements which will induce a court of equity to set aside a contract or sale." *Farwell v. Colonial Trust Co.*, 147 Fed. 480.

In order to warrant relief in equity it is not always necessary that the seller should have known that his statement was false, but it is sufficient if he had no good and reasonable ground to believe it to be true. *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074, rev'g 96 Ill. App. 17.

"To rescind a contract upon the ground of fraud, as to recover damages upon the ground of fraud, scienter must be alleged and proved; and while either the representation of a fact, knowing it to be false, made with intent to deceive, or representation of actual knowledge of a fact when no such knowledge exists and the fact is not true, is sufficient to support a cause of action, one of these conditions must be proved to exist to sustain any action based upon fraud." *L. D. Garrett Co. v. Appleton*, 101 N. Y. App. Div. 507, 92 N. Y. Supp. 136, aff'd 184 N. Y. 557, 76 N. E. 1099.

⁵² *Alabama*. *Southern Loan & Trust Co. v. Gissendaner*, 4 Ala. App. 523, 58 So. 737.

Arkansas. *Hunt v. Davis*, 98 Ark. 44, 135 S. W. 458.

California. *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011.

Colorado. *Geraghty v. Randall*, 18 Colo. App. 194, 70 Pac. 767.

Iowa. *Stotts v. Fairfield*, 163 Iowa 726, 145 N. W. 61.

Massachusetts. *Ginn v. Almy*, 212 Mass. 486, 99 N. E. 276.

Michigan. *Keyes v. Quinn*, 154 Mich. 668, 118 N. W. 615.

Minnesota. *Martin v. Hill*, 41 Minn. 337, 43 N. W. 337.

Oregon. *Joplin v. Nunnally*, 67 Ore. 566, 134 Pac. 1177.

One who obtains the money or property of another by means of statements which are untrue, but of the truth or falsity of which he is without knowledge, may be held responsible as for a legal fraud, although there was no active intention to commit a wrong. *Geraghty v. Randall*, 18 Colo. App. 194, 70 Pac. 767.

⁵³ *Alabama*. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897; *Southern Loan & Trust Co. v. Gissendaner*, 4 Ala. App. 523, 58 So. 737.

Iowa. *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801.

Michigan. *Hubbard v. Oliver*, 173 Mich. 337, 139 N. W. 77.

Minnesota. *Fawkes v. Knapp*, 165 N. W. 236; *Martin v. Hill*, 41 Minn. 337, 43 N. W. 337.

Missouri. See *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783.

Texas. *Collins v. Chipman*, 41 Tex. Civ. App. 563, 95 S. W. 666.

Utah. *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 Pac. 687.

"In case of rescission, it is not necessary to prove that the party who made the false representations knew them to be false when he uttered them, if such representations were in fact material and false and induced the

A person cannot be held liable in an action for deceit for making representations which turn out to be false, where they are in accord with and fairly represent information obtained by him from experts or other reliable sources on which he has a right to rely, and where he honestly believes them to be true.⁵⁴ And especially is this true where the other party to the contract knows that he is making his statements on information received from other sources, and not of his own knowledge of the facts.⁵⁵

False representations made by an officer of the corporation may be ground for rescission⁵⁶ or for the recovery of damages⁵⁷ even though he did not know that they were false or believed them to be true, where, by reason of his official position, he is chargeable with notice of the facts. Since he is in a position to know the facts, and it is his business to know them, he will not be permitted to say that he did not

other party to enter into a contract that he would not have entered into otherwise." *Ogden Valley Troht & Resort Co. v. Lewis*, 41 Utah 183, 125 Pac. 687.

⁵⁴*Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783.

A statement by the seller that he has been advised by named attorneys that a certain thing can be done under the laws of Mexico does not constitute fraud where he was so advised and had no personal knowledge on the subject, although the law is to the contrary. *Daly v. Brennan*, 87 Wis. 36, 57 N. W. 963.

"When the directors of a corporation consent to the issuance of a prospectus, stating as facts certain representations therein as to its property which are in accordance with the facts obtained from trustworthy sources on proper investigation and inquiry, and which they honestly believe to be true, then it cannot be said either that they are making a statement as true about which they have no knowledge, or that they are making such statement with a consciousness that they have no knowledge concerning it." Hence they cannot be held liable

in an action for deceit under such circumstances though such representations prove to be untrue. *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783.

⁵⁵*Lams v. Fish*, 86 N. J. L. 321, 90 Atl. 1105.

⁵⁶*Arkansas*. *Grant v. Ledwidge*, 109 Ark. 297, 160 S. W. 200; *Haldiman v. Taft*, 102 Ark. 45, 143 S. W. 112. See also *Hunt v. Davis*, 98 Ark. 44, 135 S. W. 458.

Kentucky. *Ligon v. Minton*, 125 S. W. 304.

Oregon. *Joplin v. Nunnally*, 67 Ore. 566, 134 Pac. 1177.

Texas. *Collins v. Chipman*, 41 Tex. Civ. App. 563, 95 S. W. 666.

West Virginia. See *Morrissey v. Williams*, 74 W. Va. 636, L. R. A. 1915 D 792, 82 S. E. 509.

⁵⁷*Long v. Douthitt*, 142 Ky. 427, 134 S. W. 453; *Ligon v. Minton* (Ky.), 125 S. W. 304; *Allen v. Neale*, 134 Ky. 690, 121 S. W. 612; *Drake v. Holbrook*, 28 Ky. L. Rep. 1319, 92 S. W. 297, 25 Ky. L. Rep. 1489, 78 S. W. 158, 23 Ky. L. Rep. 1941, 66 S. W. 512; *Snider v. McAtee*, 165 Mo. App. 260, 147 S. W. 136, aff'd (Mo.), 178 S. W. 484.

know them as against his own statements to the other party to the contract.⁵⁸

Where the sale is made through an agent, the principal will be charged with the knowledge of the agent by whom the representations were made.⁵⁹

Evidence of other similar transactions and similar statements made to others in the sale of similar stock is admissible on the issue of knowledge and intent.⁶⁰

§ 3875. — The representation as an inducement. In order that a contract for the sale or purchase of stock may be avoided, or an action of deceit sustained because of false and fraudulent representations, they must have been relied upon by the party seeking relief so as to have constituted a material inducement for the making of the contract.⁶¹ The person to whom they are made must have been igno-

⁵⁸ *Long v. Douthitt*, 142 Ky. 427, 134 S. W. 453; *Ligon v. Minton* (Ky.), 125 S. W. 304; *Drake v. Holbrook*, 28 Ky. L. Rep. 1319, 92 S. W. 297, 25 Ky. L. Rep. 1489, 78 S. W. 158, 23 Ky. L. Rep. 1941, 66 S. W. 512.

"Where one, because of his peculiar position, has special means of knowledge * * *, and makes representations which he ought to have known to be false, if he did not, the law will imply scienter against him. In such cases, the law will not permit one to assert for knowledge what he must have known that he ought not even to have believed." *Snider v. McAtee*, 165 Mo. App. 260, 147 S. W. 136, aff'd (Mo.), 178 S. W. 484.

The secretary or treasurer of the corporation, who has charge of its books, is guilty of fraud if he makes false representations as to the financial condition of the company for the purpose of inducing the person to whom they are made to purchase his stock even though he believes them to be true, since, by virtue of his position, he holds himself out as having knowledge of the facts and it is his duty to inform himself of them before making any statement to the party with whom he deals. *Grant v. Led-*

widge, 109 Ark. 297, 160 S. W. 200. *Haldiman v. Taft*, 102 Ark. 45, 143 S. W. 112.

⁵⁹ *Campbell v. Park*, 128 Iowa 181, 104 N. W. 799, 101 N. W. 861.

⁶⁰ *Stotts v. Fairfield*, 163 Iowa 726, 145 N. W. 61; *Head v. Oglesby*, 175 Ky. 613, 194 S. W. 793; *Steele v. Kellogg*, 163 Mich. 132, 128 N. W. 403; *Smith v. Gilbert*, — Utah —, 164 Pac. 1026; *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 Pac. 687.

⁶¹ *United States v. Sullivan v. Pierce*, 125 Fed. 104; *Means v. Rees*, 26 Fed. 210.

Alabama. *Armstrong v. Walker*, 76 So. 280.

Arkansas. *Evatt v. Hudson*, 97 Ark. 265, 133 S. W. 1023.

California. *Wise Realty Co. v. Stewart*, 169 Cal. 176, 146 Pac. 534; *Sheer v. Hoyt*, 13 Cal. App. 662, 110 Pac. 477; *Neher v. Hansen*, 12 Cal. App. 370, 107 Pac. 565.

Colorado. *Moore v. Carrick*, 26 Colo. App. 97, 140 Pac. 485.

Connecticut. *Meech v. Malcolm*, 88 Conn. 720, 92 Atl. 657.

District of Columbia. *Magruder v. Montgomery*, 33 App. Cas. 133.

Illinois. *Bawden v. Taylor*, 254 Ill.

rant of their falsity, and must have believed the representations to be

464, 98 N. E. 941, aff'g 166 Ill. App. 443; *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445; *Crocker v. Manley*, 164 Ill. 282, 56 Am. St. Rep. 196, 45 N. E. 577; *Rogan v. Illinois Trust & Savings Bank*, 93 Ill. App. 39, aff'd 194 Ill. 600, 62 N. E. 834.

Iowa. *State Bank of Indiana v. Gates*, 114 Iowa 323, 86 N. W. 311.

Kentucky. *Hoffman v. Friedman*, 171 Ky. 317, 188 S. W. 408; *Field v. Turley*, 120 S. W. 338; *German Nat. Bank's Receiver v. Nagel*, 26 Ky. L. Rep. 748, 82 S. W. 433.

Maryland. *Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983; *Boulden v. Stilwell*, 100 Md. 543, 1 L. R. A. (N. S.) 258, 60 Atl. 609; *Weaver v. Shriver*, 79 Md. 530, 30 Atl. 189.

Massachusetts. *Ginn v. Almy*, 212 Mass. 486, 99 N. E. 276.

Michigan. *Brooks v. Culver*, 168 Mich. 436, 134 N. W. 470; *Steele v. Kellogg*, 163 Mich. 132, 128 N. W. 403.

Minnesota. *Humphrey v. Merriam*, 46 Minn. 413, 49 N. W. 199.

Missouri. *Wann v. Scullin*, 210 Mo. 429, 109 S. W. 688; *Rigler v. Reid*, 186 Mo. App. 111, 171 S. W. 952.

New York. *Nelson v. Luling*, 62 N. Y. 645.

Oregon. *Joplin v. Nunnally*, 67 Ore. 566, 134 Pac. 1177.

Pennsylvania. *C. Jutte & Co. v. Pfeil*, 219 Pa. 520, 69 Atl. 59; *Edelman v. Latshaw*, 180 Pa. St. 419, 36 Atl. 926; *Weaver v. Cone*, 174 Pa. St. 104, 34 Atl. 551.

Texas. *Robinson v. Aldredge*, — Tex. Civ. App. —, 198 S. W. 413; *Collins v. Chipman*, 41 Tex. Civ. App. 563, 95 S. W. 666; *Downes v. Self*, 28 Tex. Civ. App. 356, 67 S. W. 897.

Utah. *Smith v. Gilbert*, 164 Pac. 1026; *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 Pac. 687; *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924.

Virginia. *Jordan v. Walker*, 115 Va. 109, 78 S. E. 643.

Washington. *Boehme v. Broadway Theater Co.*, 91 Wash. 104, 157 Pac. 218; *Templeton v. Warner*, 89 Wash. 584, 157 Pac. 458, 154 Pac. 1081; *Harris v. Stewart*, 72 Wash. 661, 131 Pac. 212; *Palmer v. Shields*, 71 Wash. 463, 128 Pac. 1051; *Shores v. Hutchinson*, 69 Wash. 329, 125 Pac. 142; *O'Neile v. Ternes*, 32 Wash. 528, 73 Pac. 692.

West Virginia. *Stalnaker v. Janes*, 68 W. Va. 176, 69 S. E. 651.

Wisconsin. *Cazier v. Hart*, 158 Wis. 362, 148 N. W. 860; *Schwab v. Esben-shade*, 151 Wis. 513, 139 N. W. 420; *Wolff v. Carstens*, 148 Wis. 178, 134 N. W. 400.

Where one purchases stock through an agent, and is without personal knowledge as to the situation, it is sufficient if the agent relied on the misrepresentations of the seller. *Geraghty v. Randall*, 18 Colo. App. 194, 70 Pac. 767.

If the fraud consists in the concealment or nondisclosure of facts, it must appear that such concealment or nondisclosure was a material inducement to the action of the other party in entering into the contract and that he relied on the nonexistence of the facts so concealed. *Wann v. Scullin*, 210 Mo. 429, 109 S. W. 688.

Whether he did rely upon them is generally a question for the jury. *Neher v. Hansen*, 12 Cal. App. 370, 107 Pac. 565; *Cherry v. First Texas Chemical Mfg. Co.*, 103 Tex. 82, 123 S. W. 689, rev'g judgment (Tex. Civ. App.), 115 S. W. 81; *Jordan v. Walker*, 115 Va. 109, 78 S. E. 643; *Schwab v. Esben-shade*, 151 Wis. 513, 139 N. W. 420.

Evidence showing misrepresentations with respect to one contract cannot be shown in a suit to set aside an entirely different contract. *Rigler v. Reid*, 186 Mo. App. 111, 171 S. W. 952.

true,⁶² that is, he must have been deceived by them.⁶³ And notice of facts sufficient to put a person of ordinary prudence and diligence on inquiry is notice of all the facts which a reasonable investigation would disclose.⁶⁴ False representations are no ground for rescission or an action of deceit, where their falsity is shown by other statements made at the same time;⁶⁵ or where the person to whom they are made acts upon his own judgment after making an independent investigation, which he is not prevented from pursuing by the other party,⁶⁶

Evidence that other persons to whom similar representations were made believe them to be true is properly excluded. *Smith v. Gilbert*, — Utah —, 164 Pac. 1026.

See also § 624, *supra*.

⁶² *United States*. *Farwell v. Colonial Trust Co.*, 147 Fed. 480.

Alabama. *Friddle v. Braun*, 180 Ala. 556, 61 So. 59; *Merritt v. Morris*, 132 Ala. 190, 31 So. 477.

Iowa. *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801.

New York. *Nelson v. Luling*, 62 N. Y. 645.

Oregon. *Joplin v. Nunnally*, 67 Ore. 566, 134 Pac. 1177.

Texas. *Collins v. Chipman*, 41 Tex. Civ. App. 563, 95 S. W. 666.

It is error to submit to the jury the question whether the purchaser knew or ought to have known the facts when the contract was made, where there is no evidence to sustain a finding that he had such knowledge. *Rumsey v. Shaw*, 212 Pa. 576, 61 Atl. 1109.

⁶³ *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801; *Rigler v. Reid*, 186 Mo. App. 111, 171 S. W. 952; *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783; *C. Jutte & Co. v. Pfeil*, 219 Pa. 520, 69 Atl. 59.

They "must be well calculated to deceive and to induce the victim to enter upon the trade, and they must accomplish that result." *Farwell v. Colonial Trust Co.*, 147 Fed. 480.

⁶⁴ *United States*. *Farwell v. Colonial Trust Co.*, 147 Fed. 480.

Illinois. *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445.

Iowa. *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

Maryland. *Boulden v. Stilwell*, 100 Md. 543, 1 L. R. A. (N. S.) 258, 60 Atl. 609.

Missouri. *Snider v. McAtee*, 165 Mo. App. 260, 147 S. W. 136, *aff'd* (Mo.), 178 S. W. 484.

New York. *Stern v. Stern*, 122 App. Div. 821, 107 N. Y. Supp. 900.

One who knows that he is purchasing treasury stock at less than par cannot be deceived by a representation that the stock is fully paid. *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

⁶⁵ *McEacheran v. Western Transportation & Coal Co.*, 97 Mich. 479, 56 N. W. 860.

⁶⁶ *California*. *Davis v. Butler*, 154 Cal. 623, 98 Pac. 1047.

Connecticut. *Meech v. Malcolm*, 88 Conn. 720, 92 Atl. 657.

Illinois. *Crocker v. Manley*, 164 Ill. 282, 56 Am. St. Rep. 196, 45 N. E. 577.

Kentucky. *Drake v. Holbrook*, 28 Ky. L. Rep. 1319, 92 S. W. 297, 25 Ky. L. Rep. 1489, 78 S. W. 158, 23 Ky. L. Rep. 1941, 66 S. W. 512.

Michigan. *Brooks v. Culver*, 168 Mich. 436, 134 N. W. 470.

Utah. *Smith v. Gilbert*, 164 Pac. 1026.

Washington. *Harris v. Stewart*, 72 Wash. 661, 131 Pac. 212; *Shores v.*

or upon the report of an attorney employed by himself,⁶⁷ or the statements and overtures of third persons.⁶⁸ Representations made after the making of the contract will not warrant a rescission or sustain an action for damages, since they could not have induced the party to whom they were made to enter into it.⁶⁹

Reliance may be presumed from the existence of confidential relations between the parties.⁷⁰ It is not necessary that the false representations should have been the sole, or even the principal, inducement for entering into the contract, but it is sufficient if they exerted a material influence upon the mind of the defrauded party.⁷¹

Hutchinson, 69 Wash. 329, 125 Pac. 142.

If he relies on his own judgment, depending on his knowledge obtained from other sources, it is immaterial whether the representations made to him were true or false. *Sullivan v. Pierce*, 125 Fed. 104.

"If investigation is made by the buyer, he cannot claim that he relied on the investigations of the seller, except in cases of active fraud or concealment, or in cases where fiduciary relations existed, or peculiar knowledge on the part of the seller was shown." *Moore v. Carrick*, 26 Colo. App. 97, 140 Pac. 485.

The fact that plaintiff, who was induced to purchase stock by false representations as to the corporate indebtedness, looked over the corporate books, was held not to prevent a rescission, where defendant told him that neither he nor the corporation kept any books showing the amount of such indebtedness. *Davis v. Butler*, 154 Cal. 623, 98 Pac. 1047.

⁶⁷ *Palmer v. Shields*, 71 Wash. 463, 128 Pac. 1051.

⁶⁸ *Brooks v. Culver*, 168 Mich. 436, 134 N. W. 470.

⁶⁹ *Steele v. Kellogg*, 163 Mich. 132, 128 N. W. 403; *Campbell v. Rushing*, — Tex. Civ. App. —, 141 S. W. 133.

The purchaser cannot rescind because of matters shown in a trial balance furnished to the purchasers

after the contract was made. *Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983.

⁷⁰ Upon the incorporation of a partnership, and the taking over by it of the partnership assets, it may properly be presumed that where the stockholders are to all practical intents and purposes merely those who compose the partnership, the confidential relation which existed between the parties as partners continues to exist between them as members of the corporation, and, where there is no evidence to the contrary, it may be presumed that where one of the members has sold his stock to the other, who was in active management of the business, that in selling he relied upon representations made by the member who was so in active control and was influenced thereby the same as he would have been had the partnership continued. But this presumption is overcome by proof that the friendly relations of the parties had ceased at the time of the sale. *Sullivan v. Pierce*, 125 Fed. 104.

The party guilty of the fraud is estopped to deny reliance under such circumstances. *Smith v. Elderton*, 16 Cal. App. 424, 117 Pac. 563.

⁷¹ *Southern Loan & Trust Co. v. Gissendan*, 4 Ala. App. 523, 58 So. 737; *Massey v. Luce*, 158 Mich. 128, 122 N. W. 514; *Robinson v. Aldredge*, — Tex. Civ. App. —, 198 S. W. 413.

The mere fact that the plaintiff

§ 3876. — Right to rely on representations. To warrant a rescission or the recovery of damages, the representations must have been of such a character that the complaining party had a right to rely upon them.⁷² Where the parties deal at arm's length and stand on the same plane, and the means of knowledge are at hand, a party to a contract for the sale of stock must use due diligence to ascertain the truth.⁷³ He is not required to exercise extraordinary diligence, however, but only that degree of care which a person of ordinary prudence would exercise under like circumstances.⁷⁴

As a general rule if one party to the contract makes positive false and fraudulent representations as to the financial condition of the company, or other material facts affecting the value of the stock, with intent that they shall be relied upon, the other party is not precluded from rescinding or recovering damages by the fact that he could have ascertained the truth from the officers of the company, or by other inquiry or investigation.⁷⁵ And especially is this true where the

consulted with or received information from others will not alone preclude recovery. *Neher v. Hansen*, 12 Cal. App. 370, 107 Pac. 565.

Partial investigations and reliance in part on representations do not preclude relief. *Tarara v. Novelty Elec. Mfg. Co.*, 136 Minn. 216, 161 N. W. 409.

⁷² *Evatt v. Hudson*, 97 Ark. 265, 133 S. W. 1023.

False representations are not ground for rescission, where in view of the knowledge the complainant had, a reasonable person would not have relied upon them. *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445.

⁷³ *Hunley v. Ingle*, 88 Wash. 446, 153 Pac. 313; *Daly v. Brennan*, 87 Wis. 36, 57 N. W. 963.

"Ordinary prudence and diligence require that each party shall seek the means of information that are open to both alike." *Evatt v. Hudson*, 97 Ark. 265, 133 S. W. 1023.

The purchaser is not entitled to rescind for false representations as to the amount of business done by the company where the books showing

the facts were in his possession before the transaction was completed. *Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983.

⁷⁴ *Stewart v. Harris*, 69 Kan. 498, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873, 77 Pac. 277; *Snider v. McAtee*, 165 Mo. App. 260, 147 S. W. 136, aff'd (Mo.), 178 S. W. 484; *Poole v. Camden*, — W. Va. —, 92 S. E. 454.

⁷⁵ **California.** *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011; *Neher v. Hansen*, 12 Cal. App. 370, 107 Pac. 565.

Idaho. *Watson v. Molden*, 10 Idaho 570, 79 Pac. 503.

Kentucky. *Head v. Oglesby*, 175 Ky. 613, 194 S. W. 793.

Minnesota. *Tarara v. Novelty Elec. Mfg. Co.*, 136 Minn. 216, 161 N. W. 409; *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056.

Missouri. *Bradbury v. Smith*, 181 S. W. 415; *Davis v. Forman*, 229 Mo. 27, 129 S. W. 213; *Wannell v. Kern*, 57 Mo. 476.

Nebraska. *Oleott v. Bolton*, 50 Neb. 779, 70 N. W. 366.

Oklahoma. *Halsell v. First Nat.*

facts are peculiarly within the knowledge or the means of knowledge of the person making the representations,⁷⁶ or the truth is not readily ascertainable,⁷⁷ or the representations are of such a character as to induce the purchaser to believe them and to prevent him from making any further inquiry.⁷⁸ And one may rely on the representations of

Bank of Muskogee, 48-Okla. 535, L. R. A. 1916 B 697, 150 Pac. 489.

Virginia. Jordan v. Walker, 115 Va. 109, 78 S. E. 643.

Washington. Boehme v. Broadway Theater Co., 91 Wash. 104, 157 Pac. 218; Gilluly v. Hosford, 45 Wash. 594, 88 Pac. 1027.

A stockholder is not required to make an investigation of the books of the bank to determine its financial condition before selling his stock, merely because he has the power to do so. Stewart v. Harris, 69 Kan. 498, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873, 77 Pac. 277.

See also § 625, *supra*.

⁷⁶ **Arkansas.** Grant v. Ledwidge, 109 Ark. 297, 160 S. W. 200; Evatt v. Hudson, 97 Ark. 265, 133 S. W. 1023.

California. Neher v. Hansen, 12 Cal. App. 370, 107 Pac. 565.

Idaho. Watson v. Molden, 10 Idaho 570, 79 Pac. 503.

Virginia. Jordan v. Walker, 115 Va. 109, 78 S. E. 643.

Washington. Boehme v. Broadway Theater Co., 91 Wash. 104, 157 Pac. 218; Borde v. Kingsley, 76 Wash. 613, 136 Pac. 1172.

West Virginia. Poole v. Camden, 92 S. E. 454.

"Where the subject-matter of the contract is not at hand and the facts are within the knowledge of the vendor and could not be ascertained by the vendee without trouble and expense, * * * he is not bound to make an independent investigation, but may rely on the representation of his vendor." Borde v. Kingsley, 76 Wash. 613, 136 Pac. 1172.

One who knows nothing about mines

may rely upon the representations of a mining man, who is his friend, as to the condition and prospects of mining property owned by the company. Gray v. Reeves, 69 Wash. 374, 125 Pac. 162.

A purchaser has a right to rely on a representation by the secretary of the corporation that it is legally organized, and is not obliged to the records or other sources of information to verify the truth of such statement. Maine v. Midland Inv. Co., 132 Iowa 272, 109 N. W. 801.

A person who purchases stock from the secretary of the corporation, who has charge of its books, is entitled to rely upon his representations as to its financial condition, and is not negligent in failing to examine the books, particularly where he informs the seller that he will rely on his statements. Grant v. Ledwidge, 109 Ark. 297, 160 S. W. 200.

One purchasing stock from a director has a right to rely upon his representations as to the financial condition and assets of the corporation, since these matters should be within his peculiar knowledge. Hunt v. Davis, 98 Ark. 44, 135 S. W. 458.

⁷⁷ Boehme v. Broadway Theater Co., 91 Wash. 104, 157 Pac. 218; McFeron v. Shoemaker, 73 Wash. 450, 131 Pac. 1126.

⁷⁸ Head v. Oglesby, 175 Ky. 613, 194 S. W. 793; Foix v. Moeller, — Tex. Civ. App. —, 159 S. W. 1048.

As where the purchaser asks to see the books, he is informed that they are not at hand. Gregg v. Hayes, 27 Colo. App. 412, 149 Pac. 1055.

the other party where he goes to him for information and notifies him that he intends to rely on his statements, even though he might have himself discovered the truth by examining the books, which he had a right to do.⁷⁹

A party to a written contract who had an opportunity to read it before signing it cannot have it set aside on the ground that he did not read it and did not know its contents, or understand its meaning or effect, in the absence of the clearest and most convincing evidence that his signature was procured by fraud or mistake.⁸⁰

§ 3877. — Necessity for injury. To sustain an action for deceit the false representations must have resulted in some injury or damage to the complaining party.⁸¹ So the purchaser cannot sustain such an action where the stock was worth all or more than he paid for it.⁸² Nor can one who is induced to sell his stock by fraud re-

⁷⁹ Grant v. Ledwidge, 109 Ark. 297, 160 S. W. 200.

A purchaser of stock who openly states to his vendor during negotiations for the purchase that he is ignorant of the facts determining the value of the stock, and that he relies, in purchasing, upon the representations of the vendor, may maintain action against such vendor if the representations are false. Watson v. Molden, 10 Idaho 570, 79 Pac. 503.

⁸⁰ Ferguson v. Akers, 165 Ky. 289, 176 S. W. 1149.

A person who is capable of understanding a contract, and who signs and retains it, will not be permitted to avoid it on the ground that he did not understand it. McMillen v. Strange, 159 Wis. 271, 150 N. W. 434.

⁸¹ United States. Stratton's Independence, Ltd. v. Dines, 135 Fed. 449, aff'g 126 Fed. 968.

California. Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011.

Delaware. Williams v. Beltz, — Del. Super. Ct. —, 101 Atl. 905.

Nebraska. Jakway v. Proudfit, 76 Neb. 62, 14 Ann. Cas. 258, 109 N. W. 388, 106 N. W. 1039.

New Jersey. Lams v. Fish, 86 N. J. L. 321, 90 Atl. 1105.

New York. Stern v. Stern, 122 App. Div. 821, 107 N. Y. Supp. 900.

Pennsylvania. Curtis v. Buzard, 254 Pa. 61, 98 Atl. 777.

Texas. Reed v. Holloway (Tex. Civ. App.), 127 S. W. 1189.

“The mere fact that others secured stock in the corporation for less than the plaintiff was induced to pay does not establish the fact that he sustained damages by the transaction.” Curtis v. Buzard, 254 Pa. 61, 98 Atl. 777.

A bona fide purchaser is not entitled to recover damages for false representations made by the corporation that the stock was fully paid up, where the corporation is estopped to deny its validity, and it would be valid in his hands. Smith v. Martin, 135 Cal. 247, 67 Pac. 779.

A representation that the corporation owns certain property is immaterial though it is false when made, if the corporation afterwards acquires such property. Lams v. Fish, 86 N. J. L. 321, 90 Atl. 1105.

See also § 626, supra.

⁸² Curtis v. Buzard, 254 Pa. 61, 98 Atl. 777.

cover damages for deceit where it is worth no more than the price which he received.⁸³

Injury or prejudice of some sort is also necessary to warrant a rescission,⁸⁴ and hence there can be no rescission for a representation which, though false when made, is afterwards made good.⁸⁵ But it is generally held that in order to rescind in equity, it is not necessary for the defrauded party to show that he has sustained pecuniary loss, or that he has been damaged in any particular amount, but that it is sufficient if the false representations were material and induced him to enter into the contract.⁸⁶ So it has been held that the purchaser is not deprived of his right to rescind because the stock is worth what he paid for it, or more, where it would have been of substantially greater value if it had been as represented.⁸⁷ The rule has been stated to be that if the purchaser, by fraud, has been induced to accept something not contemplated by the contract, he may rescind and recover what he has paid without showing that he has sustained any pecuniary injury or damage thereby, but that if he receives what he actually purchased, and bases his right to rescind on some false representation as to its quality, condition or matter affecting its

⁸³ *McDonough v. Williams*, 77 Ark. 261, 8 L. R. A. (N. S.) 452, 7 Ann. Cas. 276, 92 S. W. 783.

⁸⁴ *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011. See also *Jelinek v. Baer*, 153 Wis. 426, 141 N. W. 271.

Rescission for fraud and deceit is based upon the theory of a total or partial failure of consideration and because of the fraud, resulting in damage to the party defrauded. *McMillan v. Batten*, 52 Ore. 218, 96 Pac. 675.

The fact that the plaintiff paid twice what he would have paid but for the fraud establishes his injury. *Smith v. Elderton*, 16 Cal. App. 424, 117 Pac. 563.

Evidence that the purchaser, soon after the purchase, sold the stock to others for the same amount paid by him destroys any inference of damage unless perhaps it is shown that he was engaged in the business of buying and selling for profit and

bought for that purpose. *McMillan v. Batten*, 52 Ore. 218, 96 Pac. 675.

⁸⁵ A false representation that a bridge company had a contract with a railroad company whereby it was to receive a certain sum for every passenger carried across the bridge was held not to be ground for rescission, where it made such a contract before the bridge was completed. *Farwell v. Colonial Trust Co.*, 147 Fed. 480.

⁸⁶ *Fawkes v. Knapp*, — Minn. —, 165 N. W. 236; *Ludowese v. Amidon*, 124 Minn. 288, 144 N. W. 965.

"It will be sufficient if the facts show that material injury will necessarily ensue, although the amount of the pecuniary loss is not shown." *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011.

⁸⁷ *Davis v. Butler*, 154 Cal. 623, 98 Pac. 1047; *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011.

value, he must show that such representation was material, and that he was misled thereby to his injury and damage.⁸⁸

§ 3878. — Persons who may be held liable. To entitle either party to a contract for the sale of stock to rescind or recover damages because of false and fraudulent representations, the representations must have been made by the defendant or by some other person for whose fraud he is responsible.⁸⁹ So a purchaser of stock cannot rescind for false representations made by the officers of the corporation,⁹⁰ or by a committee of stockholders,⁹¹ where the seller was

⁸⁸ *Jakway v. Proudfit*, 76 Neb. 62, 14 Ann. Cas. 258, 109 N. W. 388, 106 N. W. 1039.

⁸⁹ *United States*. *Moloney v. Cressler*, 236 Fed. 636.

California. *Browne v. San Gabriel River Rock Co.*, 22 Cal. App. 682, 136 Pac. 542, 544.

Kentucky. *Cain v. Levy*, 179 Ky. 32, 200 S. W. 326.

Michigan. *Penfold v. Charlevoix Sav. Bank*, 140 Mich. 126, 103 N. W. 572.

Missouri. *Flood v. Busch*, 165 Mo. App. 142, 146 S. W. 73.

New York. *Rives v. Bartlett*, 215 N. Y. 33, 109 N. E. 83, rev'g 156 App. Div. 552, 141 N. Y. Supp. 561; *Thayer v. Schley*, 137 App. Div. 166, 121 N. Y. Supp. 1064; *L. D. Garrett Co. v. McComb*, 58 App. Div. 419, 68 N. Y. Supp. 996; *Bartlett v. Blei*, 133 N. Y. Supp. 475.

Texas. *Cowboy State Bank & Trust Co. v. Guinn*, — Tex. Civ. App. —, 160 S. W. 1103; *Foix v. Moeller*, — Tex. Civ. App. —, 159 S. W. 1048; *Goodwin v. Daniel* (Tex. Civ. App.), 93 S. W. 534.

"It is clear that where there is neither agency nor authority, the seller is not liable or otherwise bound by any representations which have been made, even though the purchaser acted thereon. Under such circumstances there is nothing upon which to base liability, either by way of ratification or estoppel." *L. D. Garrett Co. v.*

McComb, 58 N. Y. App. Div. 419, 68 N. Y. Supp. 996.

Neither a bank nor its officers are responsible for statements in a report of the state commissioner of banking in regard to the condition of the bank, where it is not an accurate summary of the reports of the bank's officers on that subject, and it is apparent that if the real report of such officers had been set out no one at all familiar with such statements could have failed to discover the truth. *Penfold v. Charlevoix Sav. Bank*, 140 Mich. 126, 103 N. W. 572.

The seller is not entitled to rescind because a statement as to the condition of the corporation, prepared by its bookkeeper, and in reliance on which the sale is made, is not true, where it is procured at his request, and is as much his own statement as it is the statement of the purchaser. *Goodwin v. Daniel* (Tex. Civ. App.), 93 S. W. 534.

⁹⁰ *Cain v. Levy*, 179 Ky. 32, 200 S. W. 326; *Moffat v. Winslow*, 7 Paige (N. Y.) 124.

A purchaser of stock from one of the officers of a corporation cannot rescind because of false representations made by another officer, not authorized or affirmed by the seller, although the purchase may have been induced thereby. *Doane v. King*, 30 Fed. 106.

⁹¹ *L. D. Garrett Co. v. Clark*, 102 N. Y. App. Div. 611, 92 N. Y. Supp.

innocent of any fraud, and the persons making such representations were not acting as his agent. Nor is a corporation liable for false representations made by individual stockholders for their own benefit and for the purpose of selling their own stock, although its name is signed by them to the contract of sale as well as their own names.⁹²

"Each party to a fraudulent transaction is responsible for the acts and representations of the others done in pursuance of the mutual understanding or in furtherance of the common plan, at least until the termination of the enterprise."⁹³

A principal is liable for false representations made by his agent to the same extent as though he had made them himself, if he authorized the agent to make them, or if they were made by such agent in the course of his employment as such,⁹⁴ or even though they were

1132, rev'g 42 N. Y. Misc. 610, 87 N. Y. Supp. 579, judgment affirmed 184 N. Y. 557, 76 N. E. 1099; *L. D. Garrett Co. v. Appleton*, 101 N. Y. App. Div. 507, 92 N. Y. Supp. 136, aff'd 184 N. Y. 557, 76 N. E. 1099; *L. D. Garrett Co. v. McComb*, 58 N. Y. App. Div. 419, 68 N. Y. Supp. 996.

⁹² *Home Elec. Light & Power Co. v. Collins*, 31 Ind. App. 493, 66 N. E. 780.

⁹³ *Foix v. Moeller*, — Tex. Civ. App. —, 159 S. W. 1048. See also to the same effect *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629; *Downey v. Finucane*, 205 N. Y. 251, 40 L. R. A. (N. S.) 307, 98 N. E. 391, aff'g 146 N. Y. App. Div. 209, 130 N. Y. Supp. 988.

All persons who participate in the fraud are jointly liable. *Jordan v. Walker*, 115 Va. 109, 78 S. E. 643.

⁹⁴ *Iowa*. *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801.

Kentucky. *Gooch v. Collins*, 156 Ky. 282, 160 S. W. 1038.

New York. *Downey v. Finucane*, 205 N. Y. 251, 40 L. R. A. (N. S.) 307, 98 N. E. 391, aff'g 146 App. Div. 209, 130 N. Y. Supp. 988. See also *Willettts v. Poor*, 141 App. Div. 743, 126 N. Y. Supp. 926.

Texas. *Foix v. Moeller*, — Tex. Civ. App. —, 159 S. W. 1048.

Virginia. See *White v. American Nat. Life Ins. Co.*, 115 Va. 305, 78 S. E. 582.

The principal is liable if he knows that representations made by his agent are false even though the agent does not know it. *Schafuss v. Betts*, 94 N. Y. Misc. 463, 157 N. Y. Supp. 608, aff'd 175 N. Y. App. Div. 893, 160 N. Y. Supp. 1145.

He is responsible for false representations made by an agent having authority to negotiate the sale, regardless of whether the making of such representations was within the scope of his authority. *Browne v. San Gabriel River Rock Co.*, 22 Cal. App. 682, 136 Pac. 542, 544.

The principal is responsible for the false representations of an agent in regard to a mine where he sends the agent to show the mine to a prospective purchaser of stock of the corporation owning it, and it is agreed that the agent is to have a financial interest in the transaction. *Hill v. Dillon*, 151 Mo. App. 86, 131 S. W. 728.

A corporation cannot set up limitations upon its agent's authority contained in a written application for stock to defeat a purchaser's right to

outside the scope of the agent's authority, if he subsequently ratifies the sale by accepting its benefits.⁹⁵ But he is not responsible for representations made by his agent where the latter is not acting as such when he makes them, especially where the person to whom they are made knows that such is the case, and that such representations are not made in the principal's behalf.⁹⁶ The agent is personally liable if he was a party to the fraud, even though he discloses the name of his principal.⁹⁷ But in order to render him responsible he must either have known that his statements were false, or must have made them as true of his own knowledge when he had no knowledge of their truth or falsity.⁹⁸ If the agent acts for an undisclosed prin-

rescind for the agent's false representations where the purchaser was induced not to read the application before he signed it by reason of the agent's misrepresentations as to its meaning and contents. *Southern Loan & Trust Co. v. Gissendaner*, 4 Ala. App. 523, 58 So. 737.

A stenographer employed by a firm has no power to bind it by representations as to the knowledge or belief of its members, unless general or special authority to do so is shown. *Thayer v. Schley*, 137 N. Y. App. Div. 166, 121 N. Y. Supp. 1064.

⁹⁵ *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897; *Schafuss v. Betts*, 94 N. Y. Misc. 463, 157 N. Y. Supp. 608, *aff'd* 175 N. Y. App. Div. 893, 160 N. Y. Supp. 1145; *Cunningham v. Gaines*, — Tex. Civ. App. —, 176 S. W. 148; *Cowboy State Bank & Trust Co. v. Guinn*, — Tex. Civ. App. —, 160 S. W. 1103.

Under such circumstances he cannot say that he did not authorize the agent to make the misrepresentations. *Foix v. Moeller*, — Tex. Civ. App. —, 159 S. W. 1048.

Where the seller accepts the proceeds of the transaction he is bound by the terms on which the proceeds were accepted by his agent, in so far as the right to rescind is concerned. *Southern Loan & Trust Co. v. Gissendaner*, 4 Ala. App. 523, 58 So. 737.

A corporation which receives the proceeds of a sale of its stock may be charged with the false representations of its president if made in its behalf to induce the sale, and will not be permitted to profit by the fraud and escape the burden of restitution. See *Ginn v. Almy*, 212 Mass. 486, 99 N. E. 276.

⁹⁶ *Western Realty & Investment Co. v. Haase*, 75 Conn. 436, 53 Atl. 861.

A corporation cannot be held responsible for the fraud of its president in the sale of its stock, where the fraud was committed solely in furtherance of his own purposes and for his own profit. *Ginn v. Almy*, 212 Mass. 486, 99 N. E. 276.

The purchaser of stock from corporate officers as individuals cannot rescind as against the corporation after it has become insolvent and the rights of creditors will be prejudiced thereby, because of fraudulent representations made by the sellers to which the corporation was not a party. *Hart v. Globe Ins. Co.*, 113 Fed. 307.

⁹⁷ *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801; *Foix v. Moeller*, — Tex. Civ. App. —, 159 S. W. 1048.

⁹⁸ *Foix v. Moeller*, — Tex. Civ. App. —, 159 S. W. 1048.

If the agent makes the statements which induce the sale, and actually believes them to be true, he is not li-

principal, the defrauded party may maintain a suit for rescission against either the agent or the principal, or both, and if he elects to sue one, the other is not a necessary party.⁹⁹

Where one person is referred to another for information the statements and representations of the latter relative to the matter concerning which the information is sought are binding upon the party sending him.¹ And it is a fraud for a person to sell stock in a corporation with knowledge that a prospectus issued by the officers of the corporation contains false representations, and that the purchaser makes the purchase in reliance thereon.²

An action for damages for deceit may be maintained against any one who intentionally deceived the plaintiff into making the contract,³ even though he was not a party to the sale.⁴ "In such an action it is immaterial whether the defendant did or did not receive the consideration or other benefit, because the gravamen of the action is that the plaintiff has been deceived to his injury, not that the defendant has profited by the transaction."⁵ So the corporation and its officers and directors may be liable to persons who are induced

able to the purchaser although they are untrue. *Foix v. Moeller*, — Tex. Civ. App. —, 159 S. W. 1048.

If he acts in good faith, an agent who professes to act only for a disclosed principal is not personally liable although his representations were in fact untrue. *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801.

⁹⁹ *Poole v. Camden*, — W. Va. —, 92 S. E. 454.

¹ *Evatt v. Hudson*, 97 Ark. 265, 133 S. W. 1023.

² *Foley v. Holtry*, 43 Neb. 133, 61 N. W. 120. See also *Rumsey v. Shaw*, 212 Pa. 576, 61 Atl. 1109.

³ *Cheney v. Dickinson*, 172 Fed. 109, 28 L. R. A. (N. S.) 359.

⁴ *Faville v. Shehan*, 68 Iowa 241, 26 N. W. 131; *Morgan v. Skiddy*, 62 N. Y. 319; *Hubbell v. Meigs*, 50 N. Y. 480; *Shotwell v. Mali*, 38 Barb. (N. Y.) 445; *Cross v. Sackett*, 6 Abb. Pr. (N. Y.) 247, 2 Bosw. 617, 10 How. Pr. 62; *Kennedy v. Bender*, 104 Tex. 149, 135 S. W. 524; *Bedford v. Bagshaw*, 4 H. & N. 538; *Davidson v. Tulloch*, 3 Macq. H. L. 783.

A corporate officer may be held personally liable for false representations inducing a sale of stock. *Collins v. Chipman*, 41 Tex. Civ. App. 563, 95 S. W. 666.

Where the owner of a majority of the stock in a corporation sold the same, agreeing to obtain the other stock for the purchaser, and then persuaded others to sell at a less price by a false representation as to the price for which he sold, it was held that he was liable to them in an action for deceit. *Weaver v. Cone*, 174 Pa. St. 104, 34 Atl. 551.

⁵ *Cheney v. Dickinson*, 172 Fed. 109, 28 L. R. A. (N. S.) 359. See also to the same effect *Bystrom v. Villard*, 175 N. Y. App. Div. 433, 162 N. Y. Supp. 100, appeal dismissed 220 N. Y. 765, 116 N. E. 1038.

"It is unnecessary that the party making the representation should have any interest of his own to subserve by it." *Bingham v. Fish*, 86 N. J. L. 316, 90 Atl. 1106.

to purchase stock by reason of false statements in stock certificates,⁶ or in prospectuses or reports,⁷ issued by them, although they do not themselves make the sale, where the other elements of actionable fraud are present. Of course an action to rescind and to recover the consideration paid can be maintained only against the other party to the contract to whom, or to whose order, the consideration was paid.⁸

§ 3879. — Remedies for fraud—Rescission. A person who is induced to buy or sell stock in a corporation by false and fraudulent representations may rescind the contract⁹ and set up the fraud as a

⁶ *Sykes v. Pure Food Cider Co.*, 157 Iowa 601, 138 N. W. 554.

⁷ *Faville v. Shehan*, 68 Iowa 241, 26 N. W. 131; *Cole v. Cassidy*, 138 Mass. 437, 52 Am. Rep. 284. See *Rives v. Bartlett*, 215 N. Y. 33, 109 N. E. 83, rev'g 156 N. Y. App. Div. 552, 141 N. Y. Supp. 561; *Ottinger v. Bennett*, 203 N. Y. 554, 96 N. E. 1123, adopting dissenting opinion 144 N. Y. App. Div. 525, 129 N. Y. Supp. 819, in reversing the judgment of the Appellate Division; *Bystrom v. Villard*, 175 N. Y. App. Div. 433, 162 N. Y. Supp. 100, appeal dismissed 220 N. Y. 765, 116 N. E. 1038; *Squiers v. Thompson*, 73 N. Y. App. Div. 552, 76 N. Y. Supp. 734, aff'd 172 N. Y. 652, 65 N. E. 1122. See also *Lyon v. James*, 97 N. Y. App. Div. 385, 90 N. Y. Supp. 28, aff'd 181 N. Y. 512, 73 N. E. 1126.

See also § 2544 et seq., supra, where the liability of corporate officers is discussed at length.

⁸ *Cheney v. Dickinson*, 172 Fed. 109, 28 L. R. A. (N. S.) 359; *Ginn v. Almy*, 212 Mass. 486, 99 N. E. 276. See *McElwee v. Chandler*, 198 Pa. 575, 48 Atl. 475; *Kennedy v. Bender*, 104 Tex. 149, 135 S. W. 524.

Officers of a corporation who negotiated the sale of stock belonging to it are proper parties to an action by the purchaser to recover back what he has paid, where the money was paid to them and it does not ap-

pear that they have ever paid it over to any one else. *Tarara v. Novelty Elec. Mfg. Co.*, 136 Minn. 216, 161 N. W. 409.

⁹ *United States. Cheney v. Dickinson*, 172 Fed. 109, 28 L. R. A. (N. S.) 359; *Sturges v. Stetson*, 1 Biss. 246, Fed. Cas. No. 13,568.

Alabama. *Merritt v. Ehrman*, 116 Ala. 278, 22 So. 514.

Illinois. *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445; *Murray v. Tolman*, 162 Ill. 417, 44 N. E. 748, rev'g 54 Ill. App. 420.

Indiana. *Ohlwine v. Pfaffman*, 52 Ind. App. 357, 100 N. E. 777.

Iowa. *McKay v. McCarthy*, 146 Iowa 546, 34 L. R. A. (N. S.) 911, 123 N. W. 755.

Kentucky. *Reid v. Owensboro Sav. Bank & Trust Co.*, 141 Ky. 444, 132 S. W. 1026; *Prewitt v. Trimble*, 92 Ky. 176, 36 Am. St. Rep. 586, 17 S. W. 356.

Maine. *Coolidge v. Goddard*, 77 Me. 579, 1 Atl. 831.

Minnesota. *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056.

Missouri. *Ryan v. Miller*, 236 Mo. 496, Ann. Cas. 1912 D 540, 139 S. W. 128; *Wannell v. Kern*, 57 Mo. 478; *Meinershagen v. Taylor*, 169 Mo. App. 12, 154 S. W. 886.

Nebraska. *Foley v. Holtry*, 43 Neb. 133, 61 N. W. 120.

defense in an action by the seller for the price, or on a note given for the price;¹⁰ or if the price has been paid, in whole or in part, in money or property, he may maintain an action at law or in equity,

New Jersey. *Gray v. Robbins* (N. J. Ch.), 11 Atl. 860.

New York. *Higgins v. Crouse*, 147 N. Y. 411, 42 N. E. 6; *Delano v. Rice*, 23 App. Div. 327, 48 N. Y. Supp. 295, aff'g 21 Misc. 714, 48 N. Y. Supp. 130; *Gause v. Commonwealth Trust Co.*, 44 Misc. 46, 89 N. Y. Supp. 723, judgment rev'd on other grounds 100 App. Div. 427, 91 N. Y. Supp. 847.

Utah. *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 Pac. 687.

Wisconsin. *Rosenberg v. McKinney*, 138 Wis. 381, 120 N. W. 230.

Uniform Stock Transfer Act, § 7. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Wisconsin and Alaska.

A bona fide purchaser of certificates of stock cannot rescind on the ground that they were procured by the seller from the corporation by fraud, since in the purchaser's hands they are valid as against the corporation. *Fousshee v. Snyder*, 21 Ky. L. Rep. 1410, 54 S. W. 730.

See also § 627, *supra*.

10 United States. *Sturges v. Stetson*, 1 Biss. 246, Fed. Cas. No. 13,568.

Arizona. *Hurley v. Wilky*, 18 Ariz. 270, 158 Pac. 639, 18 Ariz. 45, 156 Pac. 83.

Illinois. *Taft v. Myerscough*, 197 Ill. 600, 64 N. E. 711, rev'g judgment 92 Ill. App. 560.

Iowa. *Farmers' & Merchants' State Bank v. Shaffer*, 147 N. W. 851.

Maine. *Coolidge v. Goddard*, 77 Me. 579, 1 Atl. 831.

Minnesota. *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056. See *Fawkes v. Knapp*, 165 N. W. 236.

Missouri. *Davis v. Forman*, 229 Mo. 27, 129 S. W. 213; *Hill v. Dillon*, 151

Mo. App. 86, 131 S. W. 728; *Sherman v. Shaughnessy*, 148 Mo. App. 679, 129 S. W. 245.

Oregon. *McMillan v. Batten*, 52 Ore. 218, 96 Pac. 675.

Utah. *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 Pac. 687.

Washington. *S. R. McGowan Co. v. Carlson*, 79 Wash. 92, 139 Pac. 869.

One who purchases an option on stock may set up fraud as a defense to an action to recover a balance due on the purchase price. *Rumsey v. Shaw*, 212 Pa. 576, 61 Atl. 1109.

A false representation that the stock to be sold is a part of the original issue, carrying with it a right to share in a new issue distributed by way of a stock dividend, gives the purchaser a right to decline to accept or pay for shares of the new stock carrying no such right. *Feore v. Avent*, 4 Ala. App. 551, 58 So. 727.

Under the Illinois Negotiable Instruments Law, it is competent to show, under a plea of partial or total failure of consideration, that the purchaser was induced to execute a note sued on by false and fraudulent representations of the seller in respect to stock which formed the consideration for the note. *Taft v. Myerscough*, 197 Ill. 600, 64 N. E. 711, rev'g judgment 92 Ill. App. 560.

Where the contract is an executed one, fraud is not available as a defense to an action for the price unless rescission or a total failure of consideration is shown. *McMillan v. Batten*, 52 Ore. 218, 96 Pac. 675.

Indorsers of notes given for the purchase price of stock cannot set up fraud inducing the sale as a defense to an action against them on their contract of indorsement, since they

according to the circumstances, to recover what he has parted with;¹¹ or in a proper case, he may sue in equity to rescind and recover what he has parted with.¹²

are not parties to the contract of sale. *Elliott v. Brady*, 192 N. Y. 221, 18 L. R. A. (N. S.) 600, 127 Am. St. Rep. 898, 85 N. E. 69, aff'g 118 N. Y. App. Div. 208, 103 N. Y. Supp. 156.

See also § 627, *supra*.

11 United States. *Cheney v. Dickinson*, 172 Fed. 109, 28 L. R. A. (N. S.) 359; *Fosdick v. Sturges*, 1 Biss. 255, Fed. Cas. No. 4,956.

Alabama. *Southern Loan & Trust Co. v. Gissendaner*, 4 Ala. App. 523, 58 So. 737.

California. *Smith v. Elderton*, 16 Cal. App. 424, 117 Pac. 563.

Illinois. *Arnold v. Dodson*, 272 Ill. 377, 112 N. E. 70.

Iowa. *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

Kansas. *Ellsworth v. Trinkle*, 96 Kan. 666, 153 Pac. 543.

Massachusetts. *Gassett v. Glazier*, 165 Mass. 473, 43 N. E. 193; *Bradley v. Poole*, 98 Mass. 169, 93 Am. Dec. 144.

Michigan. *Hubbard v. Oliver*, 173 Mich. 337, 139 N. W. 77.

Minnesota. *Tarara v. Novelty Elec. Mfg. Co.*, 136 Minn. 216, 161 N. W. 409.

Missouri. *Gerardi v. Gardner*, 255 Mo. 538, 164 S. W. 568.

New York. *Moore v. Williams*, 62 Hun 55, 16 N. Y. Supp. 403.

Pennsylvania. *McElwee v. Chandler*, 198 Pa. 575, 48 Atl. 475.

Washington. *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000.

Wisconsin. See *Schwab v. Esbenshade*, 151 Wis. 513, 139 N. W. 420.

Interest is properly allowed from the date when the defendant received the money. *Ellsworth v. Trinkle*, 96 Kan. 666, 153 Pac. 543.

In *Tarara v. Novelty Elec. Mfg. Co.*,

136 Minn. 216, 161 N. W. 409, it was held that the facts did not warrant the recovery of special damages incurred by the purchaser before the discovery of the fraud, even though such damages might be recovered under some circumstances.

One seeking to rescind a transaction whereby he exchanged notes given by the defendant for stock, cannot deprive the defendant of the right to set up that the interest provided for in the notes was usurious, and if the plaintiff recovers, the amount of usurious interest must be deducted. *Hubbard v. Oliver*, 173 Mich. 337, 139 N. W. 77.

See also § 628, *supra*.

12 United States. *Farwell v. Colonial Trust Co.*, 147 Fed. 480; *Merrill v. Florida Land & Improvement Co.*, 60 Fed. 17; *Benton v. Ward*, 47 Fed. 253.

Alabama. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897; *Spence's Adm'r v. Whitaker*, 3 Port. 297.

Arkansas. *Haldiman v. Taft*, 102 Ark. 45, 143 S. W. 112; *Hunt v. Davis*, 98 Ark. 44, 135 S. W. 458; *Evatt v. Hudson*, 97 Ark. 265, 133 S. W. 1023.

California. *Browne v. San Gabriel River Rock Co.*, 22 Cal. App. 682, 136 Pac. 542, 544.

Illinois. *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074, 96 Ill. App. 17.

Kentucky. *Head v. Oglesby*, 175 Ky. 613, 194 S. W. 793; *Ligon v. Minton*, 125 S. W. 304; *Prewitt v. Trimble*, 92 Ky. 176, 36 Am. St. Rep. 586, 17 S. W. 356.

Massachusetts. *Lufkin v. Cutting*, 225 Mass. 599, 114 N. E. 822; *Ginn v. Almy*, 212 Mass. 486, 99 N. E. 276; *Stewart v. Joyce*, 205 Mass. 371, 91 N. E. 555.

If the defendant has parted with the stock and so is unable to return it, a court of equity will retain jurisdiction for the purpose of awarding damages,¹³ the measure of damages under such circumstances being the same as in actions at law, at least unless the defendant disabled himself from making the transfer by selling the stock

Michigan. Keyes v. Quinn, 154 Mich. 668, 118 N. W. 615.

Missouri. Ryan v. Miller, 236 Mo. 496, Ann. Cas. 1912 D 540, 139 S. W. 128; Davis v. Forman, 229 Mo. 27, 129 S. W. 213.

New York. Higgins v. Crouse, 147 N. Y. 411, 42 N. E. 6; Schafuss v. Betts, 94 Misc. 463, 157 N. Y. Supp. 608, aff'd 175 App. Div. 893, 160 N. Y. Supp. 1145.

Pennsylvania. Andriessen's Appeal, 123 Pa. St. 303, 16 Atl. 840.

Texas. Bolton v. Prather, 35 Tex. Civ. App. 295, 80 S. W. 666.

Utah. Morrison v. Snow, 26 Utah 247, 72 Pac. 924.

Washington. McFeron v. Shoemaker, 73 Wash. 450, 131 Pac. 1126; Gray v. Reeves, 69 Wash. 374, 125 Pac. 162.

West Virginia. Jackson v. Stockert, 75 W. Va. 482, 89 S. E. 359, 84 S. E. 919; Morrissey v. Williams, 74 W. Va. 636, L. R. A. 1915 D 792, 82 S. E. 509.

A suit in equity against the vendor of stock and against the corporation to have the sale rescinded, embracing application for the recovery of the purchase price and the release of the purchaser from liability by reason of ownership of the stock, is more complete and adequate than is an action at law for damages against the vendor. Farwell v. Colonial Trust Co., 147 Fed. 480.

Such a suit may be maintained after the death of the wrongdoer. Lufkin v. Cutting, 225 Mass. 599, 114 N. E. 822.

If the seller is induced to part with his stock by fraud, and the purchaser

has dissolved the corporation and taken over the business personally, equity will rescind the sale and charge the purchaser as a trustee ex maleficio, holding him accountable for the proceeds of the stock and all profits derived therefrom. Schafuss v. Betts, 94 N. Y. Misc. 463, 157 N. Y. Supp. 608, aff'd 175 N. Y. App. Div. 893, 160 N. Y. Supp. 1145.

The right to sue in equity for rescission is not assignable. Ryan v. Miller, 236 Mo. 496, Ann. Cas. 1912 D 540, 139 S. W. 128.

Some courts hold that one induced by fraud to purchase stock may sue in equity to cancel notes given for the purchase price although they are past due and are still in the hands of a party to the fraud. Head v. Oglesby, 175 Ky. 613, 194 S. W. 793.

The plaintiff may recover interest on the money paid. Gray v. Reeves, 69 Wash. 374, 125 Pac. 162.

See also § 627, supra.

¹³ Stewart v. Joyce, 205 Mass. 371, 91 N. E. 555.

Where the contract is made by an agent for an undisclosed principal, and the defrauded seller elects to sue the agent, if the agent has only a part of the stock, he may be decreed to restore that part, and if he has other stock of the same corporation and of the same class, he may be compelled to transfer a sufficient amount of that to make up the deficiency, or, if he has not sufficient stock to make restitution, there may be a money decree against him for the value of the stock not restored. Poole v. Camden, — W. Va. —, 92 S. E. 454.

after the suit was brought.¹⁴ And the complainant may in the same suit seek a rescission, or, if that be inequitable, then to recover his damages.¹⁵

Where a purchaser of stock conveys land in payment, and rescinds for fraud, he is entitled to a reconveyance of the land, and may obtain such relief by a suit in equity.¹⁶

Pending suit for rescission brought by the seller, the purchaser may be enjoined from disposing of the stock.¹⁷

§ 3880. — Restoration of the status quo. To entitle a purchaser of stock to rescind and defeat an action for the price, or recover what he has parted with, he must return, or offer to return, the stock, if he has received the same, and if it is of any value.¹⁸ But it is unneces-

¹⁴ *Stewart v. Joyce*, 205 Mass. 371, 91 N. E. 555.

¹⁵ *Campbell v. Rushing*, — Tex. Civ. App. —, 141 S. W. 133.

¹⁶ *Arkansas*. *Haldiman v. Taft*, 102 Ark. 45, 143 S. W. 112; *Evatt v. Hudson*, 97 Ark. 265, 133 S. W. 1023.

Illinois. See *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074, 96 Ill. App. 17.

Massachusetts. *Lufkin v. Cutting*, 225 Mass. 599, 114 N. E. 822.

Michigan. *Keyes v. Quinn*, 154 Mich. 668, 118 N. W. 615.

Minnesota. *Ludowese v. Amidon*, 124 Minn. 288, 144 N. W. 965.

New Jersey. *Gray v. Robbins* (N. J. Ch.), 11 Atl. 860.

Washington. *McFeron v. Shoemaker*, 73 Wash. 450, 131 Pac. 1126.

¹⁷ *Hoy v. Altoona Midway Oil Co.*, 136 Fed. 483; *Maine Products Co. v. Alexander*, 115 N. Y. App. Div. 112, 100 N. Y. Supp. 711.

But the right of the member to vote the stock and to exercise other incidental rights of ownership will not be enjoined. *Maine Products Co. v. Alexander*, 115 N. Y. App. Div. 112, 100 N. Y. Supp. 711.

¹⁸ *United States*. *Primeau v. Granfield*, 180 Fed. 847.

Alabama. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

California. *Fairchild v. Western*

Securities Corporation, 169 Pac. 363; *Davis v. Butler*, 154 Cal. 623, 98 Pac. 1047; *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011; *Rohrbacher v. Klee-bauer*, 119 Cal. 260, 51 Pac. 341.

Indiana. *Barnard v. First Nat. Bank of Newpoint*, 61 Ind. App. 634, 111 N. E. 451; *Heintz v. Mueller*, 27 Ind. App. 42, 59 N. E. 414; *Long v. Johnson*, 15 Ind. App. 498, 44 N. E. 552.

Iowa. *Stotts v. Fairfield*, 163 Iowa 726, 145 N. W. 61; *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801.

Kansas. *Ellsworth v. Trinkle*, 96 Kan. 666, 153 Pac. 543.

Kentucky. *Ligon v. Minton*, 125 S. W. 304.

Massachusetts. *Bassett v. Brown*, 105 Mass. 558.

Michigan. *Hubbard v. Oliver*, 173 Mich. 337, 139 N. W. 77.

Minnesota. *Tarara v. Novelty Elec. Mfg. Co.*, 136 Minn. 216, 161 N. W. 409.

Missouri. *Meinershagen v. Taylor*, 169 Mo. App. 12, 154 S. W. 886.

New York. *Francis v. New York & B. El. R. Co.*, 108 N. Y. 93, 15 N. E. 192; *Bridge v. Penniman*, 105 N. Y. 642, 12 N. E. 19.

North Dakota. *Miller v. Thompson*, 34 N. D. 63, 157 N. W. 677.

sary to return or tender the certificates where the seller has retained

Oklahoma. *Guss v. Nelson*, 14 Okla. 296, 78 Pac. 170.

Utah. *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 Pac. 687.

Compare Hill v. Harriman, 95 Tenn. 300, 32 S. W. 202.

Where he has disposed of most of the stock, and so is unable to tender it back, he will be relegated to his action for damages. *Primeau v. Granfield*, 180 Fed. 847.

Purchasers of a controlling interest in a corporation cannot rescind where, owing to their own acts after discovery of the fraud, they cannot restore the business conducted by the corporation to the seller in the condition in which they received it. *Miller v. Thompson*, 34 N. D. 63, 157 N. W. 677.

It is sufficient if the defrauding party can be placed substantially in the same position which he would have occupied had the sale not taken place. *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011.

The fact that the corporation has consolidated with another corporation, and that the plaintiff has exchanged his stock for stock of the consolidated corporation does not preclude a rescission. A tender of the stock of the consolidated corporation is sufficient. *Ginn v. Almy*, 212 Mass. 486, 99 N. E. 276.

Where the defendant agrees to a consolidation of the corporation, resulting in a substitution of stock of the consolidated corporation for that sold, and solicits the plaintiff to agree to and participate in it, he is not in a position to complain of the plaintiff's inability to restore the identical stock. *Head v. Oglesby*, 175 Ky. 613, 194 S. W. 793.

Where he did not receive the stock there is nothing to return. *Jones v. Barnes*, 107 Miss. 800, 66 So. 212.

The purchaser is under no obligation to return or offer to return bonds subsequently purchased by him from the corporation, where such purchase was an entirely independent transaction in no way connected with the purchase of the stock. *Lufkin v. Cutting*, 225 Mass. 599, 114 N. E. 822.

One who is induced to purchase an option on stock by false representations is not precluded from setting up fraud as a defense to an action for a balance due on the purchase price by reason of his failure to tender back the option, where the option expired the day after the contract was made. The rule requiring restoration does not apply where the subject of the contract has ceased to exist or has become worthless. *Rumsey v. Shaw*, 212 Pa. 576, 61 Atl. 1109.

A person who is induced to purchase stock by false representations that the company is incorporated cannot be held liable as a partner for the mismanagement of the company's property resulting in a depreciation in the value of the stock, and hence will not be denied the right to rescind and recover back what he has paid on the theory that, because of such depreciation, the defendant cannot be placed in statu quo. *Bolton v. Prather*, 35 Tex. Civ. App. 295, 80 S. W. 666.

This rule does not require the purchaser of a controlling interest in the corporation to show that all the bills incurred in operating the corporate business before the discovery of the fraud were paid. *Tarara v. Novelty Elec. Mfg. Co.*, 136 Minn. 216, 161 N. W. 409.

One who is induced to purchase a majority of the stock of a corporation by fraudulent representations is not bound to account to the seller

them as security for the purchase price,¹⁹ or where it appears that the seller would not have accepted them and would not have returned the money paid for them,²⁰ or where the stock is of no value.²¹ And it has been frequently held that, at least in cases of actual fraud, equity will not require a restoration or offer thereof before filing suit, but that it is sufficient if the complainant offers to do equity in his bill.²²

§ 3881. — — Laches as a bar to rescission. A person cannot rescind a contract for the purchase or sale of stock for fraud, either at law or in equity, if he has been guilty of laches or unreasonable delay either in discovering the fraud or in repudiating the contract after its discovery.²³ And if there are facts which would put a

for the use of the corporate franchise as a condition of rescission for the fraud, as his indebtedness for such use, if there is any, is to the corporation. *Merritt v. Ehrman*, 116 Ala. 278, 22 So. 514.

If the plaintiff is unable, through the exercise of reasonable diligence, to make a tender before bringing suit to recover what he has paid, as where he is unable to find the defendant, he may make tender in the petition. *Ellsworth v. Trinkle*, 96 Kan. 666, 153 Pac. 543.

If the circumstances are such that the defrauding party should not be made to suffer the loss due to a depreciation of the stock, a court of equity may do complete justice by abating a part of the consideration. *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011.

An allegation that the purchaser tendered to the seller and offered to transfer to him the stock is an allegation that he offered to do everything necessary to accomplish the transfer, including the delivery of an indorsed certificate, if that was necessary. *Davis v. Butler*, 154 Cal. 623, 98 Pac. 1047.

See also § 631, *supra*.

¹⁹ *Campbell v. Park*, 128 Iowa 181, 104 N. W. 799, 101 N. W. 861.

²⁰ *Southern Loan & Trust Co. v. Gissendaner*, 4 Ala. App. 523, 58 So. 737; *Ellsworth v. Trinkle*, 96 Kan. 666, 153 Pac. 543; *Fawkes v. Knapp*, — Minn. —, 165 N. W. 236.

²¹ *Alabama*. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

Illinois. *Taft v. Myerscough*, 197 Ill. 600, 64 N. E. 711, rev'g judgment 92 Ill. App. 560.

Indiana. See *Heintz v. Mueller*, 27 Ind. App. 42, 59 N. E. 414.

Iowa. *Stotts v. Fairfield*, 163 Iowa 726, 145 N. W. 61.

Kansas. *Ellsworth v. Trinkle*, 96 Kan. 666, 153 Pac. 543.

Missouri. *Gerardi v. Gardner*, 255 Mo. 538, 164 S. W. 568.

²² *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897; *Auman v. McKibben*, 179 Ill. App. 425; *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801.

Contra, where the stock is of any value. *Fairechild v. Western Securities Corporation*, — Cal. —, 169 Pac. 363.

²³ *United States*. *Irvin v. Koehler*, 230 Fed. 795; *Hart v. Globe Ins. Co.*, 113 Fed. 307.

Arkansas. *Porter v. Morris*, 199 S. W. 106.

California. *Davis v. Butler*, 154 Cal. 623, 98 Pac. 1047.

person of ordinary prudence upon inquiry, the purchaser will be charged with such knowledge as would have been obtained upon such

Georgia. Coca-Cola Bottling Co. v. Anderson, 13 Ga. App. 772, 80 S. E. 32.

Illinois. Burwash v. Ballou, 230 Ill. 34, 15 L. R. A. (N. S.) 409, 82 N. E. 355; Coolidge v. Rhodes, 199 Ill. 24, 64 N. E. 1074, rev'g 96 Ill. App. 17.

Indiana. Heintz v. Mueller, 27 Ind. App. 42, 59 N. E. 414.

Iowa. Farmers' & Merchants' State Bank v. Shaffer, 147 N. W. 851; Stotts v. Fairfield, 163 Iowa 726, 145 N. W. 61; Hinkley v. Sac Oil & Pipe Line Co., 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

Kentucky. Head v. Oglesby, 175 Ky. 613, 194 S. W. 793; Little v. Owensboro Sav. Bank & Trust Co.'s Receiver, 150 Ky. 331, 150 S. W. 334; Robertson v. Owensboro Sav. Bank & Trust Co., 150 Ky. 50, 149 S. W. 1144; Reid v. Owensboro Sav. Bank & Trust Co., 141 Ky. 444, 132 S. W. 1026; Ligon v. Minton, 125 S. W. 304.

Maryland. Latrobe v. Dietrich, 114 Md. 8, 78 Atl. 983.

Massachusetts. Lufkin v. Cutting, 225 Mass. 599, 114 N. E. 822.

Minnesota. Fawkes v. Knapp, 165 N. W. 236.

Mississippi. Jones v. Barnes, 107 Miss. 800, 66 So. 212.

Missouri. Davis v. Forman, 229 Mo. 27, 129 S. W. 213; Dawson v. Flinton, 195 Mo. App. 75, 190 S. W. 972; Rigler v. Reid, 186 Mo. App. 111, 171 S. W. 952; Meinershagen v. Taylor, 169 Mo. App. 12, 154 S. W. 886.

New York. Davis v. Levering, 168 App. Div. 78, 153 N. Y. Supp. 772.

North Dakota. Miller v. Thompson, 34 N. D. 63, 157 N. W. 677.

Oklahoma. Guss v. Nelson, 14 Okla. 296, 78 Pac. 170.

South Dakota. Keyes v. Blue Bell Medicine Co., 34 S. D. 297, 148 N. W. 505.

Virginia. White v. American Nat. Life Ins. Co., 115 Va. 305, 78 S. E. 582.

Washington. McFeron v. Shoemaker, 73 Wash. 450, 131 Pac. 1126; Harris v. Stewart, 72 Wash. 661, 131 Pac. 212; Gray v. Reeves, 69 Wash. 374, 125 Pac. 162.

Wisconsin. Cazier v. Hart, 158 Wis. 362, 148 N. W. 860; Rosenberg v. McKinney, 138 Wis. 381, 120 N. W. 230. Uniform Stock Transfer Act, § 7. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Wisconsin and Alaska.

"The one desiring to rescind is entitled to a reasonable time in which to investigate the facts in order to determine whether a rescission should be made." Dawson v. Flinton, 195 Mo. App. 75, 190 S. W. 972. See also to the same effect Rigler v. Reid, 186 Mo. App. 111, 171 S. W. 952.

What is a reasonable time depends upon the circumstances of each particular case, and is generally a question of fact. See:

United States. Irvin v. Koehler, 230 Fed. 795.

California. Davis v. Butler, 154 Cal. 623, 98 Pac. 1047.

Indiana. Heintz v. Mueller, 27 Ind. App. 42, 59 N. E. 414.

Iowa. Stotts v. Fairfield, 163 Iowa 726, 145 N. W. 61.

Minnesota. Fawkes v. Knapp, 165 N. W. 236.

Missouri. Dawson v. Flinton, 195 Mo. App. 75, 190 S. W. 972.

Virginia. White v. American Nat. Life Ins. Co., 115 Va. 305, 78 S. E. 582.

Washington. McFeron v. Shoemaker, 73 Wash. 450, 131 Pac. 1126.

The "discovery" of the fraud referred to means the fraud of the par-

inquiry.²⁴ But "laches cannot be imputed to one who was ignorant of the facts, and for that reason has failed to assert his rights."²⁵

"To bar relief against actual fraud, laches must not only consist of delay, but of delay that has worked a disadvantage to the opposing party."²⁶

ticular defendant against whom he subsequently proceeds for a cancellation or rescission. So delay in suing to cancel notes given for stock after discovery of the fraud of those who were active in inducing the purchase, where the purchaser at that time believed that the holder of the notes was an innocent purchaser, and did not discover that he was a party to the fraud until shortly before the suit was brought does not constitute laches. *Head v. Oglesby*, 175 Ky. 613, 194 S. W. 793.

The rule that the doctrine of laches is peculiarly applicable where mining property is involved does not apply to a sale of mining stock between individuals. *Gray v. Reeves*, 69 Wash. 374, 125 Pac. 162.

The defense of laches may be taken advantage of by demurrer where it appears upon the face of the bill. *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074, rev'g 96 Ill. App. 17.

See also § 634, supra.

²⁴ *United States*. *Irvin v. Koehler*, 230 Fed. 795; *Hart v. Globe Ins. Co.*, 113 Fed. 307.

Illinois. *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074, rev'g 96 Ill. App. 17.

Iowa. *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

Missouri. See *Davis v. Forman*, 229 Mo. 27, 129 S. W. 213.

Wisconsin. *Cazier v. Hart*, 158 Wis. 362, 148 N. W. 860.

Laches cannot be set up in a suit to rescind a contract for the purchase of stock alleged to have been induced under the false representation that the stock was full paid where it pur-

ported to be full paid and the corporation has paid dividends thereon, since there is nothing in such case to lead the purchaser to think that the stock is otherwise than full paid. *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074, rev'g 96 Ill. App. 17.

A purchaser of stock is not under obligation to investigate the question of compliance with incorporation statutes where the fact of incorporation has not been questioned, the business of the corporation has been duly conducted through the directors, the purchasers were told that the company was duly incorporated, and relying thereon received certificates as from a duly organized corporation. *Bolton v. Prather*, 35 Tex. Civ. App. 295, 80 S. W. 666.

²⁵ *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074, rev'g 96 Ill. App. 17; *Jones v. Barnes*, 107 Miss. 800, 66 So. 212.

Laches does not begin to run until the discovery of the fraud. *Stotts v. Fairfield*, 163 Iowa 726, 145 N. W. 61.

In *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000, the right to rescind was held not to have been lost, where her suspicions were allayed by examining the stock certificates, and by other matters.

²⁶ *George v. Ford*, 36 App. Cas. (D. C.) 315. See also to the same effect *Lufkin v. Cutting*, 225 Mass. 599, 114 N. E. 822; *White v. American Nat. Life Ins. Co.*, 115 Va. 305, 78 S. E. 582; *Gray v. Reeves*, 69 Wash. 374, 125 Pac. 162.

Whether delay in tendering back the stock prejudiced the seller may be considered in determining whether the tender was made within a reason-

Delay will not bar relief where it is the result of a reasonable expectation that the fraud will be remedied.²⁷

§ 3882. — Ratification or waiver as a bar to rescission. A contract for the purchase or sale of stock brought about by fraud is not void, but is merely voidable at the election of the defrauded party.²⁸ He may rescind it, as we have seen,²⁹ provided he acts promptly on discovery of the fraud,³⁰ but he may also affirm or ratify it.³¹ He has but one election, which, when once made, cannot be recalled,³² and if, with full knowledge of the facts, he elects to affirm the contract, he cannot thereafter shift his position and seek to rescind it.³³ Nor can he "repudiate the contract in part and affirm it in part. If he elects to take the benefit, he must also bear the burden."³⁴

A purchaser of stock who, with knowledge of the fraud, elects to receive the benefits of the contract,³⁵ or who uses the stock as his,³⁶

able time, although it is not conclusive. *Stotts v. Fairfield*, 163 Iowa 726, 145 N. W. 61.

²⁷ *White v. American Nat. Life Ins. Co.*, 115 Va. 305, 78 S. E. 582.

²⁸ *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445; *Gause v. Commonwealth Trust Co.*, 44 N. Y. Misc. 46, 89 N. Y. Supp. 723, judgment rev'd on other grounds 100 N. Y. App. Div. 427, 91 N. Y. Supp. 847.

See also § 630, *supra*.

²⁹ See § 3879, *supra*.

³⁰ See § 3881, *supra*.

³¹ See following notes. See also § 633, *supra*.

Uniform Stock Transfer Act, § 7. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Wisconsin and Alaska.

³² *Rigler v. Reid*, 186 Mo. App. 111, 171 S. W. 952.

³³ *Chicago Trust & Savings Bank v. Ball*, 208 Ill. 256, 70 N. E. 305, rev'g 108 Ill. App. 321; *Anderson v. Chicago Trust & Savings Bank*, 195 Ill. 341, 63 N. E. 203, aff'g 93 Ill. App. 347; *Tolman v. Coleman*, 104 Ill. App. 70.

This is true although the corporation was organized by its promoter for an unlawful and fraudulent purpose, where its object, as expressed in its charter, is a lawful one, and neither its charter nor its certificates of stock are void. *Anderson v. Chicago Trust & Savings Bank*, 195 Ill. 341, 63 N. E. 203, aff'g 93 Ill. App. 347.

³⁴ *Church v. Citizens' St. R. Co.*, 78 Fed. 526.

But where a deed made to two persons jointly represents separate contracts made with each for separate and distinct considerations, and the grantor was induced to enter into one of such contracts, which was for the purchase of stock, by false representations, it may be canceled as to that grantee alone. *Haldiman v. Taft*, 102 Ark. 45, 143 S. W. 112.

³⁵ *Rosenberg v. McKinney*, 138 Wis. 381, 120 N. W. 230.

³⁶ *Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983; *Meinershagen v. Taylor*, 169 Mo. App. 12, 154 S. W. 886; *Dassler v. Rowe*, 91 Neb. 637, 136 N. W. 846; *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376.

or who by his acts, recognizes the contract as being in existence,³⁷ thereby affirms the contract, and cannot subsequently rescind it. So a purchaser of stock who, with knowledge of the fraud, acts as a stockholder by attending meetings, receiving dividends, or otherwise,³⁸ or who brings a suit in which he seeks relief on the basis of his ownership of the stock,³⁹ or renews notes given for the purchase price of the stock,⁴⁰ or refuses the offer of the seller to repurchase it,⁴¹ loses his right to rescind. And the same is true of purchasers of a majority of the stock of a corporation who continue to carry

³⁷ *Ligon v. Minton* (Ky.), 125 S. W. 304; *Meinershagen v. Taylor*, 169 Mo. App. 12, 154 S. W. 886.

The fact that the defrauded party subsequently purchases bonds of the corporation, issued for the purpose of paying the indebtedness of the company, to secure the stockholders, and to furnish funds to carry on the business, is not a ratification of the contract. *Lufkin v. Cutting*, 225 Mass. 599, 114 N. E. 822.

³⁸ *California*. *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107.

Florida. *Florida Cigar & Tobacco Co. v. Baker & Holmes Co.*, 62 Fla. 487, 57 So. 174.

Kentucky. *Anderson v. Black*, 17 Ky. L. Rep. 732, 32 S. W. 468.

Maryland. *Byrd v. Rautman*, 85 Md. 414, 36 Atl. 1099.

Michigan. *McEacheran v. Western Transportation & Coal Co.*, 97 Mich. 479, 56 N. W. 860; *Maxted v. Fowler*, 94 Mich. 106, 53 N. W. 921.

Pennsylvania. *Jessop v. Ivory*, 158 Pa. St. 71, 27 Atl. 840; *Andriessen's Appeal*, 123 Pa. St. 303, 16 Atl. 840.

Virginia. *Weisiger v. Richmond Ice Mach. Co.*, 90 Va. 795, 20 S. E. 361.

Where he suggests that he be elected a director, receives dividends, and insists upon his right to subscribe for his pro rata share of a new issue of stock. *Davis v. Levering*, 168 N. Y. App. Div. 78, 153 N. Y. Supp. 772.

A purchaser cannot rescind where,

after discovering the fraud, he treats the stock as his own, accepts the benefits thereof, acts as a director and actively participates in transacting the business of the corporation, and contracts to sell a part of the stock. *Dassler v. Rowe*, 91 Neb. 637, 136 N. W. 846.

Whether one who was induced to purchase stock by representations that the seller had arranged with the other stockholders and directors that he should be made a director and given a corporate office at a stated salary waived his right to rescind by attending stockholders' and directors' meetings and temporarily accepting another position with the corporation at a less salary, while protesting that the seller had not carried out his agreement, was held to be a question for the jury in *Schwab v. Esbenshade*, 151 Wis. 513, 139 N. W. 420.

³⁹ *Chicago Trust & Savings Bank v. Ball*, 208 Ill. 256, 70 N. E. 305, rev'g 108 Ill. App. 321; *Anderson v. Chicago Trust & Savings Bank*, 195 Ill. 341, 63 N. E. 203, aff'g 93 Ill. App. 347; *Tolman v. Coleman*, 104 Ill. App. 70.

⁴⁰ *Elliott v. Brady*, 192 N. Y. 221, 18 L. R. A. (N. S.) 600, 127 Am. St. Rep. 898, 85 N. E. 69, aff'g 118 N. Y. App. Div. 208, 103 N. Y. Supp. 156.

⁴¹ *Stalnaker v. Janes*, 68 W. Va. 176, 69 S. E. 651. See also *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445.

on the corporate business for more than a year after discovery of the fraud.⁴²

Where the purchaser makes a tender of the stock to the buyer, he does not lose his right to rescind by subsequent acts with respect to the stock which are reasonably necessary to protect his interests.⁴³ So it has been held that his acts in subsequently attending a stockholders' meeting and voting his stock does not amount to a waiver of his right to rescind, or estop him from asserting it under such circumstances.⁴⁴ And it has also been held that where a previous tender of the stock and dividends previously collected by him has been refused, he is justified in collecting dividends declared after the institution of his suit to rescind and holding them at the disposal of the court, and that by so doing he is not estopped to prosecute such suit.⁴⁵

Full knowledge of the facts is always essential to a waiver⁴⁶ or a ratification of the contract.⁴⁷

§ 3883. — Action for deceit—In general. Instead of rescinding the contract the defrauded party may affirm it and maintain an action of deceit to recover the damages sustained by reason of the fraud.⁴⁸ In some jurisdictions the measure of damages in such an

⁴² *Miller v. Thompson*, 34 N. D. 63, 157 N. W. 677.

⁴³ *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000.

⁴⁴ *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000.

⁴⁵ *Davis v. Forman*, 229 Mo. 27, 129 S. W. 213.

⁴⁶ *White v. American Nat. Life Ins. Co.*, 115 Va. 305, 78 S. E. 582.

One who is induced to purchase stock in a bank by false and fraudulent representations as to its condition does not lose his right to rescind by being afterwards elected and acting as cashier, where he rescinds as soon as he learns the condition of the bank. *National Bank of Dakota v. Taylor*, 5 S. D. 99, 58 N. W. 297.

⁴⁷ *Southern Loan & Trust Co. v. Gissendaner*, 4 Ala. App. 523, 58 So. 737; *Ginn v. Almy*, 212 Mass. 486, 99 N. E. 276; *Jones v. Barnes*, 107 Miss. 800, 66 So. 212.

⁴⁸ *United States*. *Cheney v. Dickinson*, 172 Fed. 109, 28 L. R. A. (N. S.) 359.

District of Columbia. *George v. Ford*, 36 App. Cas. 315.

Indiana. *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355; *Ohlwine v. Pfaffman*, 52 Ind. App. 357, 100 N. E. 777.

Iowa. *McKay v. McCarthy*, 146 Iowa 546, 34 L. R. A. (N. S.) 911, 123 N. W. 755; *Campbell v. Park*, 128 Iowa 181, 104 N. W. 799, 101 N. W. 861.

Kansas. *Freeman v. Trickett*, 6 Kan. App. 83, 49 Pac. 672.

Kentucky. *Ligon v. Minton* (Ky. L. Rep.), 125 S. W. 304.

Massachusetts. *Ginn v. Almy*, 212 Mass. 486, 99 N. E. 276.

Missouri. *Ryan v. Miller*, 236 Mo. 496, Ann. Cas. 1912 D 540, 139 S. W. 128; *Meinershagen v. Taylor*, 169 Mo. App. 12, 154 S. W. 886.

action is the difference between the actual value of the stock and what it would have been worth if the representations had been true,⁴⁹ while in others it is the difference between the actual value of the stock at the time of the sale and the price paid or received for it.⁵⁰

New York. *Townsend v. Felt-housen*, 156 N. Y. 618, 51 N. E. 279, aff'g 90 Hun 89, 35 N. Y. Supp. 538; *Kountze v. Kennedy*, 147 N. Y. 124, 29 L. R. A. 360, 49 Am. St. Rep. 651, 41 N. E. 414.

Rhode Island. *Handy v. Waldron*, 18 R. I. 567, 49 Am. St. Rep. 794, 29 Atl. 143.

Utah. *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924.

Wisconsin. *Rosenberg v. McKinney*, 138 Wis. 381, 120 N. W. 230; *Barndt v. Frederick*, 78 Wis. 1, 11 L. R. A. 199, 47 N. W. 6.

England. *Derry v. Peek*, 14 App. Cas. 337.

⁴⁹**Indiana.** *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355.

Iowa. *Campbell v. Park*, 128 Iowa 181, 104 N. W. 799, 101 N. W. 861.

Kentucky. *Drake v. Holbrook*, 28 Ky. L. Rep. 1319, 92 S. W. 297, 25 Ky. L. Rep. 1489, 78 S. W. 158, 23 Ky. L. Rep. 1941, 66 S. W. 512; *Exchange Bank of Kentucky v. Gaitskill*, 18 Ky. L. Rep. 532, 37 S. W. 160. See also *Long v. Douthitt*, 142 Ky. 427, 134 S. W. 453. But see *Ligon v. Minton* (Ky. L. Rep.), 125 S. W. 304.

Massachusetts. *Ginn v. Almy*, 212 Mass. 486, 99 N. E. 276. But in *Stewart v. Joyce*, 205 Mass. 371, 91 N. E. 555, it was held that one induced to sell his stock by false representations was entitled to recover the difference between its market value at the date of the sale and the price paid for it, with interest.

Michigan. *Steele v. Kellogg*, 163 Mich. 132, 128 N. W. 403.

Minnesota. *Doran v. Eaton*, 40 Minn. 35, 41 N. W. 244.

Missouri. *Ryan v. Miller*, 236 Mo. 496, Ann. Cas. 1912 D 540, 139 S. W.

128; *Fisher v. Seitz*, 172 Mo. App. 162, 157 S. W. 883.

Texas. *Reed v. Holloway*, — Tex. Civ. App. —, 127 S. W. 1189.

Where a person is induced to purchase half of the stock of a corporation by false representations that it is not indebted on any promissory notes, the measure of damages is the amount of the depreciated value of the stock resulting from the existence of the indebtedness, which is one-half of the amount of such indebtedness. *Mills v. Knudson*, 54 Wash. 614, 103 Pac. 1123.

Where the seller represents that the stock is treasury stock when in fact it belongs to him individually, the measure of damages is the difference in the value of the two. If this difference is not shown, there can be no recovery. *Fisher v. Seitz*, 172 Mo. App. 162, 157 S. W. 883.

The fact that the purchaser actually got his money's worth is immaterial, and evidence as to the intrinsic value of the stock is irrelevant and improper. *Drake v. Holbrook*, 28 Ky. L. Rep. 1319, 92 S. W. 297, 25 Ky. L. Rep. 1489, 78 S. W. 158, 23 Ky. L. Rep. 1941, 66 S. W. 512.

The plaintiff is entitled to interest. *Steele v. Kellogg*, 163 Mich. 132, 128 N. W. 403.

⁵⁰**United States.** *Smith v. Bolles*, 132 U. S. 125, 33 L. Ed. 279; *Cheney v. Dickinson*, 172 Fed. 109, 28 L. R. A. (N. S.) 359; *Stratton's Independence, Ltd. v. Dines*, 135 Fed. 449, aff'g 126 Fed. 968.

Arkansas. *McDonough v. Williams*, 77 Ark. 261, 8 L. R. A. (N. S.) 452, 7 Ann. Cas. 276, 92 S. W. 783.

California. *Neher v. Hansen*, 12 Cal. App. 370, 107 Pac. 565.

The law of the state where the contract was made governs in this regard.⁵¹

Profits made by the guilty party may be recovered in equity, where an accounting is necessary to determine them and the parties stood in confidential relations.⁵²

§ 3884. — — Waiver; limitations. The right to recover damages may be waived by acts evidencing an intention to condone the fraud.⁵³ So performance of an executory contract after discovery of the fraud bars the right to sue for damages, since it is equivalent to making a new contract.⁵⁴ But the fact that a purchaser acts as a stockholder or otherwise exercises acts of ownership over the stock after discovery of the fraud will not have that effect,⁵⁵ since bringing

Delaware. *Williams v. Beltz*, 6 Boyce 554, 101 Atl. 905.

Kansas. *Stewart v. Smith*, 72 Kan. 77, 82 Pac. 482; *Stewart v. Harris*, 69 Kan. 498, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873, 77 Pac. 277.

Oregon. *Zobrist v. Estes*, 65 Ore. 573, 133 Pac. 644.

Pennsylvania. *Curtis v. Buzard*, 254 Pa. 61, 98 Atl. 777; *High v. Berret*, 148 Pa. St. 261, 23 Atl. 1004.

One who is induced by fraud to sell his stock for less than its market value may recover the difference between what he received for it and what he could have sold it for. *Weaver v. Cone*, 174 Pa. St. 104, 34 Atl. 551.

If that which plaintiff received is equal in value to what he paid, he has sustained no injury by the transaction. *Stratton's Independence, Ltd. v. Dines*, 135 Fed. 449, aff'g 126 Fed. 968.

If the stock is worth no more than the price received for it, the seller is not damaged though he was induced to make the sale by fraud. *McDonough v. Williams*, 77 Ark. 261, 8 L. R. A. (N. S.) 452, 7 Ann. Cas. 276, 92 S. W. 783.

If the stock has no market value, the court will look to the pecuniary

condition of the company to ascertain its true value. *Neher v. Hansen*, 12 Cal. App. 370, 107 Pac. 565.

Where certain assets were charged off the books of a bank long prior to the year 1900, but later they were sold and from the proceeds thereof dividends were declared in the years of 1902 and 1903, it was held that it did not necessarily follow that the value of these dividends attached to the stock in 1900 as determining the value of the stock in 1900. *Stewart v. Smith*, 72 Kan. 77, 82 Pac. 482.

See also § 629, *supra*.

⁵¹ *Williams v. Beltz*, 6 Boyce (Del.) 554, 101 Atl. 905.

⁵² *Primeau v. Granfield*, 180 Fed. 847; *George v. Ford*, 36 App. Cas. (D. C.) 315.

⁵³ *Ohlwine v. Pfaffman*, 52 Ind. App. 357, 100 N. E. 777; *Potts v. Lambie*, 138 N. Y. App. Div. 144, 122 N. Y. Supp. 935; *Kennedy v. Bender*, 104 Tex. 149, 135 S. W. 524.

⁵⁴ *McDonough v. Williams*, 77 Ark. 261, 8 L. R. A. (N. S.) 452, 7 Ann. Cas. 276, 92 S. W. 783; *Reed v. Holloway*, — Tex. Civ. App. —, 127 S. W. 1189.

⁵⁵ *Maxted v. Fowler*, 94 Mich. 106, 53 N. W. 921; *Kennedy v. Bender*, 104 Tex. 149, 135 S. W. 524.

A sale or pledge of the stock after

an action for damages involves an election to abide by the contract.⁵⁶ And especially is this true where the stock was purchased from third persons and not from the corporation.⁵⁷ It is not necessary to return or offer to return the stock in order to maintain an action for damages,⁵⁸ and its retention will not bar such an action.⁵⁹ Nor will an express waiver of the fraud and an explicit ratification of the contract have that effect, unless it is of such a character as to imply a release from the consequences of the fraud.⁶⁰ An accord and satisfaction agreement whereby the parties to a sale of stock purport to cancel all previous agreements between them, and to acknowledge full satisfaction of all claims and demands against each other, does not bar the purchaser's right of action for damages for fraud inducing the sale, where he did not know of the fraud when the agreement was entered into.⁶¹

In most jurisdictions the statute of limitations does not begin to run against the right of action for damages until the discovery of

discovering the fraud will not bar such an action. *McKay v. McCarthy*, 146 Iowa 546, 34 L. R. A. (N. S.) 911, 123 N. W. 755; *Gaylord v. Brown*, 128 N. Y. App. Div. 343, 112 N. Y. Supp. 748, 128 N. Y. App. Div. 340, 112 N. Y. Supp. 745.

An allegation that the seller is willing to credit the purchaser with the amount paid for the stock on a debt owed by the latter to the former is no defense to an action for deceit. *Gaylord v. Brown*, 128 N. Y. App. Div. 343, 112 N. Y. Supp. 748.

That the purchaser, after discovering the falsity of representations as to the condition of the company takes steps to hold up its credit, and endeavors to save it from complete ruin, does not bar such an action. *Ligon v. Minton* (Ky. L. Rep.), 125 S. W. 304.

⁵⁶ *Ligon v. Minton* (Ky. L. Rep.), 125 S. W. 304.

The rule requiring prompt disaffirmance of the contract has no application. *Potts v. Lambie*, 138 N. Y. App. Div. 144, 122 N. Y. Supp. 935.

⁵⁷ Under such circumstances acts done by the purchaser in the exer-

cise of his rights as a stockholder do not affect his claim for damages against the seller, unless it is shown that he thereby intended to waive his right of action. *Kennedy v. Bender*, 104 Tex. 149, 135 S. W. 524.

⁵⁸ *Campbell v. Park*, 128 Iowa 181, 104 N. W. 799, 101 N. W. 861.

Tender of the amount received is not a necessary condition precedent to an action by a stockholder to compel one who, by false representations and in breach of trust, has acquired the plaintiff's stock, to account for the true value of the same. *Black v. Simpson*, 94 S. C. 312, 46 L. R. A. (N. S.) 137, 77 S. E. 1023.

⁵⁹ *Ohlwine v. Pfaffman*, 52 Ind. App. 357, 100 N. E. 777.

The mere fact of affirming or ratifying the contract by deciding to retain its fruits is not a waiver of the cause of action for damages. *Potts v. Lambie*, 138 N. Y. App. Div. 144, 122 N. Y. Supp. 935.

⁶⁰ *Ohlwine v. Pfaffman*, 52 Ind. App. 357, 100 N. E. 777.

⁶¹ *Seaver v. Snider*, 21 Colo. App. 431, 122 Pac. 402.

the fraud;⁶² or until the defrauded party has notice of facts sufficient to put him on inquiry.⁶³ In some states, however, it is held that the statute begins to run when the transaction is consummated rather than when the fraud is discovered,⁶⁴ unless the existence of the cause of action is fraudulently concealed.⁶⁵ Statements designed to dissuade the defrauded party from beginning an action, and not designed to induce its postponement merely, will not, in the absence of fraud, estop the party making them from availing himself of the plea of the statute in the event of the subsequent prosecution of such action.⁶⁶ Nor will a promise by the defendant to see that the defrauded party will get his money back if the suit is not brought.⁶⁷

§ 3885. Construction of contract in general. As in other cases, the intent of the parties as expressed in the words used governs in construing a written contract for the sale of stock.⁶⁸ A contempo-

⁶² *Horner v. Perry*, 112 Fed. 906; *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779; *Gillies v. Linscott*, 98 Kan. 78, 157 Pac. 423.

⁶³ *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779; *Coffin v. Barber*, 115 N. Y. App. Div. 713, 101 N. Y. Supp. 147.

The defendant cannot escape liability on the ground of delay in discovering the fraud where it was due to the fact that he lulled the plaintiff into sleep. *Horner v. Perry*, 112 Fed. 906.

⁶⁴ *McKay v. McCarthy*, 146 Iowa 546, 34 L. R. A. (N. S.) 911, 123 N. W. 755.

The Iowa statute providing that, in actions for relief on the ground of fraud, the cause of action shall not be deemed to have accrued until the fraud shall have been discovered by the party aggrieved, is held to apply to equitable actions only, and not to actions for deceit. *McKay v. McCarthy*, 146 Iowa 546, 34 L. R. A. (N. S.) 911, 123 N. W. 755.*

⁶⁵ If the defendant fraudulently conceals from the plaintiff the existence of the cause of action, the statute does not begin to run until the fraud is discovered or might

have been discovered by the exercise of reasonable diligence. *Gamet v. Haas*, 165 Iowa 565, 146 N. W. 465. See also *McKay v. McCarthy*, 146 Iowa 546, 34 L. R. A. (N. S.) 911, 123 N. W. 755.

⁶⁶ *McKay v. McCarthy*, 146 Iowa 546, 34 L. R. A. (N. S.) 911, 123 N. W. 755.

⁶⁷ *McKay v. McCarthy*, 146 Iowa 546, 34 L. R. A. (N. S.) 911, 123 N. W. 755.

⁶⁸ *Henderson v. Phillips*, 178 Fed. 374; *McCormick v. Badham*, 191 Ala. 339, 67 So. 609; *Markis v. Melis*, — Utah —, 167 Pac. 802; *Zohrlaut v. Mengelberg*, 144 Wis. 564, 124 N. W. 247, on rehearing 144 Wis. 564, 128 N. W. 975.

Where the contract is ambiguous and evidence as to the conditions and circumstances under which it was made is admitted to show its meaning, it is for the jury to determine its meaning. *Hodgens v. Sullivan*, 209 Mass. 533, 95 N. E. 969.

A contract to sell all of the stock of a corporation which the seller owns "amounting to three-fifths of the entire capital stock" of the company, is not fulfilled by a delivery of a

aneous practical construction by the parties is strong evidence of the meaning of the contract, if its terms are equivocal.⁶⁹ But their conduct in supposed observance of the contract cannot be considered where its meaning is clear and free from ambiguity.⁷⁰ If the contract is in writing, its construction is for the court.⁷¹

Whether a particular transaction constitutes a sale of the stock or a pledge or transfer thereof as security for a loan,⁷² or a bailment or trust,⁷³ is a question of construction.

§ 3886. Admissibility of parol evidence. As in other cases, if the contract is in writing, it cannot be varied or contradicted by parol evidence.⁷⁴ So parol evidence is inadmissible to show that at the time of entry into a written contract for the sale of a specified proportion of the capital stock of a corporation the parties really intended that

smaller proportion of the capital stock, although all that the seller owns. *Dady v. O'Rourke*, 172 N. Y. 447, 65 N. E. 273, rev'g 61 N. Y. App. Div. 529, 70 N. Y. Supp. 694.

In *Miller v. Duntley*, 264 Ill. 268, 106 N. E. 198, rev'g 182 Ill. App. 205, a contract was construed to mean that the defendant, who had promised the plaintiff certain stock, should have the option of paying him a certain sum in money before a certain date instead of delivering the stock, and, in case the full amount was not so paid, he was to forfeit any payments made, and that it did not bind the defendant to pay any sum whatever.

See also the following cases where contracts for the sale of stock were construed. *Biser v. Bauer*, 205 Fed. 229; *Shuler v. Allam*, 45 Colo. 372, 101 Pac. 350.

And see standard works on contracts and sales.

⁶⁹ *Pratt v. Prouty*, 104 Iowa 419, 65 Am. St. Rep. 472, 73 N. W. 1035; *Meyer v. Levy*, 156 N. Y. App. Div. 745, 142 N. Y. Supp. 51; *Fry v. Thorne*, 64 Wash. 479, 117 Pac. 236.

On the theory of a contemporaneous practical construction, the fact that a purchaser of stock from the corporation instructed the secretary of the

corporation to explain to one to whom such purchaser subsequently sold that the shares were pool stock was held evidence that the purchaser took the stock subject to such disability. *Williams v. Ashurst Oil, Land & Development Co.*, 144 Cal. 619, 78 Pac. 28.

⁷⁰ *Twin Tree Lumber Co. v. Ensign*, 193 Ala. 113, 69 So. 525.

⁷¹ *McDonough v. Williams*, 77 Ark. 261, 8 L. R. A. (N. S.) 452, 7 Ann. Cas. 276, 92 S. W. 783; *Stokes v. Foote*, 172 N. Y. 327, 65 N. E. 176, rev'g judgment 49 N. Y. App. Div. 302, 63 N. Y. Supp. 887.

⁷² See § 3903 et seq., *infra*.

⁷³ In *Harriman v. Northern Securities Co.*, 197 U. S. 244, 49 L. Ed. 739, aff'g 134 Fed. 331, the transaction in question was held to be an unconditional purchase and sale and not a bailment or trust.

⁷⁴ *Commercial & Savings Bank of San Jose v. Pott*, 150 Cal. 358, 89 Pac. 431; *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629; *Rigler v. Reid*, 186 Mo. App. 111, 171 S. W. 952; *Barber v. Martin*, 67 Neb. 445, 93 N. W. 722.

See standard works on evidence, contracts and sales.

only such an amount of stock should pass as the vendor then owned,⁷⁵ or to show that a contract absolute and unconditional on its face was conditional.⁷⁶ "But if the writing does not show upon its face that it was intended to express the whole agreement between the parties, parol evidence is admissible to show other conditions or explain latent ambiguities."⁷⁷ If the consideration is not expressed, parol evidence is admissible to show the true consideration of the contract.⁷⁸ Parol evidence is also admissible to show a supplemental oral agreement by the seller to repurchase the stock,⁷⁹ or that the contract should only take effect upon conditions which have not been performed,⁸⁰ or to show that a party was induced to enter into the contract by fraud.⁸¹ And the rule excluding parol evidence applies only

⁷⁵ *Dady v. O'Rourke*, 172 N. Y. 447, 65 N. E. 273, rev'g 61 N. Y. App. Div. 529, 70 N. Y. Supp. 694.

⁷⁶ *Dinkler v. Baer*, 92 Ga. 432, 17 S. E. 953; *Rigler v. Reid*, 186 Mo. App. 111, 171 S. W. 952.

Where the whole transaction is reduced to writing, the purchaser cannot show a parol agreement by the seller to take back the stock if he was dissatisfied. *Rigler v. Reid*, 186 Mo. App. 111, 171 S. W. 952.

⁷⁷ *Williams v. Ashurst Oil, Land & Development Co.*, 144 Cal. 619, 78 Pac. 28; *Mulford v. Torrey Exploration Co.*, 45 Colo. 81, 100 Pac. 596; *Richardson v. Hunter*, 88 Wash. 375, 153 Pac. 325.

A latent ambiguity in the description of the subject-matter may be shown to exist and may be removed by extrinsic parol evidence. So where the contract was to purchase a certain number of shares of stock, and before it was made the corporation had increased its stock and distributed the increase in the form of a stock dividend, it was held that parol evidence was admissible to show that the contract referred to stock of the original issue. *Feore v. Avent*, 4 Ala. App. 551, 58 So. 727.

Where the contract merely provides for the sale of "shares of stock" without showing the kind of shares

the purchaser is to receive, it may be shown by parol that he was to receive so called "pool shares," on which no certificates were to be issued until the expiration of five years. *Williams v. Ashurst Oil, Land & Development Co.*, 144 Cal. 619, 78 Pac. 28.

Where the contract is partly in writing and partly in parol, it is in law a parol contract, and the true consideration for it may be shown by parol. *Roder v. Niles*, 61 Ind. App. 4, 111 N. E. 340.

⁷⁸ *Roder v. Niles*, 61 Ind. App. 4, 111 N. E. 340.

Where there are no contractual provisions in a note given for stock relative to its consideration, the defendant may show the making of a collateral agreement, without which he refused to sign the note, and its breach, and that as a result the stock became worthless. *Merchants' & Farmers' Bank v. Smith*, 107 Miss. 105, 64 So. 970.

⁷⁹ *Blair v. Minzesheimer*, 124 N. Y. App. Div. 177, 108 N. Y. Supp. 799.

⁸⁰ *Garner v. Kratzer*, 173 Iowa 292, 155 N. W. 296.

⁸¹ *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629; *Le Master v. Hailey*, — Tex. Civ. App. —, 176 S. W. 818.

as between the parties to the contract and their privies.⁸² Parol evidence is also admissible to vary or contradict the contract in a suit in equity to reform it.⁸³

§ 3887. Executed and executory contracts; when title passes.

Whether a contract for the sale of stock is executed, so that the title passes, or merely executory, is to be determined upon the same principles as in the case of a sale of any other personal property.⁸⁴ As in other cases the intention of the parties,⁸⁵ to be ascertained from a consideration of the entire instrument,⁸⁶ controls. The use of the words "sells," "have sold," "do sell," "hereby sell," and the like,⁸⁷

⁸²In an action by a principal to compel his agent to account for secret profits made by him in the sale of the principal's stock, parol evidence is admissible to show that the true consideration paid by the purchaser to the agent was a greater sum than that recited in the contract of sale. *Barber v. Martin*, 67 Neb. 445, 93 N. W. 772.

⁸³*Biser v. Bauer*, 205 Fed. 229.

⁸⁴See standard works on sales.

⁸⁵*United States. Beardsley v. Beardsley*, 138 U. S. 262, 34 L. Ed. 928.

California. Mason v. Lievre, 154 Cal. 514, 78 Pac. 1040; *Kennedy v. Lee*, 147 Cal. 596, 82 Pac. 257.

Maryland. Mitchell v. Wedderburn, 68 Md. 139, 11 Atl. 760.

Massachusetts. Bellows v. McKenzie, 212 Mass. 601, 99 N. E. 470; *Frazier v. Simmons*, 139 Mass. 531, 2 N. E. 112.

Minnesota. Peavey v. Wells, 136 Minn. 180, 161 N. W. 508.

South Dakota. Tuthill v. Sherman, 36 S. D. 237, 154 N. W. 518; *Id.* 165 N. W. 4; *Barnard v. Tidrick*, 35 S. D. 403, 152 N. W. 690.

Washington. Pacific Power & Light Co. v. White, 96 Wash. 18, Ann. Cas. 1918 B 125, 164 Pac. 602.

An agreement whereby the seller "agrees to sell" and the buyer "agrees to buy" was held not to be an executed agreement effecting a

present sale, but an executory agreement to sell. *Gilfallan v. Gilfallan*, 168 Cal. 23, Ann. Cas. 1915 D 784, 141 Pac. 623.

An agreement "to sell" stock, the time of purchase to be before a specified date in the future, optional with the purchaser, the purchaser to have any dividends paid on the stock prior to the date of purchase, was held not a contract of sale, but a contract for a sale to be thereafter consummated. *Tuthill v. Sherman*, 36 S. D. 237, 154 N. W. 518; *Id.* — S. D. —, 165 N. W. 4.

A writing which segregated and identified a certificate of stock, which had been paid for, as the property of one of the parties, was held to be an acknowledgment that the title to the certificate was in him. *Bell v. Seranton Coal Mines Co.*, 59 Wash. 659, 110 Pac. 628.

In *Beeson v. Wright*, 159 Cal. 133, 112 Pac. 1091, a contract was held to be divisible and to be an executed contract as to part of the stock covered by it.

⁸⁶*Beardsley v. Beardsley*, 138 U. S. 262, 34 L. Ed. 928; *Kennedy v. Lee*, 147 Cal. 596, 82 Pac. 257; *Pacific Power & Light Co. v. White*, 96 Wash. 18, Ann. Cas. 1918 B 125, 164 Pac. 602.

⁸⁷*Kennedy v. Lee*, 147 Cal. 596, 82 Pac. 257; *Pacific Power & Light*

or the words "we have purchased,"⁸⁸ does not necessarily operate to transfer the whole legal title to the stock in praesenti so as to be beyond modification by any other language of the instrument. The matter is regulated by statute in some jurisdictions.⁸⁹

If by the terms of the contract the buyer is bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition is fulfilled, even though the certificate may be delivered.⁹⁰ On the other hand the title passes as soon as the condition is performed.⁹¹

A contract giving an option to purchase stock gives no property interest in the stock, and does not affect its ownership except in so far as it deprives the person giving it of the right to sell the stock.⁹² Title does not pass under an option to purchase until the option is determined.⁹³

Co. v. White, 96 Wash. 18, Ann. Cas. 1918 B 125, 164 Pac. 602.

⁸⁸ Frazier v. Simmons, 139 Mass. 531, 2 N. E. 112.

⁸⁹ Under Cal. Civ. Code, § 1141, title to personal property is transferred by an executory contract for the sale thereof when the seller prepares the thing sold for delivery and offers it to the buyer with intent to transfer the title to him. Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926.

⁹⁰ Beardsley v. Beardsley, 138 U. S. 262, 34 L. Ed. 928; Snow Storm Min. Co. v. Johnson, 186 Fed. 745; Kennedy v. Lee, 147 Cal. 596, 82 Pac. 257; Ryan v. Kimberly, 118 Ill. App. 361; Pacific Power & Light Co. v. White, 96 Wash. 18, Ann. Cas. 1918 B 125, 164 Pac. 602. See also Mason v. Lievre, 154 Cal. 514, 78 Pac. 1040.

A contract providing that the buyer was to pay the seller a certain sum for the stock upon the conditions that the buyer should obtain control of the corporation, and should have realized a specified sum by sale of the property, or from the earnings of a mine located thereon, within four years, was held to be a conditional sale contract which ceased, leaving the owner-

ship of the stock in the seller where the buyer had failed to secure the said control or to realize the said sum within the said time, even though the certificate had been delivered to the buyer. Kennedy v. Lee, 147 Cal. 596, 82 Pac. 257.

⁹¹ Where a subscriber to stock pays a portion of the assessments thereon, and after having assigned a portion of the interest therein to a third party in consideration of certain other assessments being paid by such third party declines to make any further payments thereon and directs the corporation to deliver the certificate to such third party on condition that the third party pay all future assessments, the third party will be deemed, upon paying all future assessments and obtaining the certificate, to have full title to the stock. Boll v. Camp, 118 Iowa 516, 92 N. W. 703.

⁹² Equitable title to corporate bonds does not pass by the mere granting to the claimant of an option to purchase the bonds. Patterson v. Farmington St. Ry. Co., 76 Conn. 628, 57 Atl. 853.

⁹³ Guss v. Nelson, 200 U. S. 298, 50 L. Ed. 489, aff'g 14 Okla. 296, 78 Pac.

The transfer is complete as between the parties on delivery of the certificate with power to transfer, and payment of the purchase money.⁹⁴ As between them, a transfer on the corporate books is not necessary to pass the title.⁹⁵ Delivery of the certificates is essential to the passing of the title where the contract expressly requires their delivery.⁹⁶ And it has been held that merely placing the stock in the purchaser's name on the corporate books without a delivery of the certificate, is insufficient to constitute delivery and performance on the part of the seller.⁹⁷ But there may be a transfer of title as between the parties without any such delivery as will amount to a transfer of possession.⁹⁸ So the contract is executed, and the title passes, if such is the intention of the parties, even though the stock

170; *Lucas v. Milliken*, 139 Fed. 816. See *Rowe v. White*, 112 N. Y. App. Div. 688, 98 N. Y. Supp. 729, aff'd 189 N. Y. 523, 82 N. E. 1132.

⁹⁴ *Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S. W. 129; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454, aff'd 74 Mo. 77.

A transfer and delivery of the certificate is the ordinary mode of conveyance of shares of stock. *Lebrecht v. Nellist*, 184 Mo. App. 335, 171 S. W. 11.

⁹⁵ See § 3794, supra.

⁹⁶ *Barnard v. Tidrick*, 35 S. D. 403, 152 N. W. 690.

By statute in California if the agreement is executory, title does not pass until delivery is made to the buyer, or is due to him and is offered to be made, unless the contract shows a different intention. Civ. Code, § 1141. *Gilfallan v. Gilfallan*, 168 Cal. 23, Ann. Cas. 1915 D 784, 141 Pac. 623.

A contract whereby one party agrees to sell certain stock and the other to buy it at a certain price to be paid at a specified time, is an executed one, and the title vests at once in the purchaser when the stock is tendered to him. *Lewin v. Hanford*, — Cal. App. —, 169 Pac. 242.

⁹⁷ *Lebrecht v. Nellist*, 184 Mo. App. 335, 171 S. W. 11.

The statement to the contrary in *White v. Salisbury*, 33 Mo. 150, was mere dictum, and has been repudiated by the later Missouri cases. See *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454, aff'd 74 Mo. 77, and see also § 3785, supra.

⁹⁸ *Frazier v. Simmons*, 139 Mass. 531, 2 N. E. 112.

Where the stock is specifically identified, and the price is fixed and a part of it is paid, the contract is an executed one and title passes, although the seller retains possession of the certificates. *McGowin v. Dickson*, 182 Ala. 161, 62 So. 685.

The contract is fully performed though the certificate is never actually delivered to the vendee, where it is made out in his name and delivered to the vendor to be delivered to him, and the vendee subsequently acts as a stockholder and considers himself such. *Kimmel v. Gray*, 196 Ill. App. 406.

Where the owner of stock accepts an offer to purchase it, executes a written assignment of it to the purchaser, and directs one to whom it has been pledged as security for a note, to deliver it to the purchaser on payment by the latter of the note, there is an executed contract of sale, although the pledgee fails to deliver the stock. *McKee v. Bernheim*, 130

may remain in the name or in the possession of the seller,⁹⁹ or be placed in the hands of a third person¹ as security, or though the certificate is deposited in the hands of a third person to be delivered to the purchaser when the price is paid.² Under a statute providing that title to personal property shall pass at the time of agreement for a present transfer where the thing to be transferred is identified, delivery of the certificates simultaneously with payment is not necessarily of the essence of the transfer.³

Payment of the purchase price is not necessarily essential to the passing of title,⁴ but it may be so under the terms of the contract.⁵

N. Y. App. Div. 424, 114 N. Y. Supp. 1080, aff'd 198 N. Y. 575, 92 N. E. 1091.

A transfer of stock to a purchaser, and the issuing of a certificate in his name, together with the fact that he has described the stock as his own in a note given for the price, and pledged the same to secure payment of the note, is sufficient evidence of delivery of the stock and its acceptance, in an action for the price, whether he ever received the original certificate or not. *Dinkler v. Baer*, 92 Ga. 432, 17 S. E. 953.

There may be a constructive delivery and acceptance without proof of manual delivery. *DeNunzio v. DeNunzio*, 90 Conn. 342, 97 Atl. 323.

Want of delivery renders the sale void only as to creditors and subsequent purchasers. *Teague v. Abbott*, 51 Ind. App. 604, 100 N. E. 27.

See also § 3785, supra.

⁹⁹ *Beardsley v. Beardsley*, 138 U. S. 262, 34 L. Ed. 928; *Cooper v. Bay State Gas Co.*, 127 Fed. 482; *Bellows v. McKenzie*, 212 Mass. 601, 99 N. E. 470; *Frazier v. Simmons*, 139 Mass. 531, 2 N. E. 112; *Sherwood v. Graham*, 106 Minn. 542, 118 N. W. 1011.

¹ *Peavey v. Wells*, 136 Minn. 180, 161 N. W. 508.

² Though, at the request of the purchaser, it is left with a third person to be delivered to him on payment of the price. *Botsford v. Heney*, 12 Cal. App. 380, 107 Pac. 593.

Where a person sold shares of stock for a stipulated price on the open stock board, and deposited the certificates, with an executed power of attorney accompanying the same, with a trust company, empowering the company to deliver the stock upon receiving the price, and the purchaser paid a part of the price, it was held that there was such a transfer of title as to establish a right of action in the seller against the purchaser for the price. *Frazier v. Simmons*, 139 Mass. 531, 2 N. E. 112.

Where the seller directs a bank, with which the stock has been deposited as collateral, to deliver it to the purchaser as soon as it is paid for, title passes when payment is made. *Sather v. Home Security Sav. Bank*, 49 Wash. 672, 96 Pac. 229.

³ *Mason v. Lievre*, 145 Cal. 514, 78 Pac. 1040.

⁴ *McGowin v. Dickson*, 182 Ala. 161, 62 So. 685; *Bellows v. McKenzie*, 212 Mass. 601, 99 N. E. 470; *Judson v. Stonington Min. Co.*, 128 Mich. 103, 87 N. W. 108; *Peavey v. Wells*, 136 Minn. 180, 161 N. W. 508.

An agreement whereby the purchaser takes the stock at a specified price, to be paid in instalments, is an executed contract. *Graham v. Burgess*, 78 S. C. 404, 59 S. E. 29.

⁵ *McCormick v. Badham*, 191 Ala. 339, 67 So. 609; *Reid v. Caldwell*, 114 Ga. 676, 40 S. E. 712; *Ryan v. Kimberly*, 118 Ill. App. 361; *Albany Mill*

"There is no such thing as suspension of title when one stockholder transfers his stock to another. The title remains in the old stockholder until it passes to the new."⁶

§ 3888. Conditions precedent and subsequent. A contract for the sale of stock may be upon an express condition precedent, and in such a case the contract is not enforceable until the condition is performed or fulfilled.⁷ So a contract to purchase stock in a corporation when

Co. v. Huff Bros., 24 Ky. L. Rep. 2037, 72 S. W. 820.

Where under a memorandum agreement to exchange real estate for stock and a cash bonus, it was optional with either party to refuse to carry out the contract on forfeiture of \$50 to the other, it was held that title did not pass until the delivery of the deed, the payment of the bonus, and the delivery of the stock certificate. May v. McQuillan, 129 Mich. 392, 89 N. W. 45.

A contract, whereby the stock was to be deposited in escrow to be delivered in instalments on payment in instalments of the purchase price, was held not to pass title to the stock in praesenti. David v. McRae, 183 Fed. 812, aff'd 184 Fed. 988.

The fact that the agent of the seller, through whom the sale is effected, and to whom the price is paid, agrees to retain the money pending the determination of claims of third persons to the stock, does not prevent the passing of the title. Pease v. Chicago Crayon Co., 235 Ill. 391, 18 L. R. A. (N. S.) 1158, 14 Ann. Cas. 263, 85 N. E. 619, aff'g 138 Ill. App. 513.

⁶ May v. McQuillan, 129 Mich. 392, 89 N. W. 45.

⁷ Alabama. McCormick v. Badham, 191 Ala. 339, 67 So. 609.

Colorado. Divine v. George, 166 Pac. 242 (where the condition was that the corporation should establish a store at a particular place).

Illinois. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, aff'g 111 Ill. App.

606; Wilson v. Roots, 119 Ill. 379, 10 N. E. 204.

Iowa. Garner v. Kratzer, 173 Iowa 292, 155 N. W. 296.

Maryland. Mitchell v. Wedderburn, 68 Md. 139.

Massachusetts. Randall v. Clafin, 194 Mass. 560, 80 N. E. 594 (where the sale was conditional upon the giving of an opinion that an invention owned by the corporation was patentable); Murdock v. Caldwell, 8 Allen 309.

Missouri. Meinershagen v. Taylor, 169 Mo. App. 12, 154 S. W. 886.

New York. Lovell v. Jacobs, 150 N. Y. 84, 44 N. E. 792 (where the condition was that the stock should be increased); Childs v. Smith, 55 Barb. 45.

Oklahoma. Swift v. McAlester Trust Co., 154 Pac. 1175.

Washington. Umfrid v. Brooks, 14 Wash. 675, 45 Pac. 310.

Where a purchase of stock is subject to the condition that an examination by the purchaser upon his return from a journey shall show the corporation to be prosperous, as represented by the seller, and the purchaser, on his return, finds it insolvent, he may rescind without showing that it was insolvent when the contract was made. Truman v. Lombard, 10 N. Y. App. Div. 430, 42 N. Y. Supp. 262.

In Newman v. Mercantile Trust Co., 189 Mo. 423, 88 S. W. 6, it was held that the acceptance of the plaintiff's stock by the purchaser was obligatory upon it if a majority of the stock-

it shall be created cannot be enforced until the corporation has been fully and legally organized.⁸

On the other hand, where the sale is absolute, so that the title passes to the purchaser, his title is not affected, and the stock does not revert to the seller, because of the breach of an independent stipulation by the seller. The purchaser's remedy is an action for damages.⁹ "Dependence or independence of covenants is generally

holders had agreed, before a specified date to sell their stock to the purchaser for a certain price, but that it also had the option to accept it in any event, and that when it did so and paid the agreed price the sale was complete, although it was obliged to pay more than that amount to other stockholders in order to acquire a controlling interest.

In *Mitchell v. Wedderburn*, 68 Md. 139, 11 Atl. 760, a contract for the sale of stock to be paid for in fertilizer was held to be conditioned that it should become void and inoperative if payment in that manner interfered with the rights of corporate creditors.

Whether the retirement of a part of the stock was a condition precedent to the taking effect of an oral contract for the sale of stock was held to be a question for the jury. *Conger v. Lee*, 175 Iowa 423, 157 N. W. 240.

⁸ *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880; *Childs v. Smith*, 55 Barb. (N. Y.) 45.

⁹ *Canadian Agency v. Assets Realization Co.*, 165 N. Y. App. Div. 96, 150 N. Y. Supp. 758.

The rule of mutually dependent covenants does not apply where the contract contains no express covenants on the part of the seller, but a present release and assignment of his interest in the stock. *Jelinek v. Baer*, 153 Wis. 426, 141 N. W. 271.

Performance of independent covenants need not be shown to entitle the seller to demand and receive payment for the stock, nor will a breach of such provisions be a bar to his re-

covery. It merely confers a right of action for such breach. *McMillan v. Batten*, 52 Ore. 218, 96 Pac. 675.

Of this character are provisions that the seller will not engage in a similar business in a certain locality for a specified period, or do anything prejudicial to the business of the corporation, etc. *McMillan v. Batten*, 52 Ore. 218, 96 Pac. 675.

Where a sale of stock was made in consideration, in part, of a promise by the purchaser that the corporation would not set up any claim against the seller on account of past transactions, and the corporation afterwards brought suit against him, it was held that the stipulation was not a condition upon which the title to the stock depended, but an independent promise, and that the title, therefore, did not revert to the seller. *Jackson v. Grant*, 18 N. J. Eq. 145.

In *Stokes v. Foote*, 172 N. Y. 327, 65 N. E. 176, rev'g 49 N. Y. App. Div. 302, 63 N. Y. Supp. 887, it was held that the contract contained independent covenants to be separately performed, and that a particular covenant was not the sole consideration for the entire agreement, and hence that its nonperformance did not render the entire contract unenforceable for failure of consideration.

In *Linnell v. Leon*, 206 Mass. 71, 91 N. E. 895, it was held that even if a contract required a transfer of the stock before payment of a note given for the purchase price, the purchaser giving an immediate transfer back for collateral security, the failure to make

a question of intention.”¹⁰ Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, the covenants are generally mutual and dependent if they are to be done at the same time.¹¹ But covenants forming a part of the consideration of the contract are not necessarily conditions precedent.¹² And it is generally held that covenants which are to be performed at different times are independent.¹³

§ 3889. Warranties, guaranties and special stipulations—Express warranties. A contract for the sale of stock may contain express warranties, for a breach of which the purchaser may maintain an action for damages, or under some circumstances rescind the contract and defeat an action for the price.¹⁴ The seller may expressly

such transfer constituted at most a partial failure of consideration for the note, and not a total failure, and did not preclude a recovery thereon, with an allowance to the defendant for any loss or damage suffered by him by reason of such breach.

¹⁰ *McCormick v. Badham*, 191 Ala. 339, 67 So. 609; *O'Neill v. Webb*, 78 Mo. App. 1.

¹¹ *McCormick v. Badham*, 191 Ala. 339, 67 So. 609.

¹² *O'Neill v. Webb*, 78 Mo. App. 1.

¹³ *O'Neill v. Webb*, 78 Mo. App. 1. See also *McCormick v. Badham*, 191 Ala. 339, 67 So. 609.

¹⁴ Any affirmation of a material fact, as a fact, intended by the vendor as and for a warranty, and relied on as such, constitutes a warranty. An intention to warrant is generally held not to be necessary, however, where there is a positive statement of a material fact made for the purpose of inducing the sale, and relied on by the purchaser. *Cornish v. Friedman*, 94 Ark. 282, 126 S. W. 1079.

Any direct affirmation by the seller as to the quality or condition of the stock sold, as, for example, an affirmation as to the financial condition of the corporation, will be regarded as an express warranty. *Iler v. Jennings*, 87 S. C. 87, 68 S. E. 1041.

“Representations of fact as to the property of the company, its productiveness and other conditions having relation to the value or desirability of its shares as an investment, may be regarded as proper elements in a contract of warranty in the sale of” its stock. *Phillips v. Crosby*, 69 N. J. L. 612, 55 Atl. 814.

Representations or statements merely by way of commendation, or which merely express the vendor's opinion, belief, judgment or estimate, do not constitute a warranty. *Cornish v. Friedman*, 94 Ark. 282, 126 S. W. 1079.

The liability of a principal for fraudulent representations of his agent in the sale of stock need not be rested upon the tort, but may be referred to the contract, for, whether made innocently or deceitfully, such representations as against the seller operate as a warranty. *Foix v. Moeller*, — Tex. Civ. App. —, 159 S. W. 1048.

A warranty is supported by a sufficient consideration when the purchaser is thereby induced to consummate the sale at a time when he was not legally bound to do so. *Pacific Power & Light Co. v. White*, 96 Wash. 18, Ann. Cas. 1918 B 125, 164 Pac. 602.

The measure of damages for breach of warranty is the difference between

warrant the value of the stock¹⁵ or guarantee that it shall be worth par, or any other specified sum, within a certain time.¹⁶ The seller may also guarantee a certain dividend on the stock, and will be liable if such a dividend is not paid,¹⁷ or he may agree to pay the buyer

the value of the property as warranted and with the warranty broken. *Brown v. O. F. Jonasson & Co.*, 108 N. Y. Supp. 996.

As to the measure of damages for breach of a warranty of title, see *Morgan v. Hendrie Bros. & Bolthoff*, 34 Colo. 25, 7 Ann. Cas. 935, 81 Pac. 700.

That the measure of damages for breach of warranty as to the quality of the article sold is the difference in value between the article sold and the article delivered at the time and place of delivery, see *McMillan v. Batten*, 52 Ore. 218, 96 Pac. 675.

That the right to recover damages for breach of warranty as to quality is not affected by the fact that the buyer has sold the article for the price paid or a greater price, see *McMillan v. Batten*, 52 Ore. 218, 96 Pac. 675.

¹⁵ *Titus v. Poole*, 145 N. Y. 414, 40 N. E. 228; *Robertson v. Moses*, 15 N. D. 351, 108 N. W. 788; *Handy v. Waldron*, 18 R. I. 567, 49 Am. St. Rep. 794, 29 Atl. 143; *Hull v. Geary*, 71 W. Va. 490, 76 S. E. 960.

Whether a representation as to the value of the stock amounts to a warranty or is a mere expression of opinion is usually a question for the jury. *Phillips v. Crosby*, 69 N. J. L. 612, 55 Atl. 814.

In *Issenhuth v. Riegel*, 20 S. D. 322, 106 N. W. 58, a covenant as to the value of the property of the corporation was held not to mean that it should equal the par value of the capital stock.

The measure of damages for breach of a warranty as to the value is the difference between the warranted value and the actual value of the

stock. *Hull v. Geary*, 71 W. Va. 490, 76 S. E. 960. See also *Long v. Douthitt*, 142 Ky. 427, 134 S. W. 453.

¹⁶ *Hill v. Smith*, 21 How. (U. S.) 283, 16 L. Ed. 113; *Lobeck v. Duke*, 50 Neb. 568, 70 N. W. 36.

¹⁷ *United States*. In re *Pettingill & Co.*, 137 Fed. 143.

California. *Fontana v. Pacific Can Co.*, 129 Cal. 51, 61 Pac. 580.

Georgia. See *Hardin v. Bank of Harlem*, 145 Ga. 494, 89 S. E. 613; *Central Bank Block Ass'n v. James*, 81 Ga. 762, 7 S. E. 862.

Kentucky. *West v. King*, 163 Ky. 561, 174 S. W. 11.

Massachusetts. *Tilton v. Whittemore*, 202 Mass. 39, 88 N. E. 329.

New York. *Kernochan v. Murray*, 111 N. Y. 306, 2 L. R. A. 183, 7 Am. St. Rep. 744, 18 N. E. 868; *Meyer v. Levy*, 156 App. Div. 745, 142 N. Y. Supp. 51; *Mason v. Standard Distilling & Distributing Co.*, 85 App. Div. 520, 83 N. Y. Supp. 343.

Ohio. *Moorehouse v. Crangle*, 36 Ohio St. 130, 38 Am. Rep. 564.

South Dakota. See *Clement v. Rowe*, 33 S. D. 499, 146 N. W. 700.

Tennessee. *Fourth Nat. Bank of Nashville v. Stahlman*, 132 Tenn. 367, L. R. A. 1916 A 568, 178 S. W. 942.

The purchase and payment for the stock by the person to whom the promise is made is a sufficient consideration to support it. *West v. King*, 163 Ky. 561, 174 S. W. 11.

A guaranty that the purchaser shall receive a certain per cent annually on the purchase price of the stock, attached to and delivered with the stock certificate, forms a part of the contract of sale, and the purchase of the stock and payment of the price is a sufficient consideration to sup-

a certain per cent annually on the par value of the stock.¹⁸ And he may guarantee that there will be no assessments upon the stock,¹⁹ or that preferred stock will be redeemed at a specified time in the

port it. *Alger v. Minnesota Loan & Trust Co.*, 135 Minn. 235, 160 N. W. 765, 159 N. W. 565.

Where the guarantor becomes bankrupt the other party cannot prove a claim against his estate for damages arising from the failure of the corporation to pay the guaranteed dividends after the filing of the petition in bankruptcy, and this is true although such failure is due to the fact that the corporation itself is subsequently adjudged bankrupt. In *re Pettingill & Co.*, 137 Fed. 143.

In *Tilton v. Whittemore*, 202 Mass. 39, 88 N. E. 329, a guaranty of dividends was held to be limited to the year to which an obligation on the part of the seller to repurchase the stock was limited.

A guaranty by one corporation of dividends on the stock of another corporation which it purchases indorsed on the stock certificate, may be construed as an agreement to pay stated sums at stated times as instalments on the purchase price of such stock, and hence be valid, rather than as an agreement to pay dividends whether any profits are earned or not. *Windmuller v. Standard Distilling & Distributing Co.*, 106 N. Y. App. Div. 246, 94 N. Y. Supp. 52.

A certificate of stock bore the following printed guaranty: "The undersigned hereby guarantees and agrees to pay to the holder of record of the within certificate, so long as said certificate shall be outstanding, but not to exceed the present unexpired term of the period for which said * * * company is incorporated," a specific dividend. The court held that the dissolution of the company terminated the guaranty, and

that in an action on the guaranty the guarantor was not barred from setting up the dissolution of the company, by reason of the fact that the guarantor had secured such dissolution. The court remarked that the action was based wholly upon the terms of the guaranty, and while the defendant would not be permitted to take advantage of its wrongful act in securing the dissolution of the company, that the question of its fraud could not be considered in the case at bar. *Mason v. Standard Distilling & Distributing Co.*, 85 N. Y. App. Div. 520, 83 N. Y. Supp. 343.

In *Fisher v. Seitz*, 172 Mo. App. 162, 157 S. W. 883, it was held that there was no basis for the contention that the seller warranted large and profitable results to the buyer.

¹⁸ See *Hubbard v. Hubbard*, 151 N. Y. App. Div. 174, 135 N. Y. Supp. 908.

¹⁹ Where the organizers of a corporation issued the stock to themselves as fully paid, and guaranteed to subsequent purchasers that the stock should be nonassessable, it was held that they were liable to purchasers of the stock on account of payments made by the latter to satisfy an extra statutory liability for corporate debts, as well as those made on the stock itself. *Omo v. Bernart*, 108 Mich. 43, 65 N. W. 622.

A warranty by the seller of stock that there were no assessments "about to be made" upon the stock is not broken by the fact that shortly after the sale the stockholders, by agreement, issued new stock to be purchased by themselves, the proceeds to be applied in payment of debts. *Humphrey v. Merriam*, 46 Minn. 413, 49 N. W. 199.

future,²⁰ or that certain other outstanding stock is common stock,²¹ or that the corporation will return the money invested with a specified profit, on or before a certain date.²²

He may also warrant that the financial condition of the corporation is as represented,²³ or may guarantee that there are no debts against the corporation, or stipulate that, if there are debts, they shall be paid by the corporation or by himself before a certain time,²⁴ or may guarantee or warrant that the debts do not exceed a certain amount.²⁵

²⁰ A purchaser of preferred stock from the corporation may enforce a guaranty by it that such stock will be retired at a specified price within a certain time. *Keyes v. Blue Bell Medicine Co.*, 34 S. D. 297, 148 N. W. 505.

A guaranty that preferred stock will be redeemed at a certain time in the future may be construed as a contract to purchase the stock at par at that time, and is breached by the guarantor becoming bankrupt, and the other party may prove his claim for damages because of such breach in the bankruptcy proceedings. In this case the corporation was adjudged bankrupt after the guarantor. *In re Pettingill & Co.*, 137 Fed. 143.

²¹ In *Pendleton v. Harris-Emery Co.*, 124 Iowa 361, 100 N. W. 117, it was held that the breach of such a guaranty did not entitle the purchaser to any part of a fund deposited as security for its performance in the absence of a showing that he was damaged by the breach.

²² A petition in an action on such a guaranty is demurrable where it does not allege a breach. *Hunt v. Taylor*, 27 Ky. L. Rep. 978, 87 S. W. 290.

²³ Whether representations as to the financial condition of the corporation amounted to a warranty held for the jury. *Cornish v. Friedman*, 94 Ark. 282, 126 S. W. 1079.

²⁴ *United States Fire Apparatus Co. v. G. W. Baker Mach. Co.*, 10 Del. Ch. 421, 95 Atl. 294.

A contract for the sale of stock which provides that, if any liabilities or debts exist against the company, they shall be paid by the company or by the seller before a certain date, does not apply to debts created after the date of the contract, the resignation of the seller as president of the company, and the election of the purchaser. *Reed v. Hayt*, 109 N. Y. 659, 17 N. E. 418.

In *Worthington v. Herrmann*, 89 N. Y. App. Div. 627, 88 N. Y. Supp. 76, a recital in an option contract was held not to amount to a warranty of the assets and liabilities of the corporation.

²⁵ *Childs v. Krey*, 199 Mass. 352, 85 N. E. 442; *Millsaps v. Merchants' & Planters' Bank*, 71 Miss. 361, 13 So. 903; *Pacific Power & Light Co. v. White*, 96 Wash. 18, Ann. Cas. 1918 B 125, 164 Pac. 602.

On breach of a guaranty that the liabilities of the company do not exceed by more than \$100 the amount set forth in a certain statement, the measure of damages is the difference between the amount of the actual liabilities and the amount so set forth, less \$100. *Childs v. Krey*, 199 Mass. 352, 85 N. E. 442.

On breach of a covenant that the corporation is not indebted in excess of a specified amount, contained in a contract for the sale of half of the stock of a corporation, prima facie the purchaser is damaged to the extent of one-half of the amount by which the corporation's indebtedness exceeds

And he may also agree to refund to the purchaser an amount of the purchase money equal to any loss which the stockholder might sustain as a stockholder as a result of a previous misappropriation of funds by a corporate officer.²⁶

The letters "inc." placed in parenthesis immediately after the name of the corporation in the contract are not a warranty that the stock is that of a corporation de jure.²⁷

An agreement to "turn over" to the purchaser all the stock of a certain company "now owned" by the seller was held not to imply an undertaking by the latter to turn it over free from an incumbrance held by the purchaser.²⁸

The purchaser as part consideration for the contract of sale may agree to pay sums paid by the seller in settlement of claimed liens on the stock,²⁹ or to make good to the seller any loss resulting to him from errors or misstatements in statements as to the financial condition of the corporation on which the transaction was based.³⁰

that which the seller covenanted it would be. *State v. Regent Laundry Co.*, 196 Mo. App. 627, 190 S. W. 951.

Where the seller of stock gave an express warranty that the liabilities of the corporation did not exceed a certain sum, and they did exceed such sum, it was held that the breach might be set up by the purchaser to defeat an action on a note given for the stock. *Millsaps v. Merchants' & Planters' Bank*, 71 Miss. 361, 13 So. 903.

In *Worthington v. Herrmann*, 89 N. Y. App. Div. 627, 88 N. Y. Supp. 76, aff'd 180 N. Y. 559, 73 N. E. 1134, recitals in an option agreement as to the assets and liabilities of the corporation were held not to amount to a warranty. It was also held that if there was a warranty, it did not cover the indebtedness of the corporation on a certain date.

²⁶ Although such an agreement provides that the loss shall be deemed to have been sustained if the misappropriated money is not recovered by the corporation within a year after its misappropriation, the purchaser cannot recover thereon if the money is

recovered after that time but before the commencement of his action. *Robinson v. Pierce*, 34 Colo. 500, 83 Pac. 624.

Consent given by the vendee to the release of a security out of which the loss might have been recouped will bar recovery on the agreement. *Robinson v. Pierce*, 34 Colo. 500, 83 Pac. 624.

²⁷ *Marshall v. Keach*, 227 Ill. 35, 118 Am. St. Rep. 247, 10 Ann. Cas. 164, 81 N. E. 29.

²⁸ *Fuehrman v. McCord*, 107 N. Y. App. Div. 12, 95 N. Y. Supp. 489, aff'd 186 N. Y. 566, 79 N. E. 1105.

²⁹ In *Bickel v. Rockwood*, 209 Fed. 187, the seller was held entitled to recover on an agreement whereby the purchaser agreed to pay him half of the amount paid by him in settlement of an alleged lien on the stock, but not to exceed a specified sum.

³⁰ A settlement between stockholders, one of whom sold his interest to the other, was held to be a sufficient consideration to support such an agreement by the latter. *Ofner v. Weigel*, 199 Fed. 720.

In an action on an express warranty, it is not necessary to allege or prove a scienter.³¹ Nor is a return or an offer to return the stock necessary to entitle the purchaser to maintain such an action.³²

§ 3890. — Implied warranties. On a sale of stock there are certain implied warranties. The seller of stock, like the seller of any other personal property, impliedly warrants his title to the stock.³³ "And this warranty extends to and protects against liens, charges, and encumbrances by which the title is rendered imperfect and the value depreciated thereby."³⁴ It only extends to legally enforceable demands, however.³⁵ The seller also impliedly warrants

³¹ *Hier v. Jennings*, 87 S. C. 87, 68 S. E. 1041; *Hull v. Geary*, 71 W. Va. 490, 76 S. E. 960.

³² *Phillips v. Crosby*, 69 N. J. L. 612, 55 Atl. 814.

³³ *Arkansas Bankers' Trust Co. of St. Louis v. McCloy*, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205.

Illinois. *Burwash v. Ballou*, 230 Ill. 34, 15 L. R. A. (N. S.) 409, 82 N. E. 355; *Marshall v. Keach*, 227 Ill. 35, 118 Am. St. Rep. 247, 10 Ann. Cas. 164, 81 N. E. 29; *Higgins v. Illinois Trust & Savings Bank*, 193 Ill. 394, 61 N. E. 1024, aff'g 96 Ill. App. 29; *Rogan v. Illinois Trust & Savings Bank*, 93 Ill. App. 39, aff'd 194 Ill. 600, 62 N. E. 834.

Iowa. *Allen v. Pegram*, 16 Iowa 163.

Louisiana. *State v. North Louisiana & Texas R. Co.*, 34 La. Ann. 947.

New York. *McClure v. Central Trust Co. of New York*, 165 N. Y. 108, 53 L. R. A. 153, 58 N. E. 577, rev'g 28 App. Div. 433, 53 N. Y. Supp. 188; *Seizer v. Mali*, 32 Barb. 76.

North Carolina. *Martin v. McDonald*, 168 N. C. 232, 84 S. E. 258.

Pennsylvania. *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112.

A vendor of stock impliedly warrants that he is the owner thereof and authorized to transfer the title thereto. *Higgins v. Illinois Trust &*

Savings Bank, 193 Ill. 394, 61 N. E. 1024, aff'g 96 Ill. App. 29.

The Uniform Stock Transfer Act (§ 11) provides that "a person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appears, warrants * * * that he has a legal right to transfer it." This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Wisconsin and Alaska.

³⁴ *Martin v. McDonald*, 168 N. C. 232, 84 S. E. 258.

The existence of a valid lien on the stock is a good defense to an action by the buyer to recover the purchase price. *Martin v. McDonald*, 168 N. C. 232, 84 S. E. 258.

In *McClure v. Central Trust Co. of New York*, 165 N. Y. 108, 53 L. R. A. 153, 58 N. E. 577, rev'g 28 N. Y. App. Div. 433, 53 N. Y. Supp. 188, it was held that "it was a condition of the sale, whether called an implied warranty or any other name, that the defendant was to deliver marketable stock free from lien, for that alone would meet the description of the thing sold, under the circumstances surrounding the parties when the sale was made."

³⁵ It is not breached by an unenforceable demand against the stock, however just in morals. So it is not

that the certificate of stock is genuine, and legally what it purports to be.³⁶ By statute in some states he also impliedly warrants that he has no knowledge of any fact which would impair the validity of the certificate.³⁷

It has been held that where the corporation has been adjudged illegal and enjoined from continuing business, stock issued by it is a nullity, and there is no consideration for a note given for the purchase price of certain of its shares.³⁸ And according to the better opinion, where an attempted increase of the capital stock of a corporation is a nullity because of want of authority, or noncompliance with conditions, so that the issue is absolutely void, a purchaser of such stock may rescind and recover the price paid on the ground of

breached by a lien on the stock given to the corporation by its by-laws, where such lien is not enforceable against a bona fide purchaser, and the purchaser comes within that class, and if he pays the corporation's claim under such circumstances, he cannot recover the amount so paid from the seller on the implied warranty. *Bankers' Trust Co. of St. Louis v. McCloy*, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205.

³⁶ *Illinois*. *Burwash v. Ballou*, 230 Ill. 34, 15 L. R. A. (N. S.) 409, 82 N. E. 355; *Marshall v. Keach*, 227 Ill. 35, 118 Am. St. Rep. 247, 10 Ann. Cas. 164, 81 N. E. 29; *Higgins v. Illinois Trust & Savings Bank*, 193 Ill. 394, 61 N. E. 1024, aff'g 96 Ill. App. 29; *Rogan v. Illinois Trust & Savings Bank*, 93 Ill. App. 39, aff'd 194 Ill. 600, 62 N. E. 834.

Iowa. *Allen v. Pegram*, 16 Iowa 163.

Louisiana. *Lincoln v. New Orleans Exp. Co.*, 45 La. Ann. 729, 12 So. 937.

New Jersey. *Wood v. Sheldon*, 42 N. J. L. 421, 36 Am. Rep. 523.

New York. *McClure v. Central Trust Co. of New York*, 165 N. Y. 108, 53 L. R. A. 153, 58 N. E. 577, rev'g judgment 28 App. Div. 433, 53 N. Y. Supp. 188; *Fifth Av. Bank of New York v. Forty-Second St. & G.*

St. Ferry R. Co., 137 N. Y. 231, 19 L. R. A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; *Titus v. Poole*, 73 Hun 383, 26 N. Y. Supp. 451; *Shotwell v. Mali*, 38 Barb. 445; *Seizer v. Mali*, 32 Barb. 76.

Pennsylvania. *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112.

The Uniform Stock Transfer Act (§ 11) provides that "a person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appears, warrants that the certificate is genuine." This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

³⁷ The Uniform Stock Transfer Act (§ 11) provides that "a person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appears, warrants * * * that he has no knowledge of any fact which would impair the validity of the certificate." This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

³⁸ *Todd v. Ferguson*, 161 Mo. App. 624, 144 S. W. 158.

breach of implied warranty of the existence of the thing sold.³⁹ Although the corporation may be liable in damages to bona fide purchasers of such certificates, a right of action for damages against the corporation is not what the parties intended to sell and buy. But there is authority to the effect that there is no implied warranty that the stock is not part of an overissue fraudulently issued in excess of the amount permitted by the charter,⁴⁰ or that increased stock was legally issued.⁴¹

Upon a sale of stock in an existing corporation there is no implied warranty that the corporation has a de jure existence. It is sufficient to show that it is a corporation de facto,⁴² as explained in a former chapter.⁴³ One who signs a memorandum of the purchase of certificates of stock in a corporation thereby admits the legal existence of the corporation, and he is liable for the agreed price in the absence of evidence that the certificates offered were not genuine, or such as were intended by the contract.⁴⁴ Purchasers of the stock of a corporation on the market cannot complain of fraud in the organization of the corporation.⁴⁵

The seller does not impliedly warrant the solvency of the corporation,⁴⁶ or its title to particular property held by it,⁴⁷ nor the quality⁴⁸ or value⁴⁹ of the stock sold, nor that it is full paid and nonassessable.⁵⁰

³⁹ *Lincoln v. New Orleans Exp. Co.*, 45 La. Ann. 729, 12 So. 937.

⁴⁰ *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112.

⁴¹ The purchaser cannot escape liability for the price by showing that the increased stock was illegally issued in the absence of an express warranty or fraud. *Burwash v. Ballou*, 230 Ill. 34, 15 L. R. A. (N. S.) 409, 82 N. E. 355.

⁴² *Burwash v. Ballou*, 230 Ill. 34, 15 L. R. A. (N. S.) 409, 82 N. E. 355; *Marshall v. Keach*, 227 Ill. 35, 118 Am. St. Rep. 247, 10 Ann. Cas. 164, 81 N. E. 29; *Harter v. Eltzroth*, 111 Ind. 159, 12 N. E. 129; *Reynolds v. Myers*, 51 Vt. 444.

⁴³ See Chap. 10, *supra*.

⁴⁴ *Mann v. Williams*, 143 Mass. 394, 9 N. E. 807.

⁴⁵ *Caldwell v. Boyd*, 57 Pa. St. 321.

⁴⁶ *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112.

⁴⁷ *Allen v. Pegram*, 16 Iowa 163; *State v. North Louisiana & T. R. Co.*, 34 La. Ann. 947.

⁴⁸ *Allen v. Pegram*, 16 Iowa 163.

⁴⁹ *Field v. Turley* (Ky. L. Rep.), 120 S. W. 338; *Renton v. Maryott*, 21 N. J. Eq. 123; *Jones v. Garlington*, 44 S. C. 533, 22 S. E. 741; *Issenhuth v. Riegel*, 20 S. D. 322, 106 N. W. 58.

In the absence of an express warranty or fraud, the purchaser cannot escape liability for the price because the stock turns out to be of no value. *Peck Colorado Co. v. Stratton*, 95 Fed. 741.

⁵⁰ *Higgins v. Illinois Trust & Savings Bank*, 193 Ill. 394, 61 N. E. 1024; *Rogan v. Illinois Trust & Savings Bank*, 93 Ill. App. 39, *aff'd* 194 Ill. 600, 62 N. E. 834.

§ 3891. — **Agreements by seller to repurchase or giving him option to do so, and the like.** The seller of corporate stock may agree to repurchase it at a specified price at the option of the buyer, or upon certain contingencies.⁵¹ Such a contract is generally regarded as

⁵¹ **Alabama.** McGowin v. Dickson, 182 Ala. 161, 62 So. 685; Sibley v. Barclay, 14 Ala. App. 422, 70 So. 201, certiorari denied Ex parte Barclay, 70 So. 1012 (mem. dec.).

California. Fontana v. Pacific Can Co., 129 Cal. 51, 61 Pac. 580; Hudson v. Seeley Specialties Co., 19 Cal. App. 213, 124 Pac. 1051; Avery v. Cullen, 15 Cal. App. 413, 114 Pac. 1022.

District of Columbia. Crandell v. Classen, 25 App. Cas. 5.

Georgia. Poole v. Corker, 15 Ga. App. 622, 83 S. E. 1101.

Illinois. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, aff'g 111 Ill. App. 606; Shultz v. Miller-Hamilton, 189 Ill. App. 396.

Iowa. Doughty v. Law, 178 Iowa 840, 160 N. W. 226; Hamilton v. Finnegan, 117 Iowa 623, 91 N. W. 1039.

Kansas. Echternach v. Mopierief, 94 Kan. 754, 147 Pac. 860.

Massachusetts. Armstrong v. Orler, 220 Mass. 112, 107 N. E. 392; Schaefer v. Strieder, 203 Mass. 467, 89 N. E. 618; Tilton v. Whittemore, 202 Mass. 39, 88 N. E. 329; Graham v. Houghton, 153 Mass. 384, 26 N. E. 876; Thorndike v. Locke, 98 Mass. 340.

Minnesota. Lyons v. Snider, 136 Minn. 252, 161 N. W. 532; First Nat. Bank of Hastings v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

Montana. Raiche v. Morrison, 47 Mont. 127, 130 Pac. 1074; Raiche v. Morrison, 37 Mont. 244, 95 Pac. 1061.

New York. Ketchum v. Alexander, 168 App. Div. 38, 153 N. Y. Supp. 864; Meurer v. American Moving Picture Mach. Co., 61 Misc. 281, 113 N. Y. Supp. 719; Shea v. Kiely, 167 N. Y. Supp. 570.

Oregon. Paulson v. Weeks, 80 Ore. 468, 157 Pac. 590.

Pennsylvania. Flannery v. Wessels, 244 Pa. 321, 90 Atl. 715.

Vermont. Fay v. Wheeler, 44 Vt. 292.

Wisconsin. Strait v. Northwestern Steel & Iron Works, 148 Wis. 254, 134 N. W. 387; Hankwitz v. Barrett, 143 Wis. 639, 128 N. W. 430; Vohland v. Gelhaar, 136 Wis. 75, 16 Ann. Cas. 781, 116 N. W. 869.

Such an agreement is a continuing guaranty of the value of the stock, and is not invalid for indefiniteness as to the time of performance, since it would be enforceable at any time within the statute of limitations. Poole v. Corker, 15 Ga. App. 622, 83 S. E. 1101.

Where the agreement is to repurchase within 18 months in the event that the purchaser becomes dissatisfied with the stock, the seller becomes liable to repay the purchase price immediately upon being notified by the purchaser, within the time specified, that he is dissatisfied. Avery v. Cullen, 15 Cal. App. 413, 114 Pac. 1022.

An agreement by a corporation on the sale of preferred stock to commission merchants, who were acting as its factors, to take up such stock if it should "for any reason desire to change the account" was held not to obligate it to take up or redeem the stock on its going into voluntary liquidation. Farrish-Stafford Co. v. Charlotte Cotton Mills, 157 N. C. 188, 72 S. E. 973.

See Watson v. Virginia-Carolina Lumber Co., 93 S. C. 1, 75 S. E. 1020, construing a provision in such a contract requiring the purchaser to bear

being in the nature of a conditional sale, with an option in the purchaser to revoke or rescind it.⁵² The mutual promises of the parties to sell and purchase constitute a sufficient consideration to support it,⁵³ and it is not lacking in mutuality where it forms a part of the original contract of sale.⁵⁴

his proportion of the losses of the business, if any, incurred in the meantime.

The burden of proving such a contract is on the party asserting that it was made. *Blair v. Minzesheimer*, 124 N. Y. App. Div. 177, 108 N. Y. Supp. 799.

In *Strait v. Northwestern Steel & Iron Works*, 148 Wis. 254, 134 N. W. 387, the evidence was held to show an agreement by the corporation to repurchase stock issued to the plaintiff for certain property in case he should be discharged from its service.

The value of the stock as of the time of the breach controls in determining the damages. *Sibley v. Barclay*, 14 Ala. App. 422, 70 So. 201, certiorari denied *Ex parte Barclay* (Ala.), 70 So. 1012 (mem. dec.).

Upon exercising the option the purchaser is entitled to recover in an action at law the amount which the seller agreed to pay, and is not obliged to allege or prove damages arising as upon a breach of a contract of purchase or sale, nor to allege or prove facts justifying the maintenance of an action for specific performance. *Lyons v. Snider*, 136 Minn. 252, 161 N. W. 532.

In an action for breach of such an agreement, allegations that the defendants falsely represented the value of the stock and thereby induced the plaintiff to purchase it are irrelevant. *Shea v. Kiely*, 167 N. Y. Supp. 570.

Such an agreement is assignable, and may be enforced by the assignee. *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084.

Delay in bringing suit will not pre-

clude a recovery of the contract price, where it is due to solicitations of the defendant and his representations that he will comply with the contract. *Echternach v. Moncrief*, 94 Kan. 754, 147 Pac. 860.

⁵² *Shultz v. Miller-Hamilton*, 189 Ill. App. 396; *Lyons v. Snider*, 136 Minn. 252, 161 N. W. 532.

This is true although the seller agrees to pay an advance over what he received about equal to interest. *Lyons v. Snider*, 136 Minn. 252, 161 N. W. 532.

Where the seller is given an option to return the stock at a certain time, title passes at once, subject to the right to rescind and return. *Guss v. Nelson*, 200 U. S. 298, 50 L. Ed. 489, aff'g 14 Okla. 296, 78 Pac. 170.

Such a contract is not a conditional one for the sale or return of the stock, but embraces a completed sale with an option to the buyer to rescind if he becomes dissatisfied. *Paulson v. Weeks*, 80 Ore. 468, 157 Pac. 590.

The election of the purchaser to return the stock is not a repudiation or rescission of the contract, but an adoption of a right expressly contracted for. *Doughty v. Law*, 178 Iowa 840, 160 N. W. 226.

⁵³ *Flannery v. Wessels*, 244 Pa. 321, 90 Atl. 715.

An agreement by a corporation as part of a general settlement between it, its president and the plaintiff, to repurchase stock assigned to the latter is supported by a sufficient consideration, and is enforceable. *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084.

⁵⁴ *Poole v. Corker*, 15 Ga. App. 622, 83 S. E. 1101.

Where the agreement to repurchase is an absolute one, the purchaser's reason for wanting to return the stock is immaterial.⁵⁵

Time is of the essence of such agreements, and the option to return the stock and receive back the price must be exercised within the time, if any, fixed by the contract.⁵⁶ An option to rescind at any time does not mean at any time without limit, but the right must be exercised within a reasonable time.⁵⁷ And a right to return the stock if the purchaser becomes dissatisfied must be exercised promptly after he becomes dissatisfied.⁵⁸ If the contract provides that the stock

⁵⁵ *Armstrong v. Orlor*, 220 Mass. 112, 107 N. E. 392.

⁵⁶ *Guss v. Nelson*, 200 U. S. 298, 50 L. Ed. 489, aff'g 14 Okla. 296, 78 Pac. 170; *Sibley v. Barclay*, 14 Ala. App. 422, 70 So. 201, certiorari denied *Ex parte Barclay* (Ala.), 70 So. 1012 (mem. dec.); *Alexander v. Bosworth*, 26 Cal. App. 589, 147 Pac. 607; *Makuen v. Elder*, 170 N. C. 510, 87 S. E. 334.

If the option is not exercised at the time fixed, the sale is complete and the promise to pay the balance of the purchase price becomes absolute. *Guss v. Nelson*, 200 U. S. 298, 50 L. Ed. 489, aff'g 14 Okla. 296, 78 Pac. 170.

A contract whereby the seller agreed to repurchase the stock on or before 12 months from date was held not to be a bilateral contract for the resale and purchase of the stock, but merely to give the purchaser the option to compel the seller to repurchase within the time prescribed so that, where he did not exercise it within that time, no cause of action on the contract arose in his favor. *Scott v. Goodin*, 21 Cal. App. 178, 131 Pac. 76.

The seller cannot refuse to comply with his agreement to repurchase on the ground that the tender of the stock was not made in time, where the failure was due to his own acts in persuading the purchaser not to insist upon a repurchase within such time. *Avery v. Cullen*, 15 Cal. App. 413, 114 Pac. 1022.

Acts of the seller after the expiration of the time fixed cannot be deemed a waiver of his right to insist that time is of the essence of the contract, since there is no longer any liability on his part or anything to waive. *Makuen v. Elder*, 170 N. C. 510, 87 S. E. 334.

Where the seller agreed to repurchase the stock after the buyer had held it for a year, a statement made by the seller five months after the expiration of the year was held to be too late to amount to a waiver of a tender. *Wright v. Berger*, 114 N. Y. Supp. 912.

⁵⁷ *Paulson v. Weeks*, 80 Ore. 468, 157 Pac. 590.

What is a reasonable time is generally a question for the jury. But if the delay is clearly unreasonable the court may so declare as a matter of law, as where the purchaser waited more than seven years from the date of the contract, more than five years from the completion of the sale, and more than three years from the time he became dissatisfied before demanding a rescission. *Paulson v. Weeks*, 80 Ore. 468, 157 Pac. 590.

In *Armstrong v. Orlor*, 220 Mass. 112, 107 N. E. 392, it was held that the demand to take back the stock was made within a reasonable time.

⁵⁸ *Paulson v. Weeks*, 80 Ore. 468, 157 Pac. 590.

may be returned after a certain time, the purchaser has no right to return it and receive back the price before the time so specified.⁵⁹ Nor can an action for breach of an agreement by the seller to resell the stock for the purchaser within a specified time if he is dissatisfied be maintained before the expiration of the time so specified.⁶⁰

Generally the purchaser must give the seller notice of his election to return the stock,⁶¹ and must tender the stock to him and make a demand for payment.⁶² It has been held, however, that the formal-

⁵⁹ *Grant v. Ledwidge*, 109 Ark. 297, 160 S. W. 200.

Where the seller agrees to repurchase at a specified time, generally no action for breach of the agreement can be brought before that time. *Mulford v. Torrey Exploration Co.*, 45 Colo. 81, 100 Pac. 596.

Where the seller becomes insolvent and transfers the note given for the stock before the time fixed, he cannot complain that an action for breach of the agreement to repurchase was commenced before that time. *Mulford v. Torrey Exploration Co.*, 45 Colo. 81, 100 Pac. 596.

⁶⁰ *Lawrence v. Grimes*, 144 Ga. 112, 86 S. E. 218.

⁶¹ *Alabama*. *Sibley v. Barclay*, 14 Ala. App. 422, 70 So. 201, certiorari denied Ex parte Barclay, 70 So. 1012 (mem. dec.).

California. *Flickinger v. Wrenn Inv. Co.*, 172 Cal. 132, 155 Pac. 627.

Illinois. *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869, aff'g 111 Ill. App. 606.

Iowa. *Hamilton v. Finnegan*, 117 Iowa 623, 91 N. W. 1039.

Oklahoma. *Guss v. Nelson*, 14 Okla. 296, 78 Pac. 170, aff'd 200 U. S. 298, 50 L. Ed. 489.

⁶² *California*. *Flickinger v. Wrenn Inv. Co.*, 172 Cal. 132, 155 Pac. 627; *Alexander v. Bosworth*, 26 Cal. App. 589, 147 Pac. 607.

Georgia. *Poole v. Corker*, 15 Ga. App. 622, 83 S. E. 1101.

Illinois. *Shultz v. Miller-Hamilton*, 189 Ill. App. 396.

Iowa. *Hamilton v. Finnegan*, 117 Iowa 623, 91 N. W. 1039.

New York. *Ketchum v. Alexander*, 168 App. Div. 38, 153 N. Y. Supp. 864; *Wright v. Berger*, 114 N. Y. Supp. 912.

Oklahoma. *Guss v. Nelson*, 14 Okla. 296, 78 Pac. 170, aff'd 200 U. S. 298, 50 L. Ed. 489.

Where the contract designates the place of delivery and payment, the purchaser must show a tender of performance at such time and place, and that he had the stock there for delivery. *Shultz v. Miller-Hamilton*, 189 Ill. App. 396.

Merely giving the notice of an intention to exercise the option required by the contract is not sufficient to put the seller in default, but the purchaser must also tender the stock and demand performance. A tender upon the trial is insufficient. *Flickinger v. Wrenn Inv. Co.*, 172 Cal. 132, 155 Pac. 627.

Where the stock is identified and the amount to be paid for it is fixed, and upon the purchaser notifying the seller of his election to resell the latter agrees to take it and pays a part of the price, the contract is an executed one although the purchaser retains possession of the stock, and he may sue for the price without tendering the stock. *McGowin v. Dickson*, 182 Ala. 161, 62 So. 685.

If the case is to be viewed as one for rescission, the purchaser need not tender back the stock where it is worthless and never had any value.

ties necessary to entitle the purchaser to return the stock and recover back what he has paid are those fixed by the contract, and that if it provides for notice, but not for a tender, no formal tender is necessary.⁶³ It has also been held that where the purchaser gives the required notice and offers to deliver the stock to the seller on payment by him, and tenders the stock at the trial, placing the certificates in control of the court, this is sufficient although no formal tender was made before the action was brought.⁶⁴ The fact that the purchaser pledges the stock to the seller as security for a loan does not constitute an election not to insist on performance of the agreement to repurchase it.⁶⁵

The seller of stock may, for a valuable consideration, agree to resell the stock for the purchaser at a profit, but, in order to enforce such an agreement, the buyer must surrender or offer to surrender the stock to him.⁶⁶

The seller may be given the option to repurchase the stock on specified terms.⁶⁷

§ 3892. — Guaranties and agreements by third persons. To induce a person to subscribe for or purchase stock in a corporation, promoters or officers of the corporation, or other subscribers or stockholders, may enter into a contract to purchase his stock from him if he desires to withdraw. Such a contract is not a fraud upon stockholders who are not parties to the contract, but is valid and enforceable,⁶⁸ provided, however, it is supported by a sufficient consid-

Avery v. Cullen, 15 Cal. App. 413, 114 Pac. 1022.

In an action for breach of such an agreement, allegations that the defendants never delivered the certificates to the plaintiff and that the stock was never transferred into his name on the books are relevant as showing why he never tendered the certificates back to the defendants. Shea v. Kiely, 167 N. Y. Supp. 570.

⁶³ Doughty v. Law, 178 Iowa 840, 160 N. W. 226. In this case certain letters were held to constitute a sufficient tender if one was necessary.

⁶⁴ Lyons v. Snider, 136 Minn. 252, 161 N. W. 532.

⁶⁵ Armstrong v. Orler, 220 Mass. 112, 107 N. E. 392.

⁶⁶ Jones v. Dimmick, 178 Ala. 296, 59 So. 623.

⁶⁷ Eichbaum v. Sample, 213 Pa. 216, 62 Atl. 837. See Draper v. Stone, 71 Me. 175.

⁶⁸ **United States.** Morgan v. Struthers, 131 U. S. 246, 33 L. Ed. 132; Ophir Consol. Mines Co. v. Brynteson, 143 Fed. 829.

Alabama. Broadus v. Russell, 160 Ala. 353, 49 So. 327.

California. Fites v. Marsh, 171 Cal. 487, 153 Pac. 926; Gay v. Dare, 103 Cal. 454, 37 Pac. 466; McCampbell v. Obear, 27 Cal. App. 97, 148 Pac. 942; Union Collection Co. v. Oliver, 23 Cal. App. 318, 137 Pac. 1082. See also Scott v. Goodin, 21 Cal. App. 178, 131 Pac. 76; Hudson v. Seeley Special-

eration.⁶⁹ If the obligation to purchase is conditional, the subscriber

ties Co., 19 Cal. App. 213, 124 Pac. 1051.

Georgia. *Edwards v. Capps*, 122 Ga. 827, 50 S. E. 943; *Rogers v. Burr*, 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438.

Illinois. *Kincaid v. Overshiner*, 171 Ill. App. 37.

Indiana. *Newman v. Horner*, 55 Ind. App. 298, 103 N. E. 820; *Schmitt v. Weil*, 46 Ind. App. 264, 92 N. E. 178.

Kentucky. *West v. King*, 163 Ky. 561, 174 S. W. 11.

Massachusetts. See *Schaefer v. Strieder*, 203 Mass. 467, 89 N. E. 618.

Minnesota. *Traphagen v. Sagar*, 63 Minn. 317, 65 N. W. 633.

Missouri. *Simpson v. Van Laningham*, 267 Mo. 286, 183 S. W. 324; *Klein v. Johnson*, 191 Mo. App. 453, 178 S. W. 262; *Mulliken v. Haseltine*, 160 Mo. App. 9, 141 S. W. 712.

Nebraska. *Trenholm v. Kloepper*, 88 Neb. 236, 129 N. W. 436.

New York. *Drucklieb v. Sam H. Harris, Inc.*, 209 N. Y. 211, 102 N. E. 599, rev'g judgment 155 App. Div. 83, 140 N. Y. Supp. 60; *Page v. Shainwald*, 169 N. Y. 246, 57 L. R. A. 173, 62 N. E. 356, rev'g judgment 52 App. Div. 349, 65 N. Y. Supp. 174; *Meyer v. Blair*, 109 N. Y. 600, 4 Am. St. Rep. 500, 17 N. E. 228; *Baird v. Hagen*, 143 App. Div. 679, 128 N. Y. Supp. 217.

South Dakota. *Clement v. Rowe*, 33 S. D. 499, 146 N. W. 700.

Tennessee. *Fourth Nat. Bank of Nashville v. Stahlman*, 132 Tenn. 367, L. R. A. 1916 A 568, 178 S. W. 942.

A letter by the vice president of the corporation in which he expressed a willingness to enter into an agreement to buy back the stock was held not to be an enforceable contract to repurchase it. *Richardson v. Hunter*, 88 Wash. 375, 153 Pac. 325.

To make a proposal to repurchase obligatory on the obligor it must be accepted and acted upon by the person to whom it is made. If the subscription is not induced by the proposal, as, for example, where the proposal is to repurchase if the subscriber takes \$5,000 worth of stock and he only takes \$3,000 worth, then the person making it is not bound. *Schmitt v. Weil*, 46 Ind. App. 264, 92 N. E. 178.

The purchaser is not estopped from maintaining an action on the contract by reason of the fact that, between the date of the purchase and the day when he requested performance, he surrendered his certificate to the corporation and received a new one representing his original purchase and a stock dividend. *Trenholm v. Kloepper*, 88 Neb. 236, 129 N. W. 436.

Such a contract may be enforced although before it was made the corporation had forfeited its charter for failure to pay its franchise tax, where the purchaser was then ignorant of that fact. *Fites v. Marsh*, 171 Cal. 487, 153 Pac. 926.

Such a contract is not personal to the purchaser, but may be enforced by his personal representatives after his death. *Klein v. Johnson*, 191 Mo. App. 453, 178 S. W. 262.

Such an agreement is assignable, and even if it is not, an assignment thereof may be ratified by the obligor. *Union Collection Co. v. Oliver*, 23 Cal. App. 318, 137 Pac. 1082.

⁶⁹ *Ophir Consol. Mines Co. v. Brynteson*, 143 Fed. 829.

The subscription to or purchase of the stock by the person to whom the promise is made is a sufficient consideration to support the contract. *Edwards v. Capps*, 122 Ga. 827, 50 S. E. 943; *Kincaid v. Overshiner*, 171 Ill. App. 37; *West v. King*, 163 Ky. 561,

must show performance of the conditions by him.⁷⁰ So if the contract provides for a repurchase within a specified time, the subscriber must offer to return the stock and demand a return of the money within the time so prescribed.⁷¹ And where notice to the obligors is a con-

174 S. W. 11; *Klein v. Johnson*, 191 Mo. App. 453, 178 S. W. 262; *Mulliken v. Haseltine*, 160 Mo. App. 9, 141 S. W. 712; *Fourth Nat. Bank of Nashville v. Stahlman*, 132 Tenn. 367, L. R. A. 1916 A 568, 178 S. W. 942.

The fact that the obligors are residents of the town in which the corporation's manufacturing plant is to be located, and are interested in its growth and development, and jointly interested as subscribers in the furtherance of the common undertaking, is a sufficient consideration to support the agreement. *Rogers v. Burr*, 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438.

Damage to the promisee is a sufficient consideration to support a promise by a third person to purchase stock bought from the corporation provided it does not pay dividends at a certain rate. *Clement v. Rowe*, 33 S. D. 499, 146 N. W. 700.

⁷⁰ *Schmitt v. Weil*, 46 Ind. App. 264, 92 N. E. 178.

⁷¹ *Schmitt v. Weil*, 46 Ind. App. 264, 92 N. E. 178. See also *Scott v. Goodin*, 21 Cal. App. 178, 131 Pac. 76.

Where the agreement is to repurchase if requested to do so on a certain day, and no request is made on that day, the agreement is at an end. It can be revived only by the making of a new agreement. *Page v. Shainwald*, 169 N. Y. 246, 57 L. R. A. 173. 62 N. E. 356, rev'g judgment 52 N. Y. App. Div. 349, 65 N. Y. Supp. 174.

Where the agreement is to pay the purchaser 100 cents on the dollar for the stock within 90 days from date, the purchaser must show a tender of the stock to the other party and a demand for the par value of the same,

if not within the 90 days, at least before the suit was brought. *Morris v. Veach*, 111 Ga. 435, 36 S. E. 753.

The fact that the purchaser held the stock for seven years will not prevent an enforcement of the contract, where the seller agreed to repurchase it at any time. *Kincaid v. Overshiner*, 171 Ill. App. 37.

Under an agreement whereby an officer of the corporation from which the stock was purchased guarantees to refund the money paid for the stock "in twelve months from date" in case the purchaser is dissatisfied, the purchaser has a right to express his dissatisfaction and demand a fulfillment of the guarantee at any time during the life of the contract, and the seller has until the expiration of the twelve months in which to comply with such demand. *Union Collection Co. v. Oliver*, 23 Cal. App. 318, 137 Pac. 1082.

A tender of the stock before suit brought is not necessary where liability is denied and performance refused, but the bringing of the certificate into court for delivery to the other party is sufficient. *Kincaid v. Overshiner*, 171 Ill. App. 37.

Tender is not necessary where the stock is in the possession of the seller as collateral. *Simpson v. Van Laningham*, 267 Mo. 286, 183 S. W. 324.

A formal tender is excused where the seller refuses to carry out the contract. It is sufficient under such circumstances if he is the owner of the stock and is at all times ready to transfer it to the seller on payment of the agreed price. *Newman v. Horner*, 55 Ind. App. 298, 103 N. E. 820.

dition precedent to performance, the required notice must be given.⁷² And similarly an agreement to repurchase the stock of a subscriber if he is not given the position of general manager of the company and permitted to hold that position for a certain number of years, and providing that he shall render competent and efficient services in that capacity, imposes no obligation to repurchase where the subscriber is discharged from such position because of his failure to render competent and efficient services.⁷³ The fact that the stock is to be repurchased at its book value as shown by the accounts of the corporation will not justify a court of equity in intervening in the management and control of the corporate books of account, especially where the condition on which the stock is to be repurchased has not happened and may never happen.⁷⁴

The right of the corporation to make agreements of the character under discussion has been considered in a previous section.⁷⁵

Promoters, officers or directors, or others interested, may also agree with one who purchases stock from the corporation that if it fails to pay dividends at a specified rate they will make up any deficiency;⁷⁶ or may guarantee that a subscriber to its stock will not suffer any loss,⁷⁷ or that the corporation will receive certain notes

⁷² *Rogers v. Burr*, 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438.

Where the contract merely provides for notice, actual personal notice is required. Merely mailing a notice is not sufficient unless it is received. *Rogers v. Burr*, 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438.

Notice to one or more joint obligors is not notice to all, but notice to each is required. *Rogers v. Burr*, 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438.

Where two persons jointly agree to purchase 60 shares of stock, service upon each of them of a notice to purchase 30 shares is insufficient, even though 30 shares have been pledged to each of them, where such pledge is a separate independent transaction. *Baird v. Hagen*, 143 N. Y. App. Div. 679, 128 N. Y. Supp. 217.

⁷³ *Hall v. Hardaker*, 61 Fla. 267, 55 So. 977.

⁷⁴ *Drucklieb v. Sam H. Harris, Inc.*, 209 N. Y. 211, 102 N. E. 599, rev'g 155

N. Y. App. Div. 83, 140 N. Y. Supp. 60.

⁷⁵ See § 604, *supra*.

⁷⁶ *Crook v. Scott*, 65 N. Y. App. Div. 139, 72 N. Y. Supp. 516, aff'd 174 N. Y. 520, 66 N. E. 1106.

Where the purchase of the stock and the execution of such an agreement constitute one transaction, the payment for the stock is a sufficient consideration for the agreement. *Crook v. Scott*, 65 N. Y. App. Div. 139, 72 N. Y. Supp. 516, aff'd 174 N. Y. 520, 66 N. E. 1106.

⁷⁷ *Harvey v. Bonta*, 30 Ky. L. Rep. 1226, 100 S. W. 846; *Bonta v. Harvey*, 28 Ky. L. Rep. 47, 88 S. W. 1079.

Payment of his subscription by the subscriber before he is legally bound to pay it is a sufficient consideration to support such a contract. *Harvey v. Bonta*, 30 Ky. L. Rep. 1226, 100 S. W. 846.

A guaranty to hold the purchaser harmless from any loss or damage or

and mortgages in full payment for the stock;⁷⁸ or may agree to resell the stock for the purchaser.⁷⁹

§ 3893. Performance and breach generally. A contract for the sale of stock need not fix any time for delivery. If no time is fixed, it is implied that the contract is to be performed immediately, or at

liability whatever as a stockholder, and that he should in no way suffer any loss or damage by reason of his connection with the company as a stockholder, is not a guaranty against loss sustained by reason of the stock becoming worthless in the market. *Morris v. Veach*, 111 Ga. 435, 36 S. E. 753.

In *Bullock v. Lewis*, 22 Colo. App. 449, 125 Pac. 849, an agreement by a broker through whom the plaintiff purchased stock to the effect that he would see that she did not lose by the transaction, was held to be a contract of indemnity against loss, or that, in case of loss, he would reimburse her to the extent of such loss, so that, in order to recover thereon, she must show a loss, and the extent of her recovery would be the loss sustained, measured by the difference between the highest value of the stock within a reasonable time after the purchase, and the amount paid for the stock, with interest, and less any dividends received, and that her failure to avail herself of opportunities to realize upon her investment within a reasonable time might be a good defense to her action.

⁷⁸ The purchase and payment for the stock is a sufficient consideration to support such an agreement. *Patrick v. Barker*, 78 Neb. 823, 112 N. W. 358.

⁷⁹ Where stock is purchased on condition that the person selling it for the corporation shall enter into an agreement to resell it, the detriment incurred by the purchaser in buying the stock is a sufficient consideration to support the agreement to repur-

chase. *Aken v. Clark*, 146 Iowa 436, 123 N. W. 379.

Where there is an absolute agreement to resell within a specified time at a specified price, a tender of the stock to the obligor for sale is unnecessary unless required by the contract. *Aken v. Clark*, 146 Iowa 436, 123 N. W. 379.

The fact that the purchaser might have sold the stock during the time specified for more than the specified price does not estop him from recovering damages for breach of such an agreement, since he was under no obligation to sell it. *Aken v. Clark*, 146 Iowa 436, 123 N. W. 379.

Evidence that the purchaser was for a time well satisfied with his purchase, and desired to secure a dividend, which he supposed had been declared, before parting with the stock, is immaterial in an action for breach of the contract to sell, in the absence of any evidence of revocation of such contract. *Aken v. Clark*, 146 Iowa 436, 123 N. W. 379.

An agreement by the promoters of a corporation with one who purchased stock from them that for every five shares of treasury stock sold by a fiscal agent appointed for that purpose he should sell one share belonging to such purchaser until the latter should be reimbursed for the amount paid by him for his stock, was held not to have been waived by the acts of the purchaser as a director in promoting the sale of treasury stock, or in giving an option for the sale of the stock purchased by him, which was not exercised. *Quinn v. Whitney*, 204 N. Y. 363, 97 N. E. 724, rehearing de-

least within a reasonable time.⁸⁰ If a note is given for the price of the stock, and the agreement is silent as to the time when the certificates are to be delivered, the law presumes that they are to be delivered on payment of the note.⁸¹

Actual delivery of the certificates is not necessarily essential to the passing of title.⁸² But the contract may in terms require their delivery, in which case the failure to deliver them constitutes a breach of the contract for which the purchaser may recover damages.⁸³ If no certificate has been issued the seller is not obliged to procure one to be issued to himself and transfer it to the buyer, nor to procure one to be issued directly to the buyer.⁸⁴ Delivery to one of two joint purchasers is delivery to both.⁸⁵

One who has contracted to sell and deliver shares of stock makes a good tender of performance when he tenders valid certificates of the stock, properly assigned by him, and accompanied by a power of attorney to transfer the same on the books of the corporation.⁸⁶ But a tender of a certificate indorsed in blank by a prior holder, and not by the seller, is not a good tender.⁸⁷

Of course the stock tendered in performance of the contract must be the stock contracted for.⁸⁸ A contract to transfer a certain number of shares in a corporation, in the absence of any specification, is performed by a delivery of any shares to the number agreed

nied 204 N. Y. 688, 98 N. E. 1113, rev'g 137 N. Y. App. Div. 106, 122 N. Y. Supp. 154.

⁸⁰ *California*. *Mason v. Lievre*, 145 Cal. 514, 78 Pac. 1040.

Indiana. *Bruce v. Smith*, 44 Ind. 1.

New York. *Cragin v. O'Connell*, 50 App. Div. 339, 63 N. Y. Supp. 1071, aff'd 169 N. Y. 573, 61 N. E. 1128; *Boehm v. Lies*, 60 N. Y. Super. Ct. 436.

Ohio. *Davis Laundry & Cleaning Co. v. Whitmore*, 92 Ohio St. 44, Ann. Cas. 1917 C 988, 110 N. E. 518.

South Carolina. *Kerchner v. Gettys*, 18 S. C. 521.

⁸¹ *Bloodworth v. Woodward*, 20 Ga. App. 570, 93 S. E. 221; *Prontaut v. H. C. Lorick & Co.*, 17 Ga. App. 495, 87 S. E. 716.

⁸² See § 3887, *supra*.

⁸³ *Markis v. Melis*, — Utah —, 167 Pac. 802.

⁸⁴ *Ford v. Howgate*, 106 Me. 517, 29 L. R. A. (N. S.) 734, 76 Atl. 939.

⁸⁵ *Fuehrman v. McCord*, 107 N. Y. App. Div. 12, 95 N. Y. Supp. 489, aff'd 186 N. Y. 566, 79 N. E. 1105.

⁸⁶ *McGowin v. Dickson*, 182 Ala. 161, 62 So. 685; *Bruce v. Smith*, 44 Ind. 1; *Duchemin v. Kendall*, 149 Mass. 171, 3 L. R. A. 784, 21 N. E. 242; *Noyes v. Spaulding*, 27 Vt. 420.

See also § 3785 et seq., *supra*.

⁸⁷ *Hare v. Waring*, 3 M. & W. 362.

⁸⁸ *Ortmann v. Fletcher*, 117 Mich. 501, 76 Atl. 63.

A contract to turn over all the stock of a corporation is performed where all the outstanding stock is transferred, the balance being in the treasury at the time of the transfer. *Dailey v. Devlin*, 21 N. Y. App. Div. 62, 47 N. Y. Supp. 296.

upon.⁸⁹ A tender of temporary receipts, exchangeable for permanent stock certificates when the latter should be engraved and ready to be issued, has been held to be sufficient.⁹⁰

A contract to deliver stock in a corporation is not performed by the delivery of spurious certificates of stock.⁹¹ A tender of stock of a corporation created under the laws of one state is not good under a contract for the sale of stock in a corporation to be created under the laws of another state.⁹² Nor is a contract to sell stock in a corporation to be formed with a capitalization of a specified amount fulfilled by a tender of stock of a corporation with a capitalization of a less amount.⁹³ Tender of preferred stock would not be good under a contract for the sale of common stock, and vice versa.⁹⁴ And it has been held that a tender of common stock in a corporation, which has also issued preferred stock, is not good under a contract to sell stock in the corporation made prior to its formation, and making no mention of preferred stock.⁹⁵ A purchaser of treasury stock cannot be compelled to accept stock belonging to an individual.⁹⁶

⁸⁹ *Noyes v. Spaulding*, 27 Vt. 420.

Where one is entitled to a certain number of shares issued to another, a demand therefor is satisfied by a transfer of the requisite number of shares in the same corporation, although not the identical shares demanded, the shares transferred being of the same value, and serving the same purposes. *Hardenbergh v. Bacon*, 33 Cal. 356.

⁹⁰ In *Gund v. Logan*, 187 Fed. 932, it was held that the tender of temporary receipts, which were to be exchanged for permanent stock certificates as soon as the latter were engraved and ready for delivery, was a sufficient compliance with the contract under the circumstances.

⁹¹ *Barnes v. Brown*, 80 N. Y. 527.

When the seller of stock tenders certificates issued by the corporation to the transferee, and the transfer is valid, the transferee's rights cannot be affected by irregularity in the issue of the certificates. *O'Rourke v. Schultz*, 23 Mont. 285, 58 Pac. 712.

⁹² *Craig Silver Co. v. Smith*, 163 Mass. 262, 39 N. E. 1116.

⁹³ *Faulkner v. Robinson* (Tex. Civ. App.), 70 S. W. 990.

Where a contract was that the plaintiff should receive a certificate of 10 shares of the stock of a corporation whose capital stock should be \$100,000, divided into not more than 200 shares, and a certificate was tendered of 10 shares of the stock of the company, of which only \$35,000 was paid in, divided into 70 shares, it was held that the tender was not a compliance with the contract, and that the rule of damages for breach of the contract was the value of 10 shares in the full capital stock, if it had been made up at the time stipulated, and the company had been then ready, in good faith, to operate upon such capital. *Dyer v. Rich*, 1 Mete. (Mass.) 180.

⁹⁴ *Knoxville, C. G. & L. R. Co. v. Knoxville*, 98 Tenn. 1, 37 S. W. 883; *McIlquham v. Taylor* [1895], 1 Ch. 53.

⁹⁵ *McIlquham v. Taylor* [1895], 1 Ch. 53.

⁹⁶ *Newhall v. Enterprise Min. Co.*, 205 Mass. 585, 137 Am. St. Rep. 461,

The shares must be those of the capital stock of the company as it was capitalized when the contract was made.⁹⁷ If the contract is for stock of the original issue carrying with it the right to share in a new issue distributed by way of a stock dividend, the buyer will not be required to accept stock of the new issue carrying no such right.⁹⁸

It will be taken to be the intention of the parties that the shares are to be transferred in their condition at the time of the bargain, where nothing to the contrary appears.⁹⁹

The seller must be able to give a good title to the stock, or a tender may be refused. Thus, the purchaser may refuse a tender where the stock has been attached or levied upon under execution.¹

Where a person agrees to sell stock to either of two persons, a sale to one of them will relieve him of any obligation to transfer to the other;² but the fact that one of such persons declines to take the stock will not relieve him from the obligation to sell it to the other.³

Any conduct on the part of the purchaser which prevents performance by the seller is an excuse for nonperformance by the latter.⁴

§ 3894. Payment. One who buys stock at an agreed price by implication of law agrees to pay the price.⁵ If he merely agrees to pay for the stock, the law implies a promise to pay its actual value or its market price, if it has a market price.⁶ But if the seller relies upon an express promise to pay a specific price in excess of the actual value of the stock, he must show that the minds of the parties met upon the particular price or amount claimed.⁷

If no time of payment is agreed upon, the law fixes the time of

91 N. E. 905; *Gray v. Reeves*, 69 Wash. 374, 125 Pac. 162.

⁹⁷ *Choate v. Beebe*, 143 N. Y. App. Div. 683, 128 N. Y. Supp. 78.

An agreement to sell "twenty-five shares of the five hundred shares of the capital stock" of a corporation was held to mean twenty-five shares of the capital stock of the company as it then was, and not merely a one-twentieth interest in the corporation, so that the seller was required to account to the purchaser for the stock at its then book value although the capital stock of the company was subsequently reduced. *Zohrlaut v. Mengelberg*, 144 Wis. 564, 124 N. W.

247, on rehearing 128 N. W. 975.

⁹⁸ *Feore v. Avent*, 4 Ala. App. 551, 58 So. 727.

⁹⁹ *Lafountain & Woolson Co. v. Brown*, — Vt. —, 101 Atl. 36.

¹ *Eastman v. Fiske*, 9 N. H. 182.

² *Russ v. Tuttle*, 158 Cal. 226, 110 Pac. 813.

³ *Russ v. Tuttle*, 158 Cal. 226, 110 Pac. 813.

⁴ *Kelly v. Fahrney*, 123 Fed. 280.

⁵ *Gilfallan v. Gilfallan*, 168 Cal. 23, Ann. Cas. 1915 D 784, 141 Pac. 623.

⁶ *Spratt v. Paulson*, 49 Utah 9, 161 Pac. 1120.

⁷ *Spratt v. Paulson*, 49 Utah 9, 161 Pac. 1120.

delivery as the time of payment,⁸ or implies that the payment was intended to be made within a reasonable time.⁹ If the contract provides for payment on performance of a condition in the future, and the purchaser renders the performance of the condition impossible, his obligation to pay at once becomes absolute.¹⁰

Payment is not necessarily essential to the passing of title, but it may be so under the terms of the contract.¹¹ Where payment in full is a condition precedent, part payment gives the purchaser no right to compel the seller to deliver the stock.¹²

If the contract provides for payment out of dividends declared on the stock, the purchaser is under no obligation to pay for it in any other way.¹³ Where a contract provides for the payment for services in stock, the payor has the option to pay in stock or in cash up to and including the time when payment is due; but upon failure to pay in stock on that date the obligation becomes one to pay in cash.¹⁴ The contract may give the purchaser the right to pay the full amount before the limit fixed within which full payment must be made.¹⁵

⁸ This rule applies where the time of payment of part of the price is specifically fixed and the time of the payment of the remainder is left unprovided for. *Gilfallan v. Gilfallan*, 168 Cal. 23, Ann. Cas. 1915 D 784, 141 Pac. 623.

If the time of delivery is postponed until the occurrence of some act to be done by the seller, the time of payment, unless otherwise provided for, will likewise be postponed. *Gilfallan v. Gilfallan*, 168 Cal. 23, Ann. Cas. 1915 D 784, 141 Pac. 623.

⁹ *Spratt v. Paulson*, 49 Utah 9, 161 Pac. 1120.

¹⁰ Where the purchasers of stock in an oil company agreed to pay part of the purchase price in cash and to pay the balance out of the proceeds of the sale of oil, and it was provided that if the property failed to produce enough oil to make the deferred payment, the stock should be returned to the vendor unless the vendee elected to pay the balance due, and the vendee sold the stock to an innocent pur-

chaser before the deferred payment was made, thereby putting it out of his power to return it to the vendor, it was held that his obligation to make the deferred payment in money at once became absolute. *Johnson v. Sharp*, 56 Tex. Civ. App. 80, 120 S. W. 518.

¹¹ See § 3887, *supra*.

¹² *Stockton v. Russell*, 54 Fed. 224.

¹³ *Stonebraker v. Littleton*, 119 Md. 173, 86 Atl. 150. In this case it was held that the contract did not require the payment of interest on the deferred payments.

The burden of proving an agreement that the balance due on notes given for the purchase price of stock was to be paid out of dividends on the stock and not otherwise, is on the purchaser who sets it up as a defense to an action on such notes. *McVay v. Reese*, 62 Wash. 562, 114 Pac. 184.

¹⁴ *Wheeler v. Ocker & Ford Mfg. Co.*, 162 Mich. 204, 127 N. W. 332.

¹⁵ *McMillen v. Strange*, 159 Wis. 271, 150 N. W. 434.

The purchaser may recover overpayments made as a result of a mutual mistake of fact in an action for money had and received.¹⁶ And if a condition in the contract is not performed by the vendor, the purchaser may recover a part payment made by him prior to the time for performance of the condition.¹⁷

§ 3895. Tender and demand. In order to recover the contract price it must appear that the seller was able, ready and willing to turn over the stock to the buyer.¹⁸ If the conditions and promises of the parties are concurrent and dependent, neither party can require the other to perform without first offering to perform himself.¹⁹ Generally a valid tender is necessary to put the purchaser in default, and to entitle the seller to maintain an action on the contract.²⁰ But "if the contract contemplates concurrent acts, it

¹⁶ Where the stock is to be bought at its book value, and there is an overpayment as a result of a mistake in arriving at such value. *Jenemann v. Bucher*, 186 Mo. App. 179, 171 S. W. 613.

¹⁷ *Lovell v. Jacobs*, 150 N. Y. 84, 44 N. E. 792.

¹⁸ *Hershey v. Welch*, 96 Minn. 145, 104 N. W. 821.

Where a note is executed and delivered to a bank to pay for stock which the latter is to secure for and deliver to the maker, with the understanding that otherwise it is to be returned to the maker, and the stock is never delivered, the note is not the property of the bank, and it cannot recover thereon. *First Nat. Bank of Wellington v. Wich*, 62 Colo. 119, 160 Pac. 1036.

The retention of the stock by the seller as collateral security for notes given for the purchase price is no reason why payment cannot be enforced, where the stock has at all times been ready for delivery on payment of the notes. *McVay v. Reese*, 62 Wash. 562, 114 Pac. 184.

A pledgor of stock, where he holds the legal title, may make a valid sale of it although it is in the possession

of the pledgee, where it conclusively appears that he can obtain possession of the certificate at any time upon payment of his indebtedness to the pledgee. *Hershey v. Welch*, 96 Minn. 145, 104 N. W. 821.

¹⁹ *Sherman v. Shaughnessy*, 148 Mo. App. 679, 129 S. W. 245; *Kohlmetz v. Calkins*, 16 N. Y. App. Div. 518, 44 N. Y. Supp. 1031; *Astoria & S. C. R. Co. v. Hill*, 20 Ore. 177, 25 Pac. 379; *Barnard v. Tidrick*, 35 S. D. 403, 152 N. W. 690. See also *Stokes v. Foote*, 172 N. Y. 327, 65 N. E. 176, rev'g judgment 49 N. Y. App. Div. 302, 63 N. Y. Supp. 887.

"The conditions and promises assented to by the company in the purchase of treasury stock are concurrent and dependent, so that neither party can require the other to perform without first offering to perform himself." *Sherman v. Shaughnessy*, 148 Mo. App. 679, 129 S. W. 245.

²⁰ **California.** *Nicholls v. Reid*, 109 Cal. 630, 42 Pac. 298.

Connecticut. *Litchfield Sav. Society v. Dibble*, 80 Conn. 128, 67 Atl. 476.

Georgia. See *Fulgam v. Macon & B. R. Co.*, 44 Ga. 597.

Illinois. *Moyses v. Schendorf*, 238

is sufficient to put one party in default that the other party is ready, willing, and offers to perform."²¹ So where the transfer of the stock and the payment for the same are intended to be mutual and con-

Ill. 232, 87 N. E. 401, aff'g 142 Ill. App. 293.

Indiana. Newman v. Horner, 55 Ind. App. 298, 103 N. E. 820; Atkins v. Kattman, 50 Ind. App. 233, 97 N. E. 174.

Iowa. Hamilton v. Finnegan, 117 Iowa 623, 91 N. W. 1039.

Massachusetts. Craig Silver Co. v. Smith, 163 Mass. 262, 39 N. E. 1116.

Minnesota. See Marson v. Deither, 49 Minn. 423, 52 N. W. 38.

Missouri. Sherman v. Shaughnessy, 148 Mo. App. 679, 129 S. W. 245.

Nebraska. Bartlett v. Scott, 55 Neb. 477, 75 N. W. 1102.

New York. Ketchum v. Alexander, 168 App. Div. 38, 153 N. Y. Supp. 864; Security Title & Trust Co. of York, Pennsylvania v. Stewart, 154 App. Div. 434, 139 N. Y. Supp. 74; Kohlmetz v. Calkins, 16 App. Div. 518, 44 N. Y. Supp. 1031.

Oregon. Astoria & S. C. R. Co. v. Hill, 20 Ore. 177, 25 Pac. 379.

South Dakota. Tuthill v. Sherman, 36 S. D. 237, 154 N. W. 518; Id. 165 N. W. 4; Barnard v. Tidrick, 35 S. D. 403, 152 N. W. 690.

England. Hare v. Waring, 3 M. & W. 362.

There can be no breach of an option contract by the seller until the buyer exercises the option and tenders performance. An allegation that the plaintiff is desirous of paying up, and here offers to pay up, what may be due for the stock is insufficient to sustain an action at law for damages for breach of the contract. Harle v. Brennig, 131 N. Y. App. Div. 742, 116 N. Y. Supp. 51.

Where an option contract specifies no place of performance, it is incumbent on the person to whom it runs to

tender performance at the time specified. Dittenfass v. Horsley, 177 N. Y. App. Div. 143, 163 N. Y. Supp. 626.

Where the purchaser has a right to take the stock at any time before a specified date, a tender is necessary to execute the contract and pass the title. Mere lapse of the time specified will not have that effect unless the contract shows a contrary intent. Tuthill v. Sherman, 36 S. D. 237, 154 N. W. 518; Id. — S. D. —, 165 N. W. 4.

When the purchaser of stock objects to a tender of the certificates merely on the ground that they have been attached by a creditor of the former owner, he cannot afterwards object to the tender on the ground of irregularities in the issue of the certificates. O'Rourke v. Schultz, 23 Mont. 285, 58 Pac. 712.

Where the fact that one who has contracted to sell certificates of stock does not have them with him at the time he offers to deliver them to the purchaser is known to the purchaser, and he does not object on that ground, but refuses to accept them on the ground that he is under no obligation to take them, a more formal tender is not necessary. West v. Averill Grocery Co., 109 Iowa 488, 80 N. W. 555.

To keep good a tender of stock by the seller, he must be able and willing at all times between the tender and the trial to deliver the stock tendered, although the tender has been refused, and no demand has been made for delivery of the stock. Ortman v. Fletcher, 117 Mich. 501, 76 N. W. 63.

²¹ Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, aff'g 111 Ill. App. 606.

current acts, the seller is not bound to make a tender in the sense of offering the stock to the buyer unconditionally, but it is sufficient to put the buyer in default that the seller is ready, willing and offers to perform his part of the contract, provided the buyer will concurrently perform his part.²² An offer or tender is not necessary where, by the terms of the contract, the seller is bound to deliver the stock only "when called for" and it has never been called for. Proof that he was ready and willing to deliver the stock is sufficient under such circumstances.²³ In some jurisdictions no tender is necessary after the breach if the seller elects to hold the stock for the purchaser and sue for the contract price.²⁴ If the purchaser under an executory contract has a right to take the stock at any time before a specified date, at his option, a tender before that time will not operate to vest title in him unless it is accepted.²⁵

No tender need be made where it clearly appears that it would be useless, as where the buyer repudiates the contract and refuses to take and pay for the stock.²⁶ But even under such circumstances the seller cannot recover the purchase price without at least tender-

²² *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869, aff'g 111 Ill. App. 606.

Where the contract provides that if the defendant has not made a tender of a certain sum on or before a certain date he shall be obliged to accept the stock at an agreed price, no tender is necessary to enable the other party to recover the agreed price, since the most that can be said is that delivery and payment are to be concurrent. *Prest v. Cole*, 183 Mass. 283, 67 N. E. 246.

Where the contract is silent as to the time when the certificates are to be delivered, the law presumes that they are to be delivered on payment of a note given for the purchase price, and it is no defense to an action on the note that the stock was not tendered to the purchaser prior to its maturity. *Bloodworth v. Woodward*, 20 Ga. App. 570, 93 S. E. 221; *Prontaut v. H. C. Lorick & Co.*, 17 Ga. App. 495, 87 S. E. 716.

Where, on a sale of stock, the stock is to be held as collateral to the note given for the price, the seller need

not tender the stock or make a formal transfer thereof on the books of the company until payment or tender of payment of the note. *James v. Hamilton*, 2 Hun (N. Y.) 630.

²³ *Weymouth v. Goodwin*, 105 Me. 510, 75 Atl. 61.

²⁴ *McGowin v. Dickson*, 182 Ala. 161, 62 So. 685; *Cowan v. De Hart*, 84 N. Y. Supp. 576.

²⁵ *Tuthill v. Sherman*, 36 S. D. 237, 154 N. W. 518; *Id.* — S. D. —, 165 N. W. 4.

²⁶ *California*. *Eames v. Haver*, 111 Cal. 401, 43 Pac. 1120.

Illinois. *Moyses v. Schendorf*, 238 Ill. 232, 87 N. E. 401, aff'g 142 Ill. App. 293; *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869, aff'g 111 Ill. App. 606; *Kincaid v. Overshiner*, 171 Ill. App. 37.

Indiana. *Newman v. Horner*, 55 Ind. App. 298, 103 N. E. 820.

Massachusetts. *Willett v. Smith*, 214 Mass. 494, 101 N. E. 1058.

Missouri. See *Lebrecht v. Nellist*, 184 Mo. App. 335, 171 S. W. 11.

New York. *Stokes v. Mackay*, 147

ing the stock into court to be turned over to the purchaser when he pays the money, either voluntarily or through execution.²⁷ A tender is not excused because the corporation has become bankrupt and the stock is therefore worthless.²⁸

Generally a tender, to be sufficient, must be unconditional.²⁹ But it is not invalidated by being coupled with a condition which the party making it has a right to impose, and to which the other party cannot reasonably object.³⁰ Of course the stock tendered must be the particular stock called for by the contract.³¹

The purchaser cannot recover for failure of the seller to deliver the stock, where he fails to show an offer on his own part to perform, or even that he was able and willing to perform.³² And generally he must make a tender of the amount due before he can maintain an action for breach of the contract.³³ But neither a tender nor an offer of performance is necessary where the seller has repudiated the contract.³⁴ And where the dividends declared on stock remaining in the possession of the seller are to be applied on the purchase price, and the seller refuses to disclose to the buyer the

N. Y. 223, 41 N. E. 496; *Maguire v. Halsted*, 18 App. Div. 228, 45 N. Y. Supp. 783.

Pennsylvania. *Mobley v. Morgan*, 6 Atl. 694.

Wyoming. See *Kuhn v. McKay*, 7 Wyo. 42, 51 Pac. 205, 49 Pac. 473.

The bringing of the certificate into court for delivery to the purchaser is sufficient under such circumstances. *Kincaid v. Overshiner*, 171 Ill. App. 37.

²⁷ *Lebrecht v. Nellist*, 184 Mo. App. 335, 171 S. W. 11. See also *Kincaid v. Overshiner*, 171 Ill. App. 37.

²⁸ *Litchfield Sav. Society v. Dibble*, 80 Conn. 128, 67 Atl. 476.

²⁹ *Newman v. Horner*, 55 Ind. App. 298, 103 N. E. 820.

³⁰ So where the transfer of the stock is dependent on payment therefor according to the terms of the contract, a tender on condition that such payment be made is good. *Newman v. Horner*, 55 Ind. App. 298, 103 N. E. 820. See also *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869, aff'g 111 Ill. App. 606.

³¹ See § 3893, *supra*.

³² *Butterfield v. Harris*, 20 Cal. App. 471, 129 Pac. 614; *Phelan v. Jones*, 114 N. Y. Supp. 9.

If the purchaser testifies that he was ready, able and willing to pay for the stock, the defendant may show his financial condition for the purpose of showing that he was not able to pay for it. *Garner v. Kratzer*, 173 Iowa 292, 155 N. W. 296.

³³ *Brinley v. Nevins*, 162 N. Y. App. Div. 744, 147 N. Y. Supp. 985.

A demand by the purchaser for delivery, authorizing the seller to draw on him for the price, is equivalent to a tender and demand, where the seller does not object to the method of payment tendered, for the purpose of fixing the date of the breach. *Sloan v. McKane*, 131 N. Y. App. Div. 244, 115 N. Y. Supp. 648.

³⁴ *Butterfield v. Harris*, 20 Cal. App. 471, 129 Pac. 614; *Brinley v. Nevins*, 162 N. Y. App. Div. 744, 147 N. Y. Supp. 985.

amount of dividends he has received, the buyer is excused from tendering the balance due, since he is in no position to do so.³⁵

Where no time is fixed for delivery, a demand is necessary in order to put the seller in default.³⁶ But a demand at the place fixed for delivery may be waived by the seller.³⁷ Nor need a demand be shown where it appears that the seller did not have the stock ready to deliver.³⁸

§ 3896. Rescission of contract—Right to rescind in general. A contract for the sale of stock may be rescinded for fraud,³⁹ undue influence,⁴⁰ duress⁴¹ or a mistake of fact.⁴² And it may be rescinded, under some circumstances, for want or failure of consideration.⁴³

³⁵ *Garner v. Kratzer*, 163 Iowa 559, 145 N. W. 72.

³⁶ *Spencer v. Hardin*, 149 N. Y. App. Div. 667, 134 N. Y. Supp. 373.

³⁷ *Kuhn v. McKay*, 7 Wyo. 42, 51 Pac. 205, 49 Pac. 473.

³⁸ *Kuhn v. McKay*, 7 Wyo. 42, 51 Pac. 205, 49 Pac. 473.

³⁹ See § 3879, *supra*.

⁴⁰ *Bannon v. Louisville Trust Co.*, 150 Ky. 401, 150 S. W. 510.

⁴¹ *Harris v. Cary*, 112 Va. 362, Ann. Cas. 1913A 1350, 71 S. E. 551.

Uniform Stock Transfer Act, § 7. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Wisconsin and Alaska.

⁴² *United States*. *Hallett v. New England Roller-Grate Co.*, 105 Fed. 217, judgment rev'd on other grounds 119 Fed. 873.

Colorado. See *Moore v. Carrick*, 26 Colo. App. 97, 140 Pac. 485.

Kentucky. *Neale v. Wright*, 130 Ky. 146, 112 S. W. 1115.

Minnesota. *Fawkes v. Knapp*, 138 Minn. 384, 165 N. W. 236.

New York. *Canadian Agency v. Assets Realization Co.*, 165 App. Div. 96, 150 N. Y. Supp. 758. See also *L. D. Garrett Co. v. Astor*, 67 App. Div. 595, 73 N. Y. Supp. 966.

Texas. See *Bolton v. Prather*, 35 Tex. Civ. App. 295, 80 S. W. 666.

Uniform Stock Transfer Act, § 7. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Wisconsin and Alaska.

A mistake of law is not ground for rescission. *Merritt v. Morris*, 132 Ala. 190, 31 So. 477; *Rogan v. Illinois Trust & Savings Bank*, 93 Ill. App. 39, aff'd 194 Ill. 600, 62 N. E. 834; *Daly v. Brennan*, 87 Wis. 30, 57 N. W. 963.

But a mistake as to the law of another state may be regarded as a mistake of fact. *Hallett v. New England Roller-Grate Co.*, 105 Fed. 217, judgment rev'd on other grounds 119 Fed. 873; *Daly v. Brennan*, 87 Wis. 36, 57 N. W. 963.

⁴³ *United States*. See *Hallett v. New England Roller-Grate Co.*, 105 Fed. 217, judgment rev'd on other grounds 119 Fed. 873.

Arizona. *Hurley v. Wilky*, 18 Ariz. 270, 158 Pac. 639, 18 Ariz. 45, 156 Pac. 88.

Montana. See *Cotter v. Butte & Ruby Valley Smelting Co.*, 31 Mont. 129, 77 Pac. 509.

Oregon. See *McMillan v. Batten*, 52 Ore. 218, 96 Pac. 675.

Texas. *Le Master v. Hailey*, — Tex. Civ. App. —, 176 S. W. 818.

See also § 3858, *supra*.

The purchaser may rescind if, without his knowledge, the corporation had been dissolved or its charter has expired at the time the contract was made.⁴⁴ He may also rescind and recover back what he has paid if the seller breaches the contract,⁴⁵ as where he fails to deliver the stock,⁴⁶ or to perform conditions precedent,⁴⁷ or where the stock delivered is not of the kind contracted for,⁴⁸ or where he is induced to purchase the stock by an agreement or undertaking made on the seller's behalf by the seller's agent who negotiates the sale, and which is afterwards repudiated by the seller on the ground that the agent had no authority to make it.⁴⁹

The fact that the corporation has issued watered stock, or mortgaged its property, or otherwise been guilty of ultra vires acts, gives one who has contracted to purchase stock therein no right to rescind.⁵⁰ Nor can the purchaser of stock rescind on the ground that the corporation was insolvent at the time the contract was made,⁵¹ where the seller was guilty of no false and fraudulent representations; or, in the absence of fraud, because the property of the corporation is of no value;⁵² or because of loss of property by the corporation;⁵³ or because the price paid for the stock was inadequate, unless the in-

⁴⁴ *Scott v. Davis*, — Mo. App. —, 200 S. W. 723; *Kip v. Monroe*, 29 Barb. (N. Y.) 579.

⁴⁵ *Kinser v. Cowie*, 235 Ill. 383, 126 Am. St. Rep. 221, 85 N. E. 623, aff'g 138 Ill. App. 143; *Cary v. Leszynsky*, 184 Mass. 44, 67 N. E. 637; *Watkins v. Record Photographing Abstract Co.*, 76 Ore. 421, 149 Pac. 478.

He may rescind the contract and sue in assumpsit for the recovery of the sum paid as money had and received. *Watkins v. Record Photographing Abstract Co.*, 76 Ore. 421, 149 Pac. 478.

⁴⁶ *Kinser v. Cowie*, 235 Ill. 383, 126 Am. St. Rep. 221, 85 N. E. 623, aff'g 138 Ill. App. 143; *Cary v. Leszynsky*, 184 Mass. 44, 67 N. E. 637. See also *Bank of Bakersfield v. Conner*, 29 Cal. App. 153, 154 Pac. 869.

⁴⁷ *Meinershagen v. Taylor*, 169 Mo. App. 12, 154 S. W. 886.

⁴⁸ *Newhall v. Enterprise Min. Co.*, 205 Mass. 585, 137 Am. St. Rep. 461, 91 N. E. 905.

⁴⁹ *Southern Loan & Trust Co. v. Gis-*

sendaner, 4 Ala. App. 523, 58 So. 737; *Dennette v. Boston Securities Co.*, 206 Mass. 401, 92 N. E. 498; *Lancaster v. Southern Life Ins. Co.*, 89 S. C. 179, 71 S. E. 864.

⁵⁰ *Noyes v. Spaulding*, 27 Vt. 420; *Faulkner v. Hebard*, 26 Vt. 452.

⁵¹ *Rudge v. Bowman*, L. R. 3 Q. B. 689. And see *Gordon v. Parker*, 10 La. 56.

⁵² *Watts v. Stevenson*, 165 Mass. 518, 43 N. E. 497.

One who purchases stock in a corporation for the purpose of getting control of a patent owned by it cannot rescind because of a claim by a third person that machines manufactured under such patent infringed his patent, and threatened infringement suits, where there was no fraud and the purchaser had knowledge of the facts. *United States Fire Apparatus Co. v. G. W. Baker Mach. Co.*, 10 Del. Ch. 421, 95 Atl. 294.

⁵³ *Kerchner v. Gettys*, 18 S. C. 521.

adequacy is so gross as to shock the conscience and to amount in itself to conclusive and decisive evidence of fraud;⁵⁴ or because the stock is not pecuniarily worth what the purchaser supposed it to be;⁵⁵ or has turned out to be of little or no value,⁵⁶ or has depreciated or become worthless since the contract was made;⁵⁷ or because the corporation has been consolidated with another, where the consolidation was authorized by its charter;⁵⁸ or because the corporation has allowed stockholders who paid a less amount for their shares an equal share of the profits with those paying full value, and has thereby lessened the value of the latter's shares, including those which are the subject of the contract.⁵⁹

The seller of stock cannot rescind because notes given in payment are not paid,⁶⁰ unless payment is expressly made a condition precedent to the purchasers' right to the stock.⁶¹ Where part of the stock sold is delivered, and the seller afterwards refuses to deliver the balance, the purchaser cannot rescind.⁶² But the seller may rescind and recover back his stock if the purchaser repudiates the contract.⁶³ Of course the contract may be rescinded by mutual consent of the parties;⁶⁴ and it may in terms give the purchaser the right to rescind within a specified time.⁶⁵ If the seller rescinds, the purchaser is entitled to recover what he has paid.⁶⁶

⁵⁴ *Steinfeld v. Nielsen*, 15 Ariz. 424, 139 Pac. 879, 12 Ariz. 381, 100 Pac. 1094; *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636.

⁵⁵ *Furber v. Fogler*, 97 Me. 585, 55 Atl. 514.

⁵⁶ *Peck Colorado Co. v. Stratton*, 95 Fed. 741; *Renton v. Maryott*, 21 N. J. Eq. 123.

Because the property of the corporation did not prove of the value the purchaser expected, and its operations were unprofitable, resulting in a loss to him. *Hill v. Dillon*, 176 Mo. App. 192, 161 S. W. 881.

⁵⁷ *Litchfield Sav. Society v. Dibble*, 80 Conn. 128, 67 Atl. 476; *Goad v. Lewis*, 174 Ky. 394, 192 S. W. 30; *Furber v. Fogler*, 97 Me. 585, 55 Atl. 514; *Moore v. Caldwell*, 8 Rich. Eq. (S. C.) 22.

⁵⁸ *Noyes v. Spaulding*, 27 Vt. 420.

⁵⁹ *Faulkner v. Hebard*, 26 Vt. 452.

⁶⁰ *A. D. Smith & Sons v. Securities*

Co. of America, — Ala. —, 73 So. 892; *Chater v. San Francisco Sugar Refining Co.*, 19 Cal. 219.

⁶¹ *Davison v. Davis*, 125 U. S. 90, 31 L. Ed. 635; *A. D. Smith & Sons v. Securities Co. of America*, — Ala. —, 73 So. 892.

⁶² *Matthews v. Cady*, 61 N. Y. 651.

⁶³ *Clarke v. Borough Asphalt Co.*, 93 N. Y. Misc. 662, 157 N. Y. Supp. 581.

⁶⁴ *Conger v. Lee*, 175 Iowa 423, 157 N. W. 240.

⁶⁵ See § 3891, *supra*.

⁶⁶ *McVity v. E. D. Albro Co.*, 90 N. Y. App. Div. 109, 86 N. Y. Supp. 144, *aff'd* 180 N. Y. 554, 73 N. E. 1126.

Where certain stockholders contract to sell stock which they individually own, the fact that, being officers, they also sign the name of the corporation does not render the corporation liable for the amount of payments made by the purchaser, on rescission by the

§ 3897. — Limitations on the right to rescind. A person cannot rescind a part of the contract, but must rescind in toto, if at all.⁶⁷

Ordinarily the party seeking to rescind must restore or offer to restore to the other party what he has received under the contract.⁶⁸ But it is generally held that the purchaser need not tender back the certificates where the stock is of no value.⁶⁹

A party to a contract for the purchase of stock may, of course, be barred from maintenance of action for rescission by laches.⁷⁰ He must act promptly, and must repudiate the contract within a reasonable time after discovery of the facts entitling him to do so.⁷¹ But

sellers, the corporation and its members being distinct entities. *Home Elec. Light & Power Co. v. Collins*, 31 Ind. App. 493, 66 N. E. 780.

⁶⁷ *Daly v. Brennan*, 87 Wis. 36, 57 N. W. 963.

For applications of this rule where rescission is sought on the ground of fraud, see § 3882, *supra*.

⁶⁸ *Iowa*. See *Doughty v. Law*, 178 Iowa 226, 160 N. W. 226.

Massachusetts. *Dennette v. Boston Securities Co.*, 206 Mass. 401, 92 N. E. 498.

Missouri. *Meinershagen v. Taylor*, 169 Mo. App. 12, 154 S. W. 886; *Donovan v. McDermott*, 108 Mo. App. 533, 84 S. W. 153.

Montana. *Cotter v. Butte & R. Val. Smelting Co.*, 31 Mont. 129, 77 Pac. 509.

Oregon. *McMillan v. Batten*, 52 Ore. 218, 96 Pac. 675.

If an action or defense is based on a rescission for a total failure of consideration, the buyer must account for what he obtained for the alleged worthless article. If he has sold it at a profit, he has sustained no damage. *McMillan v. Batten*, 52 Ore. 218, 96 Pac. 675.

For applications of this rule where rescission is sought on the ground of fraud, see § 3880, *supra*.

⁶⁹ *Avery v. Cullen*, 15 Cal. App. 413, 114 Pac. 1022; *State Bank of Indiana v. Cook*, 125 Iowa 111, 100 N. W. 72.

In an action to recover the purchase price of stock bought from the corporation which had been held to be invalid because issued for less than par, it was held sufficient that the certificates had been brought into court so that they could be surrendered to the corporation and it could thus be protected against any danger of being estopped to deny their validity. *Hallett v. New England Roller-Grate Co.*, 105 Fed. 217, judgment rev'd on other grounds 119 Fed. 873.

See also § 3880, *supra*.

⁷⁰ *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32; *Clarke v. Borough Asphalt Co.*, 93 N. Y. Misc. 662, 157 N. Y. Supp. 581.

Uniform Stock Transfer Act, § 7. This act is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Wisconsin and Alaska.

For applications of this rule where rescission is sought on the ground of fraud, see § 3881, *supra*.

⁷¹ *Meinershagen v. Taylor*, 169 Mo. App. 12, 154 S. W. 886; *Cotter v. Butte & R. Val. Smelting Co.*, 31 Mont. 129, 77 Pac. 509; *Clarke v. Borough Asphalt Co.*, 93 N. Y. Misc. 662, 157 N. Y. Supp. 581; *Paulson v. Weeks*, 80 Ore. 468, 157 Pac. 590.

For applications of this rule where rescission is sought on the ground of fraud, see § 3881, *supra*.

where the statute of limitations is not pleaded, mere delay is no bar to an action at law for money had and received brought by the purchaser of stock to recover back what he has paid.⁷²

Accepting the benefits of the contract with knowledge of facts justifying a rescission constitutes a ratification of the contract, and a waiver of the right to rescind.⁷³ Nor can a purchaser who elects to continue his demand for performance after a breach by the seller, and brings an action to enforce delivery of the stock, recall his payment of the purchase price even though delivery and payment were to be concurrent acts.⁷⁴

Equity will not grant relief to one who does not come into court with clean hands.⁷⁵

§ 3898. Remedies for breach of the contract—In general. The remedies of the parties in case of the breach of a contract for the sale of stock in a corporation are substantially the same as in the case of a contract for the sale of any other personal property, and a full treatment of the subject, therefore, does not properly come within the scope of a work on the law of corporations, and will not be attempted.⁷⁶

If the seller of stock has delivered the same, he may maintain an action for the price agreed upon.⁷⁷ If the stock has not been deliv-

⁷² *Hallett v. New England Roller-Grate Co.*, 119 Fed. 873, rev'g 105 Fed. 217.

⁷³ *Scott v. Davis*, — Mo. App. —, 200 S. W. 723; *Meinershagen v. Taylor*, 169 Mo. App. 12, 154 S. W. 886; *Clarke v. Borough Asphalt Co.*, 93 N. Y. Misc. 662, 157 N. Y. Supp. 581.

Where the purchaser accepts the certificate after knowledge of a breach, he cannot thereafter rescind because of such breach. *Brown v. O. F. Jonasson & Co.*, 108 N. Y. Supp. 996.

For applications of this rule where rescission is sought on the ground of fraud, see § 3882, *supra*.

⁷⁴ *Bank of Bakersfield v. Conner*, 29 Cal. App. 153, 154 Pac. 869.

⁷⁵ Equity will not rescind a contract to purchase stock of a corporation organized for the purpose of conducting horse races and bookmaking on

such races, and thereby fleecing the general public, if the venture turns out to be unprofitable, where the purchaser knew of the unlawful purpose when he made the contract. *Ryan v. Miller*, 236 Mo. 496, Ann. Cas. 1912 D 540, 139 S. W. 128.

⁷⁶ See standard works on sales.

⁷⁷ *Botsford v. Heney*, 12 Cal. App. 380, 107 Pac. 593; *Pounds v. Coburn*, 210 Mo. 115, 107 S. W. 1080.

Where the seller has placed the stock in escrow to be delivered on payment of the price, he may sue for the price if the purchaser refuses to pay it. *Obery v. Lander*, 179 Mass. 125, 60 N. E. 378.

“Where there is a dispute between the parties as to the agreed price, evidence of the value of the stock is competent as bearing on the probability of the respective contentions.” Whether or not the corporation has

ered, and the purchaser refuses to receive the same, the seller may keep it as his own, and maintain an action to recover damages for the purchaser's breach of contract. Ordinarily the measure of his damages will be the difference between the market price of the stock at the time and place fixed for delivery and the contract price.⁷⁸ The seller may sell the stock, within a reasonable time after the purchaser's refusal to take the same, at the best price obtainable, and recover from the purchaser the difference between the price received and the contract price.⁷⁹ If the stock has no market value at the

ever paid a dividend, and whether the purchaser at the time knew the actual value of the stock, are relevant facts within this rule. *Duggan v. Williams*, 153 N. Y. Supp. 230. See also *McIntosh v. McNair*, 53 Ore. 87, 99 Pac. 74.

In an action to recover a balance due on a contract for the sale of stock, the evidence was held not to show an agreement that money advanced to the corporation should be credited on the price. *Clough v. Monro*, 86 Wash. 507, 150 Pac. 1190.

Where stock bought by individuals is to be paid for in part by a contract and a mortgage to be executed by the corporation, which are executed and delivered, the seller cannot recover the part of the consideration represented by them in money on the ground that the corporation had no authority to make them. *Hess v. Riech*, 78 N. J. L. 645, 75 Atl. 925.

The purchaser of stock in a re-organized corporation from an original subscriber is liable to the seller for exactly what he agreed to pay for it, no more and no less, regardless of the extent of the liability of either to corporate creditors. *Munson v. Gunder*, 70 Wash. 629, 127 Pac. 193.

⁷⁸ **Arkansas.** *Eustice v. Meytrott*, 100 Ark. 510, 140 S. W. 590.

California. *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926.

Delaware. *G. W. Baker Mach. Co. v. United States Fire Apparatus Co.*,

97 Atl. 613, rev'g judgment 10 Del. Ch. 421, 95 Atl. 294.

Iowa. *Hamilton v. Finnegan*, 117 Iowa 623, 91 N. W. 1039.

Maryland. *Tyng & Co. v. Woodward*, 121 Md. 422, 88 Atl. 243.

Michigan. *Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329.

New Hampshire. *Rand v. White Mountains R. R.*, 40 N. H. 79.

New York. *Wildes v. Robinson*, 50 App. Div. 192, 63 N. Y. Supp. 811.

Pennsylvania. *Flannery v. Wessels*, 244 Pa. 321, 90 Atl. 715; *Corser v. Hale*, 149 Pa. St. 274, 24 Atl. 285; *Mobley v. Morgan*, 6 Atl. 694.

The value of the stock at the time of the breach is the proper criterion for determining the damages. *Sibley v. Barclay*, 14 Ala. App. 422, 70 So. 201, certiorari denied *Ex parte Barclay* (Ala.), 70 So. 1012 (mem. dec.).

⁷⁹ **United States.** *Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1183, rev'g judgment 96 Fed. 648.

California. *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926.

Delaware. *G. W. Baker Mach. Co. v. United States Fire Apparatus Co.*, 97 Atl. 613, rev'g judgment 10 Del. Ch. 421, 95 Atl. 294.

Iowa. *Hamilton v. Finnegan*, 117 Iowa 623, 91 N. W. 1039.

Maryland. *Woodward v. Dudley A. Tyng & Co.*, 123 Md. 98, 91 Atl. 166; *Tyng & Co. v. Woodward*, 121 Md. 422, 88 Atl. 243.

time of the purchaser's breach of the contract, the seller may recover the full contract price.⁸⁰ And the same is true where the stock has been lost to the seller by reason of the breach;⁸¹ or where the contract is one whereby the seller is to be paid a specified sum for a particular

Minnesota. *Sherwood v. Graham*, 106 Minn. 542, 118 N. W. 1011.

Montana. *Raiche v. Morrison*, 47 Mont. 127, 130 Pac. 1074; *Welch v. Nichols*, 41 Mont. 435, 110 Pac. 89.

Pennsylvania. *Flannery v. Wessels*, 244 Pa. 321, 90 Atl. 715; *Mobley v. Morgan*, 6 Atl. 694.

England. *Pott v. Flather*, 16 L. J. Q. B. 366; *Stewart v. Cauty*, 8 M. & W. 160.

The contract sometimes contains a specific provision to this effect. *Sherwood v. Graham*, 106 Minn. 542, 118 N. W. 1011.

The vendor must exercise his right of resale in good faith and at such time and by such methods as are most likely to produce the fair value of the property, and the burden is on him to show that it was so exercised. Whether he has exercised reasonable diligence in the conduct of the resale is a question of law for the court on facts to be found by the jury. *Woodward v. Dudley A. Tyng & Co.*, 123 Md. 98, 91 Atl. 166; *Tyng & Co. v. Woodward*, 121 Md. 422, 88 Atl. 243.

The resale need not necessarily be made on the stock exchange or at public auction. *Woodward v. Dudley A. Tyng & Co.*, 123 Md. 98, 91 Atl. 166; *Tyng & Co. v. Woodward*, 121 Md. 422, 88 Atl. 243.

The vendor need not notify the vendee of the time and place of sale, but it is sufficient if he notifies him of his intention to make it. *Woodward v. Dudley A. Tyng & Co.*, 123 Md. 98, 91 Atl. 166; *Tyng & Co. v. Woodward*, 121 Md. 422, 88 Atl. 243.

The proper action to recover the difference is one for damages. A common count for goods bargained and

sold will not lie. *Tyng & Co. v. Woodward*, 121 Md. 422, 88 Atl. 243.

Under the Montana statute the seller may sell the stock as a pledge at public auction, in which case his measure of damages is the difference between the contract price and the net proceeds of the sale, or he may sell it as his own in the market at the best available price, in which case his measure of damages is the difference between the contract price and the value of the stock to him, together with any excess of the amount of expense incurred in getting it to market over and above what such expense would have been had the buyer accepted it. The value of the property to the seller is deemed to be the price which he could have obtained for it in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach as would have sufficed, with reasonable diligence, for the seller to effect a resale. *Raiche v. Morrison*, 47 Mont. 127, 130 Pac. 1074; *Welch v. Nichols*, 41 Mont. 435, 110 Pac. 89.

⁸⁰ *Mobley v. Morgan (Pa.)*, 6 Atl. 694.

This is true where the stock has become worthless before the time of delivery. *Flannery v. Wessels*, 244 Pa. 321, 90 Atl. 715.

⁸¹ As where the purchaser agrees to purchase the stock when the seller recovers it from a pledgee, it being contemplated that the latter's lien shall be paid off by the purchaser, but the purchaser refuses to take it, and he, and the pledgee buy it on foreclosure of the lien. *Lydon v. Sullivan*, 31 Ky. L. Rep. 227, 101 S. W. 940.

block of stock, and its purpose is to end his connection with the company, and not one merely giving the purchaser a right to the specified number of shares of any stock.⁸² In some jurisdictions it is held that if the contract is executed the seller may retain the stock, after a tender, for the purchaser, and maintain an action for the agreed price.⁸³ The contract may give the seller the option to declare the contract void in case of default, or to enforce it and collect the purchase price.⁸⁴

Although no damages are proved, the seller is entitled to nominal damages on proof of a breach by the purchaser.⁸⁵

If the seller of stock refuses or fails to deliver the stock in accordance with his contract, the purchaser may maintain an action for damages.⁸⁶ Ordinarily the measure of damages is the difference be-

⁸² *Pittsburgh Hardware & Home Supply Co. v. Bown*, 174 Fed. 981.

⁸³ *Alabama*. *McGowin v. Dickson*, 182 Ala. 161, 62 So. 685.

California. *Lewin v. Hanford*, — Cal. App. —, 169 Pac. 242; *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926.

Iowa. *Hamilton v. Finnegan*, 117 Iowa 623, 91 N. W. 1039.

Kansas. *Echternach v. Moncrief*, 94 Kan. 754, 147 Pac. 860.

Maryland. *Tyng & Co. v. Woodward*, 121 Md. 422, 88 Atl. 243.

Massachusetts. *Bellows v. McKenzie*, 212 Mass. 601, 99 N. E. 470.

Missouri. *Klein v. Johnson*, 191 Mo. App. 453, 178 S. W. 262.

New York. *Phelps-Stokes Estates v. Nixon*, 222 N. Y. 93, 118 N. E. 241, rev'g judgment 165 App. Div. 373, 150 N. Y. Supp. 944; *Cragin v. O'Connell*, 50 App. Div. 339, 63 N. Y. Supp. 1071, aff'd 169 N. Y. 573, 61 N. E. 1128; *Holmes & Griggs Mfg. Co. v. Morse*, 53 Hun 58, 5 N. Y. Supp. 940; *In re Ives*, 25 Abb. N. Cas. 63; *Cowan v. DeHart*, 84 N. Y. Supp. 576.

South Carolina. *Graham v. Burgiss*, 78 S. C. 404, 59 S. E. 29.

Washington. See *Templeton v. Warner*, 89 Wash. 584, 157 Pac. 458, 154 Pac. 1081.

Wisconsin. *Strait v. Northwestern Steel & Iron Works*, 148 Wis. 254, 134 N. W. 387.

This rule applies only where the title has passed to the vendee. Otherwise the vendor has no cause of action for the purchase price, but is confined to an action for damages founded on a breach of the contract. *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926.

To entitle the seller to recover under this rule he must at all times treat the stock as the property of the buyer. "The specific property must have been appropriated by the vendor to the sale, and everything done, except actual acceptance under the terms of the sale by the vendee." And "the property must at least be in a condition to be delivered upon the acceptance of the tender previously made." *Hamilton v. Finnegan*, 117 Iowa 623, 91 N. W. 1039.

⁸⁴ *McMillen v. Strange*, 159 Wis. 271, 150 N. W. 434.

⁸⁵ *Raiche v. Morrison*, 47 Mont. 127, 130 Pac. 1074.

⁸⁶ *Lancaster v. Southern Life Ins. Co.*, 89 S. C. 179, 71 S. E. 864.

He may treat the executory agreement as subsisting and recover the damages occasioned by the breach.

tween the contract price and the market price at the time and place fixed for delivery,⁸⁷ allowing, according to some of the cases, a reasonable time for the purchaser to go into the market and purchase other shares.⁸⁸

Under some circumstances the buyer may recover the market value of the stock at the time of the default,⁸⁹ as where he has paid the

Watkins v. Record Photographing Abstract Co., 76 Ore. 421, 149 Pac. 478.

If the seller breaks the contract by failing to perform in accordance with its terms, the buyer may affirm the contract and sue at law to recover the damages sustained by him in consequence of the breach. **Meinershagen v. Taylor**, 169 Mo. App. 12, 154 S. W. 886.

The purchaser's right of action for damages is assignable. **Stringer v. Kessler**, — Okla. —, 155 Pac. 867.

See also the cases cited in the following notes.

⁸⁷ **Illinois**. **Farson v. Buder**, 187 Ill. App. 318.

Indiana. See **Coffin v. State**, 144 Ind. 578, 55 Am. St. Rep. 188, 43 N. E. 654.

Massachusetts. **Eastern R. Co. v. Benedict**, 10 Gray 212.

Missouri. **Gibson v. Whip Pub. Co.**, 28 Mo. App. 450.

New York. **Sloan v. McKane**, 131 App. Div. 244, 115 N. Y. Supp. 648; **Wildes v. Robinson**, 50 App. Div. 192, 63 N. Y. Supp. 811; **Hutton v. Tullis**, 93 Misc. 548, 157 N. Y. Supp. 214. See **Barnes v. Seligman**, 55 Hun 339, 8 N. Y. Supp. 834.

England. **Tempest v. Kilner**, 3 C. B. 249; **Shaw v. Holland**, 15 M. & W. 136.

⁸⁸ **Vos v. Child, Hulswit & Co.**, 171 Mich. 595, 43 L. R. A. (N. S.) 368, 137 N. W. 209; **Shaw v. Holland**, 15 M. & W. 136. See also **Turner v. Jackson** (Tenn. Ch. App.), 63 S. W. 511.

"The damages ordinarily allowed for the breach of a contract to buy or sell stock is the difference between the

price stated in the contract and the price at which the same stock can be sold or bought in the market within a reasonable time after the breach." **Joseph v. Sulzberger**, 136 N. Y. App. Div. 499, 121 N. Y. Supp. 73.

If the stock has no market value, but the plaintiff has a contract with a third person under which he can obtain it at a specified price, the price so specified is to be taken as its market value. **Joseph v. Sulzberger**, 136 N. Y. App. Div. 499, 121 N. Y. Supp. 73.

As to the measure of damages under the South Dakota statute, see **Tuthill v. Sherman**, — S. D. —, 165 N. W. 4; **Id.** 36 S. D. 237, 154 N. W. 518.

If the facts surrounding the transaction are in dispute, or if different inferences can be reasonably drawn from them, the question of what is a reasonable time is for the jury; otherwise it is for the court. **Vos v. Child, Hulswit & Co.**, 171 Mich. 595, 43 L. R. A. (N. S.) 368, 137 N. W. 209.

⁸⁹ **Roder v. Niles**, 61 Ind. App. 4, 111 N. E. 340.

On breach of any agreement to deliver a specified number of shares of stock in part payment for property, the measure of damages is the value of the stock, with interest. **Kuhn v. McKay**, 7 Wyo. 42, 51 Pac. 205, 49 Pac. 473.

For breach of an agreement by a corporation to turn over stock in payment for services, the measure of damages is its market value at the time of the default. **Saunders v. United States Marble Co.**, 35 Wash. 475, 65 Pac. 782.

purchase price in full.⁹⁰ And it has also been held that a buyer who has paid for the stock and demanded delivery may recover damages resulting from the depreciation of the stock between the time fixed for delivery and the date when delivery is actually made.⁹¹ The market value may be shown by evidence of the price at which the stock sold near the time the demand was made therefor.⁹² If the stock has no market value, the plaintiff is entitled to recover its actual value, to be ascertained from the value of the corporate assets, the amount of its liabilities, the dividend earning capacity of the stock, and the like.⁹³ Nominal damages may be recovered where a breach of the contract is shown, although no damage is proved.⁹⁴

The measure of damages for breach of an agreement to exchange stock is the difference between the value of the stock that the plaintiff was to transfer to the defendant and the value of the stock that the defendant was to transfer to the plaintiff.⁹⁵

If a person agrees to pay for services partly in preferred stock of a corporation*to be organized in the future, and, when the services

⁹⁰ Shuler v. Allam, 45 Colo. 372, 101 Pac. 350; Belden v. Krom, 34 Wash. 184, 75 Pac. 636.

⁹¹ Chapman v. Fowler, 132 N. Y. App. Div. 250, 116 N. Y. Supp. 962.

Acceptance of the stock after the date fixed for delivery is not a waiver of the right to recover such damages, nor is the buyer thereby estopped to recover them. Chapman v. Fowler, 132 N. Y. App. Div. 250, 116 N. Y. Supp. 962.

⁹² Farson v. Buder, 187 Ill. App. 318; Clements v. Sherwood-Dunn, 108 N. Y. App. Div. 327, 95 N. Y. Supp. 766, aff'd 187 N. Y. 521, 79 N. E. 1102; Saunders v. United States Marble Co., 25 Wash. 475, 65 Pac. 782.

⁹³ Julia v. Critchfield, 137 Fed. 969, aff'd 147 Fed. 65, certiorari denied 203 U. S. 593, 51 L. Ed. 332 (mem. dec.); Butler v. Wright, 103 N. Y. App. Div. 463, 93 N. Y. Supp. 113, judgment rev'd on other grounds 186 N. Y. 259, 78 N. E. 1002; Tuthill v. Sherman, — S. D. —, 165 N. W. 4.

The book value can be taken as the basis for fixing the damages only where there is no evidence of the

value of the stock as such. Joseph v. Sulzberger, 136 N. Y. App. Div. 499, 121 N. Y. Supp. 73.

If there has never been any open market for the stock, the question of the amount of damages is for the jury. Spencer v. Hardin, 149 N. Y. App. Div. 667, 134 N. Y. Supp. 373.

⁹⁴ Even though there is no proof of damage it is error to dismiss the complaint on that ground since nominal damages should be awarded. Hutton v. Tullis, 93 N. Y. Misc. 548, 157 N. Y. Supp. 214.

If no corporation has been formed and no stock issued, or, if issued, it was valueless, only nominal damages can be recovered. Gibson v. Whip Pub. Co., 28 Mo. App. 450. See also Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760.

If the stock had no value at the time of the default, only nominal damages can be recovered. Roder v. Nites, 61 Ind. App. 4, 111 N. E. 340.

⁹⁵ Butler v. Wright, 103 N. Y. App. Div. 463, 93 N. Y. Supp. 113, judgment rev'd on other grounds 186 N. Y. 259, 78 N. E. 1002.

have been rendered and the corporation is formed, purposely refrains from issuing preferred stock, the other party is entitled to recover what would have been the value of such stock if it had been issued.⁹⁶ Damages cannot be recovered for breach of an agreement to form a corporation and issue stock to the plaintiff, where the corporation is never organized, and there is nothing to show that if it had been, its stock would have been of any value, but, on the contrary, there is affirmative proof that it would have been of no value.⁹⁷

Instead of suing for damages, the purchaser may rescind the contract and recover any payments he may have made;⁹⁸ or he may set up the breach as a defense to an action for the price.⁹⁹

An agreement between stockholders for the purchase and sale of stock at the book value, as shown by the accounts of the corporation, will not justify a court of equity in intervening in the management and control of the corporate books of account.¹

Where the sale of stock is enjoined and it becomes worthless pending the dissolution of the injunction, and it appears that but for the injunction it could and would have been sold, the injunction is the proximate cause of the damage resulting from the failure to sell, and such damage may be recovered in an action on the injunction bond. The measure of damages under such circumstances is the amount of the loss, but no recovery can be had in excess of the penalty of the bond.²

§ 3899. — Specific performance—General principles. The general rule that specific performance will not lie to enforce an executory agreement for the sale of personal property, unless, by reason of exceptional circumstances, the remedy by an action at law for damages for breach of the contract would not afford adequate relief,

⁹⁶ *Julia v. Critchfield*, 137 Fed. 969, aff'd 147 Fed. 65, certiorari denied 203 U. S. 593, 51 L. Ed. 332 (mem. dec.).

⁹⁷ *Eisenmayer v. Leonardt*, 148 Cal. 596, 84 Pac. 43.

In an action on such a contract it is improper to ask a witness to give his opinion as to what would have been the value of such stock, if issued, where the question merely recites the provisions of the contract, and neither real nor hypothetical facts are stated. *Eisenmayer v. Leonardt*, 148 Cal. 596, 84 Pac. 43.

⁹⁸ See § 3896, *supra*.

⁹⁹ *Stringer v. Kessler*, — Okla. —, 155 Pac. 867.

¹ *Drucklieb v. Sam H. Harris, Inc.*, 209 N. Y. 211, 102 N. E. 599, rev'g 155 N. Y. App. Div. 83, 140 N. Y. Supp. 60.

² The injunction is the proximate cause of the loss, although the depreciation was the result of the forfeiture of a lease by the corporation and of accidents to its property. *Slack v. Stephens*, 19 Colo. App. 538, 76 Pac. 741.

applies to sales of corporate stock. Specific performance of such a contract will not be decreed, therefore, where the remedy by an action for damages is in fact adequate,³ as where the stock has a market or

3 United States. *Bernier v. Griscom-Spencer Co.*, 169 Fed. 889, 161 Fed. 438; *Newton v. Wooley*, 105 Fed. 541.

California. *Gilfallan v. Gilfallan*, 168 Cal. 23, Ann. Cas. 1915 D 784, 141 Pac. 623; *Bacon v. Grosse*, 165 Cal. 481, 132 Pac. 1027; *Wait v. Kern River Mining, Milling & Developing Co.*, 157 Cal. 16, 106 Pac. 98; *Treasurer v. Commercial Coal Min. Co.*, 23 Cal. 390.

Delaware. *G. W. Baker Mach. Co. v. United States Fire Apparatus Co.*, 97 Atl. 613, rev'g judgment 10 Del. Ch. 421, 95 Atl. 294; *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163, 14 Atl. 27, aff'd 8 Houst. 372.

Florida. *Graham v. Herlong*, 50 Fla. 521, 39 So. 111.

Illinois. *Barton v. DeWolf*, 108 Ill. 195; *Pierce v. Plumb*, 74 Ill. 326.

Indiana. *Vernon, G. & R. R. Co. v. Washington Tp. Decatur Co.*, 48 Ind. App. 309, 95 N. E. 599.

Louisiana. *Lamb v. General Film Co.*, 130 La. 1026, 58 So. 867.

Massachusetts. *Noyes v. Marsh*, 123 Mass. 286.

Michigan. *Cole v. Cole-Realty Co.*, 169 Mich. 347, 135 N. W. 329.

Minnesota. *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084; *Moulton v. Warren Mfg. Co.*, 81 Minn. 259, 83 N. W. 1082; *Northern Trust Co. v. Markell*, 61 Minn. 271, 63 N. W. 735.

Missouri. *O'Neill v. Webb*, 78 Mo. App. 1.

Nevada. *Oliver v. Little*, 31 Nev. 476, 103 Pac. 240.

New Hampshire. *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626.

New Jersey. *Kimball v. Morton*, 5 N. J. Eq. 26, 53 Am. Dec. 621.

New York. *Butler v. Wright*, 186 N. Y. 259, 78 N. E. 1002, rev'g judgment 103 App. Div. 463, 93 N. Y. Supp. 113; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *Harle v. Brenning*, 131 App. Div. 742, 116 N. Y. Supp. 51; *Kennedy v. Thompson*, 97 App. Div. 296, 89 N. Y. Supp. 963; *Gilbert v. Bunnell*, 92 App. Div. 284, 86 N. Y. Supp. 1123; *Bateman v. Straus*, 86 App. Div. 540, 83 N. Y. Supp. 785; *Morrison v. Chapman*, 63 Misc. 195, 116 N. Y. Supp. 522; *Dingwall v. Chapman*, 63 Misc. 193, 116 N. Y. Supp. 520; *Rau v. Seidenberg*, 53 Misc. 386, 104 N. Y. Supp. 798.

North Carolina. *Meisenheimer v. Alexander*, 162 N. C. 226, 78 S. E. 161.

North Dakota. *Gage v. Fisher*, 5 N. D. 297, 31 L. R. A. 557, 65 N. W. 809.

Pennsylvania. *Northern Cent. Ry. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253; *Rigg v. Reading & S. W. St. Ry. Co.*, 191 Pa. St. 298, 43 Atl. 212; *Appeal of Goodwin Gas Stove & Meter Co.*, 117 Pa. St. 514, 2 Am. St. Rep. 696, 12 Atl. 736.

Rhode Island. *Manton v. Ray*, 18 R. I. 672, 49 Am. St. Rep. 811, 29 Atl. 998.

Washington. *Gleason v. Earles*, 78 Wash. 491, 51 L. R. A. (N. S.) 785, 139 Pac. 213.

West Virginia. *Morgan v. Bartlett*, 75 W. Va. 293, L. R. A. 1915 D 300, 83 S. E. 1001; *Hogg v. McGuffin*, 67 W. Va. 456, 31 L. R. A. (N. S.) 491, 68 S. E. 41.

Wisconsin. *Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317.

The injured party will be confined to his action for damages, unless it appears that he is entitled to the

easily ascertainable value, and can be readily purchased, and there is no reason why the purchaser should have the particular shares contracted for.⁴ But it is otherwise if for any reason the remedy at law is inadequate, and a judgment for damages would not place the injured party in as good a position as a decree for specific performance. Under such circumstances an action for specific performance will lie.⁵ "A court of equity cannot refuse to enforce a bona fide

property contracted for in specie, which to him has some special value and which he cannot readily obtain in the market, or unless in cases where it is apparent that compensation in damages would not furnish a complete and adequate remedy. *Butler v. Wright*, 186 N. Y. 259, 78 N. E. 1002, rev'g judgment on other grounds 103 N. Y. App. Div. 463, 93 N. Y. Supp. 113.

4 United States. *Hyer v. Richmond Traction Co.*, 168 U. S. 471, 42 L. Ed. 547; *Eckley v. Daniel*, 193 Fed. 279.

Illinois. *Hills v. McMunn*, 232 Ill. 488, 83 N. E. 963, rev'g 135 Ill. App. 338; *Cazier v. Mohr*, 197 Ill. App. 550; *Kimmel v. Gray*, 196 Ill. App. 406.

Maryland. *Ryan v. McLane*, 91 Md. 175, 50 L. R. A. 501, 80 Am. St. Rep. 438, 46 Atl. 340.

Michigan. *Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329.

Missouri. *Wood v. Kansas City Home Tel. Co.*, 223 Mo. 537, 123 S. W. 6.

Nevada. *Turley v. Thomas*, 31 Nev. 181, 135 Am. St. Rep. 667, 101 Pac. 568.

New Jersey. *Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371.

New York. *Waddle v. Cabana*, 220 N. Y. 18, 114 N. E. 1054, rev'g judgment 169 App. Div. 968, 154 N. Y. Supp. 1149.

Oregon. *Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803.

In a Maryland case it was held that specific performance of a contract to sell stock will not be decreed unless such stock cannot be otherwise ob-

tained, and its value is difficult of ascertainment, and a decree for specific performance was refused, therefore, because the plaintiff in another action instituted by him concerning the same stock alleged it to be of a certain value per share. *Ryan v. McLane*, 91 Md. 175, 50 L. R. A. 501, 80 Am. St. Rep. 438, 46 Atl. 340.

A mere allegation that the stock has no fixed or marketable value, and is not quoted in commercial circles is not sufficient to warrant a decree, since it may nevertheless be salable on the market with a determinable value which could be easily estimated in an action for damages. *Moulton v. Warren Mfg. Co.*, 81 Minn. 259, 83 N. W. 1082.

5 United States. *David v. McRae*, 183 Fed. 812, aff'd 184 Fed. 988; *Bernier v. Griscom-Spencer Co.*, 169 Fed. 889, 161 Fed. 438; *Lucas v. Milliken*, 139 Fed. 816.

California. *Gilfallan v. Gilfallan*, 168 Cal. 23, Ann. Cas. 1915 D 784, 141 Pac. 623; *Bacon v. Grosse*, 165 Cal. 481, 132 Pac. 1027; *Treasurer v. Commercial Coal Min. Co.*, 23 Cal. 390.

Colorado. *Frue v. Houghton*, 6 Colo. 318.

Delaware. *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163, 14 Atl. 27, aff'd 8 Houst. 372.

Florida. See *Graham v. Herlong*, 50 Fla. 521, 39 So. 111.

Louisiana. *Longino v. Webb Press Co.*, 132 La. 25, 60 So. 707.

Michigan. See *Millen v. Potter*, 190 Mich. 262, 157 N. W. 101.

Minnesota. *Moulton v. Warren Mfg.*

contract for the sale of actual stock, where it would decree specific performance if the contract related to any other kind of personal property, without turning its back on one of the most conservative and ancient remedies, and shaking confidence in the value of investments in corporate stock.”⁶ So it is generally held that the action will lie where the stock has no market value, and its actual value is difficult or impossible of ascertainment, and where it cannot be purchased on the open market or easily be procured elsewhere.⁷ Also it

Co., 81 Minn. 259, 83 N. W. 1082; Northern Trust Co. v. Markell, 61 Minn. 271, 63 N. W. 735.

Missouri. O'Neill v. Webb, 78 Mo. App. 1.

New York. Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315; Harle v. Brenning, 131 App. Div. 742, 116 N. Y. Supp. 51; Kennedy v. Thompson, 97 App. Div. 296, 89 N. Y. Supp. 963; Gilbert v. Bunnell, 92 App. Div. 284, 86 N. Y. Supp. 1123; Bateman v. Straus, 86 App. Div. 540, 83 N. Y. Supp. 785; White v. Schuyler, 1 Abb. Pr. (N. S.) 300.

North Carolina. Meisenheimer v. Alexander, 162 N. C. 226, 78 S. E. 161.

North Dakota. Gage v. Fisher, 5 N. D. 297, 31 L. R. A. 557, 65 N. W. 809.

Oregon. See Watkins v. Record Photographing Abstract Co., 76 Ore. 421, 149 Pac. 478.

Pennsylvania. Northern Cent. Ry. Co. v. Walworth, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253; Rigg v. Reading & S. W. St. Ry. Co., 191 Pa. St. 298, 43 Atl. 212; Appeal of Goodwin Gas Stove & Meter Co., 117 Pa. St. 514, 2 Am. St. Rep. 696, 12 Atl. 736.

Rhode Island. Manton v. Ray, 18 R. I. 672, 49 Am. St. Rep. 811, 29 Atl. 998.

Washington. Gleason v. Earles, 78 Wash. 491, 51 L. R. A. (N. S.) 785, 139 Pac. 213.

West Virginia. Bumgardner v. Lea-

vitt, 35 W. Va. 194, 12 L. R. A. 776, 13 S. E. 67.

Wisconsin. Avery v. Ryan, 74 Wis. 591, 43 N. W. 317.

England. Paine v. Hutchinson, L. R. 3 Ch. 388; Duncuft v. Albrecht, 12 Sim. 189. See also as to the English law, Vernon, G. & R. R. Co. v. Washington Tp. Decatur Co., 48 Ind. App. 309, 95 N. E. 599.

“Inadequacy of the remedy is the basis for equity jurisdiction to enforce performance.” Morgan v. Bartlett, 75 W. Va. 293, L. R. A. 1915 D 300, 83 S. E. 1001.

An agreement by the defendant to turn over to plaintiff certain stock in a proposed corporation when it was formed in consideration of services to be rendered in promoting the company was specifically enforced in Butler v. Murphy, 106 Mo. App. 287, 80 S. W. 337.

Specific performance will be decreed at the instance of the seller, where the contract is executory, and the stock has been deposited in escrow to be delivered to the purchaser on payment of the purchase price, since, under such circumstances, he could not, in an action for the purchase price, truthfully allege a sale and delivery of the stock, nor could he withdraw the stock for the purpose of making a tender. David v. McRae, 183 Fed. 812, aff'd 184 Fed. 988.

⁶ Henry L. Doherty & Co. v. Rice, 186 Fed. 204.

⁷ United States. Hyer v. Richmond

has been held that specific performance will be decreed where the

Traction Co., 168 U. S. 471, 42 L. Ed. 547; *Newton v. Wooley*, 105 Fed. 541.

California. *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084.

Delaware. *G. W. Baker Mach. Co. v. United States Fire Apparatus Co.*, 97 Atl. 613, rev'g judgment 10 Del. Ch. 421, 95 Atl. 294.

Illinois. *Cazier v. Mohr*, 197 Ill. App. 550; *Kimmel v. Gray*, 196 Ill. App. 406.

Iowa. *Schmidt v. Pritchard*, 135 Iowa 240, 112 N. W. 801.

Maryland. *Ryan v. McLane*, 91 Md. 175, 50 L. R. A. 501, 80 Am. St. Rep. 438, 46 Atl. 340.

Michigan. *Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329.

Minnesota. *Selover v. Isle Harbor Land Co.*, 91 Minn. 451, 98 N. W. 344; *Moulton v. Warren Mfg. Co.*, 81 Minn. 259, 83 N. W. 1082; *Northern Trust Co. v. Markell*, 61 Minn. 271, 63 N. W. 735.

Missouri. *Whiting v. Enterprise Land & Sheep Co.*, 265 Mo. 374, 177 S. W. 589; *Wood v. Kansas City Home Tel. Co.*, 223 Mo. 537, 123 S. W. 6; *Dennison v. Keasby*, 200 Mo. 408, 98 S. W. 546.

Oregon. *Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803.

Pennsylvania. *Eichbaum v. Sample*, 213 Pa. 216, 62 Atl. 837.

Rhode Island. *Manton v. Ray*, 18 R. I. 672, 49 Am. St. Rep. 811, 29 Atl. 998.

West Virginia. *Morgan v. Bartlett*, 75 W. Va. 293, L. R. A. 1915 D 300, 83 S. E. 1001.

"To deny this remedy where the stock has no ascertainable value, is nearly all held by one man and can be obtained only from him, and only as a favor and for special reasons, would be to deny to appellant the substantial benefit of the contract, and defeat the relief which should in conscience be given." *Waddle v. Cabana*,

220 N. Y. 18, 114 N. E. 1054, rev'g 169 N. Y. App. Div. 968, 154 N. Y. Supp. 1119.

"The specific circumstances which authorize the court to give this relief are: 1. That the stock has no market value; and 2. Plaintiff purchased the stock for an investment—in other words, with a view to anticipated increase in value; and 3. That he cannot purchase other shares in the corporation, because no holder will sell any." *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084.

Specific performance will be granted where the pecuniary value of the stock is not provable so that the plaintiff could not recover adequate damages at law. *Baumhoff v. St. Louis & K. R. Co.*, 205 Mo. 248, 120 Am. St. Rep. 745, 104 S. W. 5.

Where no stock has ever been sold in the market, and to remit the complainant to an action for damages would defeat the very purpose of the contract, specific performance will lie. *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432.

Equity will specifically enforce a contract whereby the complainant is to receive stock of a street railway company as compensation for constructing its line, where the stock of the company was small, presumably could not be procured in the market, and had no market value, and whatever value it had was given it by the plaintiff's work and expenditures. *Altoona Electrical Engineering & Supply Co. v. Kittanning & F. C. St. Ry. Co.*, 126 Fed. 559.

Specific performance of a contract for the sale of stock in a particular company will be decreed, where such stock cannot be otherwise secured, and that it is no answer to say that an action for damages will afford an

stock is that of a close corporation;⁸ or the transaction involves all the stock of the corporation;⁹ or where its value is speculative and contingent on the future workings of the company,¹⁰ as in the case of mining or oil stock, the value of which depends upon the results of the future development of the company's property, and which has no market value.¹¹ But, on the other hand, it has been held by some

adequate remedy. *Northern Cent. Ry. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253.

The contract may be enforced at the instance of the seller where the difficulty in ascertaining the value of the stock is such that his remedy at law is inadequate. *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084; *Morgan v. Bartlett*, 75 W. Va. 293, L. R. A. 1915 D 300, 83 S. E. 1001.

There is no inadequacy of remedy at law because of mere conflict of testimony as to the value of stock having no market value. *Rigg v. Reading & S. W. St. Ry. Co.*, 191 Pa. St. 298, 43 Atl. 212.

⁸ Where the corporation is a close one and its stock is not procurable in the market and its pecuniary value is not readily ascertainable, especially where the court has jurisdiction on ground that is action to enforce trust. *Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371.

Specific performance will be granted where the stock is that of a close corporation which cannot be purchased in the open market or elsewhere, and hence its value is not readily ascertainable, especially where the other party to the contract is insolvent or practically so. *Hogg v. McGuffin*, 67 W. Va. 456, 31 L. R. A. (N. S.) 491, 68 S. E. 41.

Specific performance will be decreed at the instance of the seller where the corporation is a close one, in the nature of a family affair, and he has partly performed by withdrawing from participation in the management

of the corporation and allowing a policy which he had previously opposed to be pursued, the consequences of which, and the resultant damage to him could not be readily ascertained. Under such circumstances, it will not be presumed that the stock can be procured on the market or has a market value. *Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329.

⁹ *Moloney v. Cressler*, 236 Fed. 636; *McCullough v. Sutherland*, 153 Fed. 418.

¹⁰ *Hyer v. Richmond Traction Co.*, 168 U. S. 471, 42 L. Ed. 547.

Where the stock is not shown to have any market value, or to have ever been on the market for sale, but whatever value it has is dependent on the value of a patent owned by the corporation. *Hills v. McMunn*, 232 Ill. 488, 83 N. E. 963, rev'g 135 Ill. App. 338.

¹¹ *Wait v. Kern River Mining, Milling & Developing Co.*, 157 Cal. 16, 106 Pac. 98; *Treasurer v. Commercial Coal Min. Co.*, 23 Cal. 390; *Sherwood v. Wallin*, 1 Cal. App. 532, 82 Pac. 566; *Frue v. Houghton*, 6 Colo. 318; *Turley v. Thomas*, 31 Nev. 181, 135 Am. St. Rep. 667, 101 Pac. 568; *Rau v. Seidenberg*, 53 N. Y. Misc. 386, 104 N. Y. Supp. 798.

Specific performance will lie at the instance of the buyer of oil stock, where the company has no property except oil land on which oil has not yet been discovered; the stock has no market value and its value depends on the discovery of oil and the condition of the oil market from time to time; and where the stock is owned

courts that specific performance will not lie merely because it would be difficult to ascertain the value of the stock for the purpose of fixing the damages in an action at law;¹² or merely because the stock of the corporation in question is seldom found for sale;¹³ or because most of the stock is held by employees of the company and the complainant is one of the employees.¹⁴

Specific performance will generally be granted where the stock has a special or peculiar value to the purchaser,¹⁵ or where the seller is

by a few persons, none of it is for sale, and the plaintiff cannot elsewhere obtain the amount agreed to be sold to him or any considerable portion thereof. *Gilfallan v. Gilfallan*, 168 Cal. 23, Ann. Cas. 1915 D 784, 141 Pac. 623.

¹² *Ehrich v. Grant*, 111 N. Y. App. Div. 196, 97 N. Y. Supp. 600; *Clements v. Sherwood-Dunn*, 108 N. Y. App. Div. 327, 95 N. Y. Supp. 766, aff'd 187 N. Y. 521, 79 N. E. 1102; *Gilbert v. Bunnell*, 92 N. Y. App. Div. 284, 86 N. Y. Supp. 1123; *Morrison v. Chapman*, 63 N. Y. Misc. 195, 116 N. Y. Supp. 522; *Dingwall v. Chapman*, 63 N. Y. Misc. 193, 116 N. Y. Supp. 520. See also *Hyer v. Richmond Traction Co.*, 168 U. S. 471, 42 L. Ed. 547.

In *Butler v. Wright*, 103 N. Y. App. Div. 463, 93 N. Y. Supp. 113, it was held that an action may not be maintained for specific performance of a contract to deliver stock in a certain corporation where the plaintiff is without special interest in acquiring the stock except for the pecuniary gain anticipated therefrom, although it appears that no sales of stock in the corporation have been made, that it is not listed on any exchange, and that it will be difficult to ascertain the value of the stock by reason of the fact that defendant holds a large majority thereof. The Court of Appeals (186 N. Y. 259, 78 N. E. 1002) reversed the judgment of the Appellate Division on the ground that the latter court, in its judgment reversing the judgment of the

trial court, had failed to state that the reversal was based upon the facts or was in the exercise of its discretion, and hence that it must be presumed that it was reversed upon the law only, and that while the Appellate Division might have reversed it, in its discretion, upon a consideration of the facts, it was not bound or authorized to do so as a question of law.

¹³ *Barton v. De Wolf*, 108 Ill. 195.

¹⁴ *Barton v. De Wolf*, 108 Ill. 195.

¹⁵ *Vernon, G. & R. R. Co. v. Washington Tp. Decatur Co.*, 48 Ind. App. 309, 95 N. E. 599; *Kennedy v. Thompson*, 97 N. Y. App. Div. 296, 89 N. Y. Supp. 963; *Lathrop v. Columbia Colliers Co.*, 70 W. Va. 58, 73 S. E. 299; *Bumgardner v. Leavitt*, 35 W. Va. 194, 12 L. R. A. 776, 13 S. E. 67.

"Equity has jurisdiction to grant relief by specific performance of a contract for the sale of stock in a corporation, when the stock has a special or peculiar value and is not readily purchasable in the market, or when it has no ascertainable value." *Morgan v. Bartlett*, 75 W. Va. 293, L. R. A. 1915 D 300, 83 S. E. 1001.

Equity will decree specific performance of a contract to sell stock and bonds of a company, where the seller owns all of them so none can be bought elsewhere; and they are really muniments of title to land owned by the corporation which the seller has also contracted to sell to the purchaser of the stock and bonds. *Lathrop v. Columbia Collieries Co.*, 70 W. Va. 58, 73 S. E. 299.

insolvent or financially irresponsible; ¹⁶ or where a trust is involved; ¹⁷ or where the contracts involve a sale of real estate as well as stock. ¹⁸

According to some courts, the fact that the stock contracted for will give the purchaser control of the corporation is in itself a reason for granting specific performance. ¹⁹ But there is authority to the

In *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276, an agreement to convey land and transfer a certain number of shares of water stock was specifically enforced, it appearing that the transfer of the stock was a part of the entire consideration for the contract, and was essential to the adequate relief of the vendee, and it not being shown that such stock had any market value.

Where the stock is limited in amount, is not purchasable in the market, has no quoted or ascertainable market value, and has a peculiar value to the plaintiff as an investment. *Eichbaum v. Sample*, 213 Pa. 216, 62 Atl. 837.

In *Riverside Land Co. v. Jarvis*, 174 Cal. 316, 163 Pac. 54, specific performance was granted at the instance of one who had acquired land under foreclosure proceedings to compel a transfer of water stock going with the land.

¹⁶ *Draper v. Stone*, 71 Me. 175; *Rau v. Seidenberg*, 53 N. Y. Misc. 386, 104 N. Y. Supp. 798; *Hogg v. McGuffin*, 67 W. Va. 456, 31 L. R. A. (N. S.) 491, 68 S. E. 41. See also *Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317.

¹⁷ *Colorado & S. R. Co. v. Blair*, 163 N. Y. App. Div. 698, 148 N. Y. Supp. 671, rev'g judgment 81 N. Y. Misc. 654, 143 N. Y. Supp. 510.

Where the transfer is subject to a trust imposed by the contract, and the shares have no market value, and their value, even if ascertained, would not necessarily be the proper measure of damages. *Appeal of Goodwin Gas Stove & Meter Co.*, 117 Pa. St. 514, 2 Am. St. Rep. 696, 12 Atl. 736.

¹⁸ A contract for the sale of real estate, and also of stock in a corporation, will be specifically enforced as to the stock as well as the real estate, although specific performance of the contract for the sale of the stock alone might not be enforced. *Perin v. Megibben*, 53 Fed. 86; *Leach v. Fobes*, 11 Gray (Mass.) 506, 71 Am. Dec. 732.

¹⁹ **United States.** *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204.

California. *Sherwood v. Wallin*, 1 Cal. App. 532, 82 Pac. 566.

Missouri. *Whiting v. Enterprise Land & Sheep Co.*, 265 Mo. 374, 177 S. W. 589; *O'Neill v. Webb*, 78 Mo. App. 1.

Pennsylvania. *Sherman v. Herr*, 220 Pa. 420, 69 Atl. 899; *Rumsey v. New York & P. R. Co.*, 203 Pa. 579, 53 Atl. 495.

West Virginia. *Bumgardner v. Leavitt*, 35 W. Va. 194, 12 L. R. A. 776, 13 S. E. 67.

Specific performance will be granted where the stock has no ascertainable value and carries with it a controlling voice in the management of the corporation. *Rumsey v. New York & P. R. Co.*, 203 Pa. 579, 53 Atl. 495.

Where the buyer purchases a majority of the stock of a corporation solely for the purpose of obtaining control of a patent, and neither the stock nor such control can be obtained elsewhere, he is entitled to specific performance. *United States Fire Apparatus Co. v. G. W. Baker Mach. Co.*, 10 Del. Ch. 421, 95 Atl. 294, judgment rev'd — Del. —, 97 Atl. 613.

While specific performance of a con-

contrary.²⁰ And it has even been held that the fact that the purpose of the purchaser is to obtain such control is a reason for denying him relief.²¹

There are holdings to the effect that the remedy is a mutual one, so that if one party has the right to enforce performance the other has also.²² But some courts have refused to enforce this rule so as to give a party who has an adequate remedy at law by an action for damages relief by way of specific performance merely because the other party to the contract might have such relief at his election.²³

tract for the sale of stock will not be decreed where a judgment for damages will be adequate, yet where a contract for the sale of stock in a corporation calls for the transfer of sufficient stock to make the transferee the owner of half the entire stock, so that the chief value is not the money value, but the power and influence given in the management of the corporation, specific performance should be decreed. *O'Neill v. Webb*, 78 Mo. App. 1.

An agreement between the holders of a majority of the stock of a corporation that, if either of them dies or wishes to sell his stock, the other shall have the right to purchase it will be specifically enforced. *Scruggs v. Cotterill*, 67 N. Y. App. Div. 583, 73 N. Y. Supp. 882.

²⁰ *Rigg v. Reading & S. W. St. Ry. Co.*, 191 Pa. St. 298, 43 Atl. 212.

The desire of the plaintiff, with the aid of the stock he is seeking to obtain, to secure control of the corporation, is not such a peculiar feature as will justify the granting of specific performance. *Gage v. Fisher*, 5 N. D. 297, 31 L. R. A. 557, 65 N. W. 809; *Gleason v. Earles*, 78 Wash. 491, 51 L. R. A. (N. S.) 785, 139 Pac. 213.

²¹ See § 3900, *infra*.

²² *Morgan v. Bartlett*, 75 W. Va. 293, L. R. A. 1915 D 300, 83 S. E. 1001. See also *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163, 14 Atl. 27, *aff'd* 8 Houst. (Del.) 372.

“Equity less readily entertains the cause of a vendor seeking specific performance than that of a vendee, on the ground that, in many instances, the vendor can more easily compel adequate relief in a court of law; but in cases where the contract is mutually binding it is an accepted rule that if the vendee is entitled to specific performance the vendor should be granted the same relief, for the reason that mutual obligations should give mutual remedies.” *Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329.

For a statement and discussion of this rule, see *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626.

²³ *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626.

The rule does not mean that because the buyer is entitled to specific performance the seller is entitled to a remedy in equity to recover money damages based on the contract price which he could have recovered equally well in an action at law. *United States Fire Apparatus Co. v. G. W. Baker Mach. Co.*, 10 Del. Ch. 421, 95 Atl. 294, judgment *rev'd* — Del. —, 97 Atl. 613.

The mere fact that the buyer might be entitled to specific performance because of the rarity of the stock does not entitle the seller to that remedy to compel the buyer to give his note for the purchase price, but his remedy is by an action for damages.

Nor does it apply in any case where the statute makes the jurisdiction of courts of equity depend upon the absence of an adequate remedy at law.²⁴

It has been said that the modern tendency is towards a more liberal allowance of the remedy.²⁵ And also that "in administering the remedy current authority regards the jurisdiction as flexible, depending largely upon the facts of each individual case, and not bound by hard and fast rules, a reasonable discretion being allowed in awarding relief, and in determining the right thereto the situation involved should be considered from a practical, rather than a theoretical, viewpoint."²⁶

The party seeking specific performance must show performance on his part,²⁷ and if the contract is conditional, the condition must have

Templeton v. Warner, 89 Wash. 584, 157 Pac. 458, 154 Pac. 1081.

²⁴ Under such circumstances the right to specific performance does not depend upon mutuality of remedy but upon the inadequacy of an action at law, and a vendor who has an adequate remedy at law is not entitled to specific performance merely because the vendee would have been. *G. W. Baker Mach. Co. v. United States Fire Apparatus Co.*, — Del. —, 97 Atl. 613, rev'g judgment 10 Del. Ch. 421, 95 Atl. 294.

²⁵ *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084.

²⁶ *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084.

In each case, the question whether equity will take jurisdiction and grant relief rests in the sound discretion of the court, to be exercised upon a consideration of the facts and circumstances. Such relief cannot be demanded as a matter of right. *Butler v. Wright*, 186 N. Y. 259, 78 N. E. 1002, rev'g judgment on other grounds 103 N. Y. App. Div. 463, 93 N. Y. Supp. 113. See also to the same effect *Newton v. Wooley*, 105 Fed. 541; *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626.

²⁷ *United States. Moloney v. Cressler*, 236 Fed. 636; *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204; *Bernier v. Griseom-Spencer Co.*, 161 Fed. 438; *McCullough v. Sutherland*, 153 Fed. 418.

California. *Gilfallan v. Gilfallan*, 168 Cal. 23, Ann. Cas. 1915 D 784, 141 Pac. 623.

Indiana. *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880; *Atkins v. Kattman*, 50 Ind. App. 233, 97 N. E. 174.

Louisiana. See *Longino v. Webb Press Co.*, 132 La. 25, 60 So. 707.

New Jersey. See *Roche v. Hiss*, 84 N. J. Eq. 242, 93 Atl. 804.

New York. See *Colorado & S. R. Co. v. Blair*, 81 Misc. 654, 143 N. Y. Supp. 510.

Oregon. *Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803.

Pennsylvania. *C. Jutte & Co. v. Pfeil*, 219 Pa. 520, 69 Atl. 59.

Washington. See *Fry v. Thorne*, 64 Wash. 479, 117 Pac. 230.

He "must aver full performance by himself, and a refusal to perform by the other party, upon tender and demand being made, or a sufficient excuse for failure to make tender." *Atkins v. Kattman*, 50 Ind. App. 233, 97 N. E. 174.

Where the contract is one for the exchange of stock, and the plaintiff

occurred or been performed,²⁸ according to the settled rule.

"Equity will not interpose to enforce a part of a contract, unless that part is clearly severable from the remainder," or unless the parties have contemplated a piecemeal performance.²⁹

The fact that the voting power of the stock is vested in trustees so that the complainant could not vote it in any event will not prevent specific performance.³⁰

Specific performance will be denied where it is absolutely impossible for the defendant to perform, even though he intentionally rendered himself unable to do so.³¹ Usually, under such circum-

has partly performed it, and offers to fully perform on performance by defendant, a decree directing simultaneous performance by both is not open to objection. *Cazier v. Mohr*, 197 Ill. App. 550.

If he makes a tender of performance, he must show that he was then able to perform and that at all times since he has been ready, able and willing to do so. *Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803.

Tender by the vendor is not necessary where the vendee has expressed a purpose not to comply with the contract. *McCullough v. Sutherland*, 153 Fed. 418.

Where the defendant leaves the jurisdiction, and withdraws power from his attorney to act for him, thereby rendering a tender to the stock to him impossible, it is sufficient if the complainant tenders performance in court and submits himself unreservedly to the court's jurisdiction. *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204.

He may be required to perform as a condition of requiring other party to do so. *United States Fire Apparatus Co. v. G. W. Baker Mach. Co.*, 10 Del. Ch. 421, 95 Atl. 294.

²⁸ *Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803.

²⁹ *Pantages v. Grauman*, 191 Fed. 317.

In *Longino v. Webb Press Co.*, 132 La. 25, 60 So. 707, an objection that

the plaintiff was seeking to enforce particular stipulations of an indivisible contract was held to have been properly overruled on the ground that the entire contract and all the parties thereto were before the court and the plaintiffs were seeking to enforce the contract according to its terms.

³⁰ *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204.

³¹ This rule was applied where the stock standing in the defendant's name and which he contracted to sell did not belong to him individually, but to a partnership of which he was a member, and the real interest of any member therein could only be ascertained by a settlement of the partnership business. *Jones v. Tunis*, 99 Va. 220, 37 S. E. 841.

As where he is not the owner of the stock. *Booth v. Dingley*, 148 Mich. 197, 111 N. W. 851.

In a suit by the purchaser of stock for specific performance, the fact that the seller has sold and delivered the stock to others is no defense, where the latter purchased with notice, and are made parties. *Northern Cent. Ry. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253.

The inability of the defendant to perform the contract at the time he entered into it is a matter of defense to be pleaded and proved by him. *Cazier v. Mohr*, 197 Ill. App. 550.

stances, a court of equity will retain jurisdiction and will ascertain and decree the damages to which the plaintiff is entitled by reason of the defendant's breach, provided the contract is clearly proved. But this will not be done when the plaintiff knew when he sued that specific performance was impossible, and under such circumstances the plaintiff will be remitted to an action at law.³² If relief by way of specific performance is denied, the court may, in a proper case, retain jurisdiction for the purpose of ordering an accounting.³³ It is not necessary to the statement of a good cause of action that the bill show that the purchaser is entitled to an accounting for the amount of dividends earned by the stock.³⁴ The corporation is not a necessary or indispensable party to a suit for the specific performance of a contract to which it is not a party.³⁵

Upon a proper showing the defendant may be enjoined from disposing of the stock until the suit for specific performance is determined.³⁶

§ 3900. — — Right as affected by nature, validity and purpose of contract. To warrant a decree of specific performance in any case the contract must be clearly and satisfactorily proved.³⁷ It must be

³² *Jones v. Tunis*, 99 Va. 220, 37 S. E. 841; *Hogg v. McGuffin*, 67 W. Va. 456, 31 L. R. A. (N. S.) 491, 68 S. E. 41. See also *Clarke v. Borough Asphalt Co.*, 93 N. Y. Misc. 662, 157 N. Y. Supp. 581.

The suit will be retained for the purpose of awarding complainant money compensation where the defendant sells the stock after the suit is filed. *Altoona Electrical Engineering & Supply Co. v. Kittanning & F. C. St. Ry. Co.*, 126 Fed. 559.

But even where the complainant knows before he sues that the defendant has sold the stock, a court of equity will give him a charge or lien on the purchase money in the hands of the purchaser. *Hogg v. McGuffin*, 67 W. Va. 456, 31 L. R. A. (N. S.) 491, 68 S. E. 41.

³³ Where there is a trust relation, and the bill prays for an accounting and alleges facts warranting such relief. *A. D. Smith & Sons v. Securities Co. of America*, — Ala. —, 73 So. 892.

³⁴ *Bernier v. Grisco-Spencer Co.*, 161 Fed. 438.

³⁵ *Lucas v. Milliken*, 139 Fed. 816.

³⁶ *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204; *Lucas v. Milliken*, 139 Fed. 816. See also *Zeiger v. Stephenson*, 153 N. C. 528, 69 S. E. 611.

Where defendant is financially irresponsible. *Rau v. Seidenberg*, 53 N. Y. Misc. 386, 104 N. Y. Supp. 798.

³⁷ *District of Columbia*. *Stubblefield v. Stubblefield*, 32 App. Cas. 535.

Illinois. *Kimmel v. Gray*, 196 Ill. App. 406.

Louisiana. *Blanks v. Sutcliffe*, 122 La. 448, 47 So. 765.

New Jersey. *Sheehan v. Humphreys*, 81 N. J. Eq. 416, 83 Atl. 189, aff'd 81 N. J. Eq. 513, 87 Atl. 1119.

Wisconsin. *Hibbert v. Mackinnon*, 79 Wis. 673, 49 N. W. 21.

See also *Morgan v. Bartlett*, 75 W. Va. 293, L. R. A. 1915 D 300, 83 S. E. 1001, where it was held that the contract of sale had been sufficiently proved.

definite and certain in its terms,³⁸ and must be supported by a consideration.³⁹ There must also be mutuality of obligation,⁴⁰ and it fol-

38 United States. *Lucas v. Milliken*, 139 Fed. 816. See also *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204.

Alabama. *Stay v. Tennile*, 159 Ala. 514, 49 So. 238.

California. *Gilfillan v. Gilfillan*, 168 Cal. 23, Ann. Cas. 1915 D 784, 141 Pac. 623.

Connecticut. *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 553.

Delaware. *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163, 14 Atl. 27, aff'd 8 Houst. 372.

Illinois. *Kimmel v. Gray*, 196 Ill. App. 406.

Indiana. *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880.

Louisiana. *Longino v. Webb Press Co.*, 132 La. 25, 60 So. 707.

Michigan. See *Millen v. Potter*, 190 Mich. 262, 157 N. W. 101.

Missouri. *Butler v. Murphy*, 106 Mo. App. 287, 80 S. W. 337.

Nevada. *Oliver v. Little*, 31 Nev. 476, 103 Pac. 240; *Turley v. Thomas*, 31 Nev. 181, 135 Am. St. Rep. 667, 101 Pac. 568.

New Jersey. *Sheehan v. Humphreys*, 81 N. J. Eq. 416, 83 Atl. 189, aff'd 81 N. J. Eq. 513, 87 Atl. 1119.

Washington. *Huston v. Harrington*, 58 Wash. 51, 107 Pac. 874.

A contract for the sale of stock by which the seller agrees that all debts of the company shall be paid on the day of the transfer, and the purchaser is to retain sufficient of the price to assure him that the company is free from debt, is not too uncertain to be specifically enforced because it does not state the debts, where the amount to be paid is fixed and definite. *Northern Cent. Ry. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253.

An agreement to pay a "reason-

able compensation" for services in stock, without designating the number of shares, is too indefinite to be specifically enforced. *Oliver v. Little*, 31 Nev. 476, 103 Pac. 240.

39 *Lucas v. Milliken*, 139 Fed. 816; *Wait v. Kern River Mining, Milling & Developing Co.*, 157 Cal. 16, 106 Pac. 98; *Johnston v. Frederick Stearns & Co.*, 160 Mich. 247, 125 N. W. 29; *Hibbert v. Mackinnon*, 79 Wis. 673, 49 N. W. 21.

Specific performance will not be refused merely because the price is inadequate or excessive. "The difference must be so great as to lead to a reasonable conclusion of fraud, mistake, or concealment in the nature of fraud, and to render it plainly inequitable and against conscience that the contract should be enforced." *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432.

40 United States. *Lucas v. Milliken*, 139 Fed. 816.

Colorado. *Frue v. Houghton*, 6 Colo. 318.

Maryland. *Ryan v. McLane*, 91 Md. 175, 50 L. R. A. 501, 80 Am. St. Rep. 438, 46 Atl. 340.

Minnesota. *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084.

New Hampshire. *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626.

New York. *Waddle v. Cabana*, 220 N. Y. 18, 114 N. E. 1054, rev'g 169 App. Div. 968, 154 N. Y. Supp. 1149; *Dittenfass v. Horsley*, 177 App. Div. 143, 163 N. Y. Supp. 626.

Oregon. *Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803.

Pennsylvania. *Sherman v. Herr*, 220 Pa. 420, 69 Atl. 899; *Northern Cent. Ry. Co. v. Walworth*, 193 Pa. St.

lows that relief will be denied where there is a mere option,⁴¹ unless it is founded upon a valuable consideration,⁴² or is under seal,⁴³ or has been accepted by the party to whom it runs.⁴⁴ Nor will specific

207, 74 Am. St. Rep. 683, 44 Atl. 253.

"The assignee of a contract, who has not assumed the obligations of his assignor thereunder, is not entitled to specific performance, although he alleges readiness, willingness, and ability to perform the obligations of his assignor." *Dittenfass v. Horsley*, 177 N. Y. App. Div. 143, 163 N. Y. Supp. 626.

The principle that contracts must be mutual—must bind both parties or neither—to entitle one of the parties to specific performance, does not mean that in every case each party must have the same remedy for a breach by the other, but that the contract must be enforceable on both sides, in some manner,—not necessarily enforceable on both sides by specific performance. *Northern Cent. Ry. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253. And see to the same effect *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626.

Specific performance of a contract for the sale of stock which requires the purchaser to give his note for the price will not be denied for lack of mutuality because of the death of the purchaser, where the stock is to be held as security by the seller. The note is merely evidence of the indebtedness, and the obligation to pay is not affected by the purchaser's death. *Waddle v. Cabana*, 220 N. Y. 18, 114 N. E. 1054, rev'g 169 N. Y. App. Div. 968, 154 N. Y. Supp. 1149.

⁴¹ *Dittenfass v. Horsley*, 177 N. Y. App. Div. 143, 163 N. Y. Supp. 626.

Ryan v. McLane, 91 Md. 175, 50 L. R. A. 501, 80 Am. St. Rep. 438, 46 Atl. 340. In this case it was held that a court of equity would not de-

cree specific performance of a contract to sell stock made by a committee representing a pool of the stock of a corporation pooled for a period of years for voting purposes under an agreement wherein it was stipulated that none of the stock pooled should be sold without the consent of the owners of three-fourths of the stock represented in the pool, and which contract provided that the buyer should take all the stock which should be pooled before a certain date, or, in case of his failure to complete the contract, forfeit as liquidated damages a sum of money paid on account of the stock so purchased, since this contract constituted, not a sale, but a mere option to purchase.

⁴² *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084.

⁴³ *Hogg v. McGuffin*, 67 W. Va. 456, 31 L. R. A. (N. S.) 491, 68 S. E. 41.

Specific performance may be decreed where the option is under seal and recites the receipt of a consideration. *Watkins v. Robertson*, 105 Va. 269, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33.

⁴⁴ *Dittenfass v. Horsley*, 177 N. Y. App. Div. 143, 163 N. Y. Supp. 626.

Where the party to whom the option runs accepts it and tenders performance, it becomes a bilateral contract. *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084.

Although the contract is conditional or unilateral and is not binding upon the promisor until the condition is performed, it becomes absolute and mutual upon such performance, and a decree of performance cannot then be prevented by setting up the original

performance be granted where the contract is contrary to public policy,⁴⁵ or where there has been fraud,⁴⁶ mistake,⁴⁷ breach of trust,⁴⁸ or laches,⁴⁹ or for any other reason a decree for specific performance would be inequitable or unjust.⁵⁰

lack of mutuality. *Frue v. Houghton*, 6 Colo. 318.

See also § 3858, *supra*.

⁴⁵ *Ryan v. McLane*, 91 Md. 175, 50 L. R. A. 501, 80 Am. St. Rep. 438, 46 Atl. 340; *Noyes v. Marsh*, 123 Mass. 286; *Volney v. Nixon*, 68 N. J. Eq. 605, 60 Atl. 189, *aff'd* 67 N. J. Eq. 457, 58 Atl. 75. See also *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204.

⁴⁶ *United States. Moline Plow Co. of Kansas City, Missouri v. Carson*, 72 Fed. 387. See also *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204.

Delaware. *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163, 14 Atl. 27, *aff'd* 8 Houst. 372.

Louisiana. See *Blanks v. Sutcliffe*, 122 La. 448, 47 So. 765.

Maryland. *McLaughlin v. Leonhardt*, 113 Md. 261, 77 Atl. 647.

Washington. *Huston v. Harrington*, 58 Wash. 51, 107 Pac. 874.

⁴⁷ *McLaughlin v. Leonhardt*, 113 Md. 261, 77 Atl. 647. See also *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204.

In such an action parol evidence that the intention of the parties was different from that expressed in the contract may be considered. *Newton v. Wooley*, 105 Fed. 541.

The defendant may show by parol that, through the mistake of both or either of the parties, the writing does not express the real agreement, or that it was entered into through a mistake as to its subject-matter or its terms. *McLaughlin v. Leonhardt*, 113 Md. 261, 77 Atl. 647.

⁴⁸ *Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803.

Where one corporation owned stock in another and authorized a committee from its board of directors to en-

ter into contract for the sale of the shares of stock of the latter company, and the committee directors inserted in the contract of sale a provision that they should have an option to deliver shares owned by them in the latter company to the purchaser at same price, such option not being secured to the remaining stockholders, upon objection by the corporation and its stockholders the court refused to decree specific performance of the contract. The committee directors "occupied a fiduciary position," said the court, "in which they are practically to be regarded as trustees for the stockholders as cestuis que trust." *Kelsey v. New England St. Ry. Co.*, 62 N. J. Eq. 742, 48 Atl. 1001. It was further held that the committee was only the special agent of the corporation, and hence that the purchaser was chargeable with notice of its powers, and that as the agreement itself recited that the committee was acting "by the written consent of the directors," this made it his duty to learn what such consent disclosed, and charged him with notice that they were not authorized to secure any exclusive personal advantage from the contract.

⁴⁹ *Moloney v. Cressler*, 236 Fed. 636; *Mundy v. Davis*, 20 Fed. 353; *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163, 14 Atl. 27, *aff'd* 8 Houst. (Del.) 372; *Schimpff v. Dime Deposit & Discount Bank*, 208 Pa. 380, 57 Atl. 767; *Rogers v. Van Nortwick*, 87 Wis. 414, 58 N. W. 757.

⁵⁰ *United States. Newton v. Wooley*, 105 Fed. 541. See also *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204.

California. *Gilfallan v. Gilfallan*,

The court "will look to the substance of the transaction, to the purpose of the agreement and the real understanding of the parties, whether expressed in the written contract or not, and will never decree the specific performance of a contract when its enforcement will defeat the primary object of the agreement and the real understanding of the parties."⁵¹ Specific performance of an agreement to take stock in a corporation to be formed will not be decreed where the corporation attempted to be organized is not a corporation de jure.⁵²

It has been held in several cases that a court of equity will not enforce specific performance of a contract to sell stock in a corporation, where it appears that the object is to place the control of the corporation in the hands of the plaintiff and his associates, even though the contract is valid.⁵³ But the weight of authority is to the

168 Cal. 23, Ann. Cas. 1915 D 784, 141 Pac. 623; *Wait v. Kern River Mining, Milling & Developing Co.*, 157 Cal. 16, 106 Pac. 98.

Connecticut. *Clowes v. Miller*, 74 Conn. 287, 50 Atl. 728.

Delaware. *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163, 14 Atl. 27, aff'd 8 Houst. 372.

Maryland. *McLaughlin v. Leonhardt*, 113 Md. 261, 77 Atl. 647; *Ryan v. McLane*, 91 Md. 175, 50 L. R. A. 501, 80 Am. St. Rep. 438, 46 Atl. 340.

Missouri. *Butler v. Murphy*, 106 Mo. App. 287, 80 S. W. 337.

New York. *York v. Searles*, 97 App. Div. 331, 90 N. Y. Supp. 37, aff'd 189 N. Y. 573, 82 N. E. 1134.

Pennsylvania. *Schimpff v. Dime Deposit & Discount Bank*, 208 Pa. 380, 57 Atl. 767.

Relief will be denied where the contract is unfair, one-sided, and unconscionable, and its enforcement would be very oppressive on the defendant. *Newton v. Wooley*, 105 Fed. 541.

Where a contract to purchase stock provided that the purchaser should take all the stock that was pooled for voting purposes under an agreement whereby the owners agreed not to

sell the stock during a period of years without the consent of the owners of three-fourths of the stock pooled, and the purchaser had notice of the purpose of the pool, it was held that specific performance of the contract would not be decreed at the suit of the purchaser, since, if the pooling agreement was void as contrary to public policy, the contract to purchase was so connected therewith that it would be inequitable to enforce it, and if the pooling agreement was valid, the owners of three-fourths of the stock in the pool had not consented to the contract, and it was therefore ineffectual. *Ryan v. McLane*, 91 Md. 175, 50 L. R. A. 501, 80 Am. St. Rep. 438, 46 Atl. 340.

⁵¹ *Clowes v. Miller*, 74 Conn. 287, 50 Atl. 728.

⁵² *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880.

⁵³ In *re Foll's Appeal*, 91 Pa. St. 434, 36 Am. Rep. 671, which, however, was questioned in *Northern Cent. Ry. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253.

In *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204, it is said: "The doctrine that a contract for the sale of corporate shares of stock will not be en-

contrary.⁵⁴ And it is generally held that the fact that the stock will give the purchaser control of the corporation is in itself a reason for granting him relief.⁵⁵

§ 3901. — — Necessity for mutuality of remedy. Some courts have held that there must be mutuality of remedy to warrant specific performance,⁵⁶ while others hold that mutuality of remedy is not the sole test of specific enforceability, and is not always essential thereto.⁵⁷

Some of the courts which adopt the rule that mutuality of remedy is essential hold that such mutuality must exist at the time the con-

forced if the purchaser desires thereby to gain control of a corporation, whether or not competition is involved, has received recognition in only two or three states of the Union. All the cases are based on Foll's Appeal, 91 Pa. 434, 36 Am. Rep. 671, which has since been repudiated in the state which gave birth to the doctrine."

In *Ryan v. McLane*, 91 Md. 175, 50 L. R. A. 501, 80 Am. St. Rep. 438, 46 Atl. 340, the court refused to enforce such a contract on the ground that it would be inequitable under the circumstances, but said that they did not wish to be understood as saying that a court of equity would never, under any circumstances, enforce a contract for the purchase of a controlling interest.

In *McLaughlin v. Leonhardt*, 113 Md. 261, 77 Atl. 647, specific performance of a contract which would have had this effect was refused on the ground that it would be inequitable to enforce it under the particular circumstances of the case.

See also *Schmidt v. Pritchard*, 135 Iowa 240, 112 N. W. 801; *Gage v. Fisher*, 5 N. D. 297, 31 L. R. A. 557, 65 N. W. 809.

⁵⁴ *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204; *O'Neill v. Webb*, 78 Mo. App. 1.

⁵⁵ See § 3899, *supra*.

⁵⁶ **United States.** *Pantages v. Grauman*, 191 Fed. 317; *McCullough v. Sutherland*, 153 Fed. 418.

Delaware. See *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163, 14 Atl. 27, aff'd 8 Houst. 372.

Minnesota. See *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084.

New York. See *Waddle v. Cabana*, 220 N. Y. 18, 114 N. E. 1054, rev'g 169 App. Div. 968, 154 N. Y. Supp. 1149, where the remedy was held to be mutual.

Oregon. *Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803.

West Virginia. *Bumgardner v. Leavitt*, 35 W. Va. 194, 12 L. R. A. 776, 13 S. E. 67.

If a covenant by the purchaser is of such a character that equity would not specifically enforce it at the instance of the seller, and the contract is not severable, specific performance will not be decreed at the instance of the purchaser. *Pantages v. Grauman*, 191 Fed. 317.

⁵⁷ *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084. See also *Frue v. Houghton*, 6 Colo. 318; *G. W. Baker Mach. Co. v. United States Fire Apparatus Co.*, — Del. —, 97 Atl. 613, rev'g judgment 10 Del. Ch. 421, 95 Atl. 294; *Turley v. Thomas*, 31 Nev. 181, 135 Am. St. Rep. 667, 101 Pac. 568.

tract is executed,⁵⁸ and that neither performance⁵⁹ nor an offer or tender of performance⁶⁰ of those provisions the performance of which could not be compelled in equity is sufficient to relieve the case of the lack of mutuality as to remedy. On the other hand, it has been held that it is "sufficient if mutual enforcement is practicable when performance is decreed, so that the court may then be able to enforce all of the terms of the contract at once in praesenti and have the power to superintend the performance of the conditions of the contract by each of the parties and in all its parts."⁶¹ So it has been held that there is no want of mutuality of remedy if the provisions which could not be specifically enforced have been fully performed,⁶² or if the party seeking specific performance offers to perform on his part, and unreservedly submits himself to the court to decree whatever may be proper in enforcing the rights of the other party to the contract.⁶³

⁵⁸ The remedy will not avail "unless both parties at the time the contract is executed have the right to resort to equity for its specific performance." *Pantages v. Grauman*, 191 Fed. 317.

⁵⁹ Where the contract is not specifically enforceable against one of the parties at the time of its execution, he cannot, by subsequent performance of those conditions that could not be specifically enforced, put himself in a position to demand specific enforcement against the other party. *Pantages v. Grauman*, 191 Fed. 317.

⁶⁰ So where a contract for the sale of stock binds the buyer to furnish the personal services of himself and his wife, the case is not taken out of the rule by an offer to perform such services. *Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803.

⁶¹ *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084.

⁶² *Turley v. Thomas*, 31 Nev. 181, 135 Am. St. Rep. 667, 101 Pac. 568; *Bumgardner v. Leavitt*, 35 W. Va. 194, 12 L. R. A. 776, 13 S. E. 67.

A contract for the delivery of stock in payment for personal services to be rendered may be specifically en-

forced by the person to whom delivery is to be made where such services have been fully performed, although the courts would not have compelled their specific performance. *Turley v. Thomas*, 31 Nev. 181, 135 Am. St. Rep. 667, 101 Pac. 568.

The fact that a contract by a corporation to convey stock to an employee in consideration for services to be rendered contains a provision requiring him to offer the stock to the corporation before transferring it to anyone else, which cannot be specifically enforced, does not deprive the employee of his right to specific performance after the stock has been fully paid for. *Johnston v. Frederick Stearns & Co.*, 160 Mich. 247, 125 N. W. 29.

In *Wait v. Kern River Mining, Milling & Developing Co.*, 157 Cal. 16, 106 Pac. 98; *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276; and in *Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371, the court decreed specific performance of a contract to give the complainant stock in compensation for services, where the services had been performed. The question of mutuality of remedy was not discussed or referred to.

⁶³ *First Nat. Bank of Hastings v.*

XXVI. PLEDGES, MORTGAGES AND LEASES OF STOCK

§ 3902. Shares of stock may be pledged. Since possession must uniformly accompany a pledge,⁶⁴ and since shares of stock are of an incorporeal nature, and hence are incapable of manual delivery,⁶⁵ it was formerly thought that shares of stock could not be the subject of a pledge.⁶⁶ A contrary doctrine is now well settled, however, and it can no longer be doubted that shares of stock may be pledged as collateral security.⁶⁷

§ 3903. Nature, essentials and validity of contract of pledge generally. "A pledge is a transfer of personal property as a security

Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

The court may decree specific performance of an option to sell stock, which originally is enforceable only at the option of the seller, where the latter exercises the option prior to bringing the action, and tenders performance on his part. *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084. See also *Frue v. Houghton*, 6 Colo. 318.

"The objection of want of mutuality of remedy in the sense in which equity uses those terms no longer exists. Complainants seeking specific performance offer to perform on their part and unreservedly submit themselves to the court to decree whatever may be proper in enforcing the rights of the other party to the contract. If defendants accept their offer, complainants cannot afterwards retract it, and thus escape a decree in favor of the defendants. If, on the other hand, defendants refuse the offer, and unsuccessfully resist specific performance, they cannot be compelled to perform unless performance of every stipulation of the contract for their benefit is likewise coerced from complainants. In either event complete enforcement of the legal and equitable rights of the parties will be ef-

fected by one comprehensive decree, and the defendant cannot be remitted to a court of law for the enforcement of any of their rights." *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204. Quoted with approval in *First Nat. Bank of Hastings v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084.

⁶⁴ See § 3905, *infra*.

⁶⁵ See § 3430, *supra*.

⁶⁶ See *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307.

⁶⁷ *New Orleans Nat. Banking Ass'n v. P. S. Wiltz & Co.*, 10 Fed. 330; *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307. See also the cases cited in the following sections of this subdivision.

"Strictly speaking, stock being of an incorporeal nature, is not capable of being pledged, as there cannot be a delivery of intangible property. It may be, and frequently is, hypothecated, which is a pledge in a secondary sense." *Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589, 57 N. E. 455.

But a mere subscription to stock which has never been issued or delivered to the subscriber or paid for by him, while it may give him some qualified interest in or right to the stock, constitutes no tangible right

for a debt or other obligation.”⁶⁸ “A pledge is something more than a simple lien. It is a deposit or delivery of possession and control of property, made as security for debt, vesting a right to the property in the pledgee to the full extent necessary to protect and collect the debt.”⁶⁹

In order to constitute a pledge of corporate stock there must be a contract whereby the stock is held as security.⁷⁰ The minds of the parties must have met with respect to the subject-matter,⁷¹ and their agreement must have been supported by a sufficient consideration.⁷²

capable of being pledged. *Cattle-men's Trust Co. of Ft. Worth v. Turner*, — Tex. Civ. App. —, 182 S. W. 438.

⁶⁸ *Morgan v. Johns*, 84 Ore. 557, 165 Pac. 369.

It “is a bailment as security for an obligation.” *Helliwell, Stock & Stockholders*, § 356. Quoted in *First Nat. Bank of St. Johns v. Multnomah State Bank*, — Ore. —, 170 Pac. 534.

“At common law a pledge is a bailment of personal property, as a security for some debt or engagement.” *Hyams v. Bamberger*, 10 Utah 3, 36 Pac. 202.

⁶⁹ *Austin v. Hayden*, 171 Mich. 38, Ann. Cas. 1915 B 894, 137 N. W. 317. See also *First Nat. Bank of Omaha, Nebraska v. Illinois Trust & Savings Bank*, 84 Fed. 34. See also *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84.

⁷⁰ *Wilkinson v. Misner*, 158 Mo. App. 551, 138 S. W. 931.

⁷¹ *Wilkinson v. Misner*, 158 Mo. App. 551, 138 S. W. 931.

In *Schwind v. Boyce*, 94 Md. 510, 51 Atl. 45, the evidence was held to show a pledge of stock subscribed for by an employee of the corporation to its president to secure sums advanced or guaranteed by him.

A court of equity may reform a contract of pledge by inserting words omitted through a mutual mistake of fact, even after the pledgor has become bankrupt. *First Nat. Bank of*

Waterloo v. Bacon, 113 N. Y. App. Div. 612, 98 N. Y. Supp. 717, aff'd 198 N. Y. 533, 82 N. E. 1126, 216 U. S. 134, 54 L. Ed. 418.

As to the effect of duress, see *MacFarland v. Liberty Nat. Bank of New York*, 166 N. Y. Supp. 393.

⁷² *Wilkinson v. Misner*, 158 Mo. App. 551, 138 S. W. 931.

An agreement that the seller of stock is to hold the same as security for payment of the purchase price is supported by a sufficient consideration. *Loveless v. Bridges*, 136 Ga. 338, 71 S. E. 166.

A pledge made to secure performance of an agreement, for a valuable consideration, to sell at a profit other stock sold by the pledgor to the pledgee is supported by a sufficient consideration. *Jones v. Dimmick*, 178 Ala. 296, 59 So. 623.

An antecedent debt is sufficient consideration to support a pledge. *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87; *Hickok v. Cowperthwait*, 210 N. Y. 137, Ann. Cas. 1915 B 1002, 103 N. E. 1111, aff'g judgment 147 N. Y. App. Div. 900, 131 N. Y. Supp. 838, and modifying judgment 147 N. Y. App. Div. 121, 131 N. Y. Supp. 829.

The extension of the time for payment of an existing indebtedness is a sufficient consideration to support a pledge of stock to secure it. *Central Sav. Bank v. Smith*, 43 Colo. 90, 95 Pac. 307.

The contract need not necessarily be an express one, but it may be implied from the facts and circumstances of the case.⁷³ "No formal agreement is necessary to establish a pledge so long as the agreement be clearly express or implied."⁷⁴

A person may pledge stock belonging to another with the consent of the owner,⁷⁵ and a stockholder may pledge stock owned by him individually for the purpose of obtaining money for the benefit of the corporation.⁷⁶ If he does so, and the stock is lost to him because of the failure of the corporation to pay, he does not thereby become entitled to other stock of the same value and to the same amount, but merely stands as a creditor of the company to the amount of the sum advanced to it.⁷⁷

A void pledge creates no lien, and gives the pledgee no right to the possession of the stock.⁷⁸ And stock pledged to secure the payment of money owing under a void contract may be recovered by the pledgee.⁷⁹

A pledge of stock of a corporation whose charter has expired may be regarded as a pledge of the assets of the company itself.⁸⁰

But equity will not enforce a promise to transfer stock as security based on a past consideration, as distinguished from a present or future one. *Andrews v. Guayaquil & Q. R. Co.*, 73 N. J. Eq. 150, 75 Atl. 812, judgment aff'd 75 N. J. Eq. 535, 72 Atl. 355.

⁷³ *Leary v. United States*, 229 Fed. 660; *Wilkinson v. Misner*, 158 Mo. App. 551, 138 S. W. 931.

Where it appears that the property is held by the creditor as collateral security to a debt, with the consent of the owner, for a sufficient consideration, there is a contract of pledge, although it is not an express one. *Wilkinson v. Misner*, 158 Mo. App. 551, 138 S. W. 931.

But the mere withholding by one person of the stock of another, with the declaration that it will be withheld until a debt of the owner is paid, does not of itself constitute a pledge, even though the owner fails to object at the time when such declaration is made. *Wilkinson v. Misner*, 158 Mo. App. 551, 138 S. W. 931.

The relation of pledgee and pledgor

exists between a broker and his customer by operation of law, where the former advances the full amount necessary to purchase stock for the latter. *Content v. Banner*, 184 N. Y. 121, 6 Ann. Cas. 106, 76 N. E. 913, rev'g judgment 96 N. Y. App. Div. 625, 88 N. Y. Supp. 1095.

⁷⁴ *Dexter Horton Nat. Bank v. Washington-Alaska Bank*, 86 Wash. 452, 150 Pac. 1176, where the pledge was held to have been sufficiently established.

⁷⁵ *Greene v. Faber*, 158 N. Y. App. Div. 149, 143 N. Y. Supp. 27; *Hickok v. Cowperthwait*, 137 N. Y. App. Div. 94, 122 N. Y. Supp. 28.

⁷⁶ *Dempster v. Rosehill Cemetery Co.*, 206 Ill. 261, 68 N. E. 1070.

⁷⁷ *Dempster v. Rosehill Cemetery Co.*, 206 Ill. 261, 68 N. E. 1070.

⁷⁸ *Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943.

⁷⁹ *Willcox v. Edwards*, 162 Cal. 455, Ann. Cas. 1913 C 1392, 123 Pac. 276.

⁸⁰ *Scott v. Davis*, — Mo. App. —, 200 S. W. 723.

"The rights of the parties with respect to the debt, and the stock pledged as security, are governed by the laws of the state * * * where the contract was made and where the parties resided." ⁸¹

§ 3904. Pledges, mortgages and sales distinguished. The difference between a pledge and a mortgage at common law is that in the former the possession only is transferred, while in the latter the title is transferred, either with or without the possession.⁸² "It is often difficult to determine whether a given transaction is a mortgage or a pledge when possession of the property is delivered to the creditor."⁸³ The question is one of construction, and depends upon the intent of the parties.⁸⁴ In case of doubt the law favors the conclusion that the transaction is a pledge rather than a mortgage.⁸⁵ And it has been said that "the general rule is that an assignment and transfer of shares of stock in a corporation by a debtor as security for a debt is a pledge, and not a mortgage."⁸⁶ If shares of stock

⁸¹ *Warrior Coal & Coke Co. v. National Bank of Augusta (Ala.)*, 53 So. 997.

⁸² *United States. Casey v. Cava-roc*, 96 U. S. 467, 24 L. Ed. 779; *National Bank of Commerce in St. Louis v. Equitable Trust Co. of New York*, 227 Fed. 526, rev'g judgment 211 Fed. 688.

Alabama. Gilmer v. Morris, 80 Ala. 78, 60 Am. Rep. 85.

Arizona. Martin v. Bankers' Trust Co., 18 Ariz. 55, 156 Pac. 87.

Arkansas. Merchants' & Farmers' Bank v. Citizens' Bank, 125 Ark. 131, 187 S. W. 650.

California. Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

Oregon. Irving Park Ass'n v. Watson, 41 Ore. 95, 67 Pac. 945.

Utah. Hyams v. Bamberger, 10 Utah 3, 36 Pac. 202.

"Speaking generally, the distinction between a mortgage and pledge of personal property is that in the former the thing pledged must be delivered to the pledgee, while in the latter the possession may remain with the mortgagor." *Irving Park Ass'n v. Watson*, 41 Ore. 95, 67 Pac. 945.

⁸³ *Irving Park Ass'n v. Watson*, 41 Ore. 95, 67 Pac. 945.

⁸⁴ *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87; *First Nat. Bank of Waterloo v. Exchange Nat. Bank of Seneca Falls*, 179 N. Y. App. Div. 22, 153 N. Y. Supp. 818, aff'd 179 N. Y. App. Div. 22, 164 N. Y. Supp. 1092.

⁸⁵ *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87.

⁸⁶ *Irving Park Ass'n v. Watson*, 41 Ore. 95, 67 Pac. 945.

A transfer by a debtor to his creditor of a certificate of stock as collateral security to the payment of a note, the transferee being authorized to sell in case of nonpayment, is to be deemed a pledge rather than a mortgage of the certificate. *Irving Park Ass'n v. Watson*, 41 Ore. 95, 67 Pac. 945.

In *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546, an assignment of stock to a trustee, named in a deed of trust of land and such stock as security for a debt, providing for a sale of the stock in connection with the realty in case the debt was not paid, and under which

are transferred on the books of the corporation, or by assignment and delivery of the certificate, with the intention that they shall be held merely as collateral security, and returned on payment of the debt, the courts will give effect to the intention of the parties, and hold the transaction a pledge, and not a mortgage. Although the apparent legal title may be vested by the transfer in the pledgee, the general property, as between the parties, will remain in the pledgor.⁸⁷ If there is no delivery, the transaction will be held to be a mortgage.⁸⁸ The two forms of security may be combined into one, and the same transaction may partake of the nature of both.⁸⁹

Whether a particular transaction is a pledge or a sale is also a question of construction, and depends upon the intention of the parties.⁹⁰ Although a transfer of shares on the books of the corpora-

the corporation issued a new certificate to the trustee, was held to be a pledge and not a mortgage.

See also *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87, where the transaction was held to be a pledge.

⁸⁷ *United States. Smith v. Lee*, 77 Fed. 779.

Alabama. *Campbell v. Woodstock Iron Co.*, 83 Ala. 351, 3 So. 369; *Gilmer v. Morris*, 80 Ala. 78, 60 Am. Rep. 85; *Nabring v. Bank of Mobile*, 58 Ala. 204.

California. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

Illinois. *Rice v. Gilbert*, 173 Ill. 348, 50 N. E. 1087.

Indiana. *Manns v. Brookville Nat. Bank*, 73 Ind. 243; *Evans v. Darlington*, 5 Blackf. 320.

Maryland. *Dungan v. Mutual Ben. Life Ins. Co.*, 38 Md. 242.

Massachusetts. *Newton v. Fay*, 10 Allen 505; *Merchants' Bank v. Cook*, 4 Pick. 405.

New Jersey. *Mechanics' Building & Loan Ass'n v. Conover*, 14 N. J. Eq. 219.

New York. *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307; *Hasbrouck v. Vandervoort*, 4 Sandf. 74.

North Carolina. *Doak v. Bank of State*, 6 Ired. 309.

Ohio. *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 Ohio St. 208.

Utah. *George R. Barse Live-Stock Co. v. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. 630.

⁸⁸ *Merchants' & Farmers' Bank v. Citizens' Bank*, 125 Ark. 131, 187 S. W. 650.

⁸⁹ As where the transferee holds both the possession and the title of the stock. *Gilmer v. Morris*, 80 Ala. 78, 60 Am. Rep. 85.

⁹⁰ *First Nat. Bank of Lake Charles v. Bell*, 141 La. 53, 74 So. 628; *Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943; *United Nat. Bank v. Tappan*, 33 R. I. 1, 79 Atl. 946. See also *Blanton v. Chalmers*, 158 Fed. 907.

In each of the following cases the transaction in question was held to be a pledge and not a sale. In *re McLean-Bowman Co.*, 138 Fed. 181; *First Nat. Bank of Lake Charles v. Bell*, 141 La. 53, 74 So. 628; *Colonial Trust Co. v. McMillan*, 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933; *Jones v. Seaman*, 133 N. Y. App. Div. 127, 117 N. Y. Supp. 288, aff'd 200 N. Y. 553, 93 N. E. 1123; *Eichbaum v. Sample*, 213 Pa. 216, 62 Atl. 837.

In *re International Radiator Co.*, 10 Del. Ch. 358, 92 Atl. 255, it was held that while the form of the written agreement of the company raised

tion, or by assignment of the certificate, may be absolute in form, yet if the intention is that the transferee shall hold them merely as collateral security, the transfer is a pledge merely, and such intention may be shown either by other writings or by parol evidence.⁹¹

some doubt as to whether the transaction in question was a sale or a pledge of its stock, the dealings of the parties were such as to be inconsistent with a sale and consistent only with a pledge.

In each of the following cases the transaction in question was held to be a sale. *Sheakley v. Nelson*, 13 Cal. App. 379, 109 Pac. 891; *Star Mills v. Bailey*, 140 Ky. 194, 140 Am. St. Rep. 370, 130 S. W. 1077; *Roche v. Hiss*, 84 N. J. Eq. 242, 93 Atl. 804; *Malloy v. Drumheller*, 68 Wash. 106, 122 Pac. 1005.

In *Commercial & Savings Bank of San Jose v. Pott*, 150 Cal. 358, 89 Pac. 431, the transaction in question was held to be a sale, although the contract provided that the buyers were to have the right to all dividends while the seller held the stock as security for the payment of the purchase price.

Whether a deposit of stock with a third person was a pledge or a sale is a question of fact for the jury where its solution depends on conflicting oral testimony. *Morgan v. Jones*, 84 Ore. 557, 165 Pac. 369.

⁹¹ *United States*. *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Brick v. Brick*, 98 U. S. 514, 25 L. Ed. 256.

California. *Shattuck & Desmond Warehouse Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348.

Colorado. *Ellis v. Gibbons*, 26 Colo. App. 454, 145 Pac. 285.

Connecticut. *Stamford Bank v. Ferris*, 17 Conn. 259.

Illinois. *Travers v. Leopold*, 124 Ill. 431, 16 N. E. 902.

Indiana. *Ginz v. Stumph*, 73 Ind. 209.

Louisiana. *Citizens' Bank of Louisiana v. Folse*, 123 La. 918, 49 So. 641.

Massachusetts. *Riley v. Hampshire County Nat. Bank*, 164 Mass. 482, 41 N. E. 679; *Minchin v. Minchin*, 157 Mass. 265, 32 N. E. 164; *Boardman v. Holmes*, 124 Mass. 438; *Newton v. Fay*, 10 Allen 505.

Michigan. *May v. Genesee County Sav. Bank*, 120 Mich. 330, 79 N. W. 630.

Missouri. *Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943.

Montana. *Murray v. Butte-Monitor Tunnel Min. Co.*, 41 Mont. 449, 112 Pac. 1132, 110 Pac. 497.

New York. *McMahon v. Macy*, 51 N. Y. 155; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307.

Contra, *Bend v. Susquehanna Bridge & Bank Co.*, 6 Harr. & J. (Md.) 128, 14 Am. Dec. 261.

The fact that the stock was placed in the name of a transferee on the books of the corporation, and that a certificate therefor was issued directly to him is not conclusive that the transaction was a sale and not a pledge. *Colonial Trust Co. v. McMillan*, 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933.

Proof of an oral contract, made subsequently to a written contract for the sale of stock, that the vendor is to hold the same as security for the purchase price, does not tend to vary or contradict the written contract, and is admissible. *Loveless v. Bridges*, 136 Ga. 338, 71 S. E. 166.

Whether a transfer absolute in form, but giving the transferor the option to repurchase within a specified time, is a conditional sale or a pledge, is a mixed question of law and fact, to be

If a debtor turns over shares of stock to his creditor, the presumption is, in the absence of any evidence of a contrary intention, that the transfer is a pledge of the stock as collateral security for payment of the debt, and not a sale or a payment of the debt.⁹² And generally in doubtful cases the transaction will be deemed to be a pledge rather than a sale.⁹³ The character of the transaction "is fixed at its inception, and is not changed by lapse of time."⁹⁴

An absolute transfer of stock in payment of a debt, with an option to redeem the same within a certain time upon payment of the debt, is not a pledge.⁹⁵ Nor is a subscription for or purchase of shares of stock, with an option to resell the stock within a certain time, a pledge of the stock as security for repayment of the money paid by the subscriber or purchaser.⁹⁶

According to the weight of authority, where a stockbroker purchases stock for a client upon margins, holding the stock as security for advances made by him, he is a pledgee of the stock.⁹⁷ In Massa-

determined by a consideration of the peculiar circumstances of each case. *Collins v. Denny Clay Co.*, 41 Wash. 136, 82 Pac. 1012.

The burden of proving that a transfer absolute on its face was intended as a pledge is on the party asserting it. *Murray v. Butte-Monitor Tunnel Min. Co.*, 41 Mont. 449, 112 Pac. 1132, 110 Pac. 497.

⁹² *Borland v. Nevada Bank of San Francisco*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737. See also *Murray v. Butte-Monitor Tunnel Min. Co.*, 41 Mont. 449, 112 Pac. 1132, 110 Pac. 497.

⁹³ *Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943.

⁹⁴ *Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943.

⁹⁵ *In re Lauman's Appeal*, 68 Pa. St. 88.

⁹⁶ *Crimp v. McCormick Construction Co.*, 71 Fed. 356; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. 270.

⁹⁷ *United States. Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, aff'g 149 Fed. 176; *Richardson v.*

Shaw, 209 U. S. 365, 52 L. Ed. 835, 14 Ann. Cas. 981, aff'g 147 Fed. 659.

California. *Thompson v. Toland*, 48 Cal. 99. See *Cashman v. Root*, 89 Cal. 373, 12 L. R. A. 511, 23 Am. St. Rep. 482, 26 Pac. 883.

Connecticut. *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

Illinois. *Brewster v. Van Liew*, 119 Ill. 554, 59 Am. Rep. 823, 8 N. E. 842, rev'g 20 Ill. App. 43; *Hughes v. Barrell*, 167 Ill. App. 100; *Schaefer v. Dickinson*, 141 Ill. App. 234; *Whipple v. Tucker*, 123 Ill. App. 223.

Maryland. *Worthington v. Tormey*, 34 Md. 182.

Michigan. *Austin v. Hayden*, 171 Mich. 38, Ann. Cas. 1915 B 894, 137 N. W. 317.

New York. *Content v. Banner*, 184 N. Y. 121, 6 Ann. Cas. 106, 76 N. E. 913, rev'g judgment 96 App. Div. 625, 88 N. Y. Supp. 1095; *De Cordova v. Barnum*, 130 N. Y. 615, 27 Am. St. Rep. 538, 29 N. E. 1099; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Stenton v. Jerome*, 54 N. Y. 480; *Markham v. Jaudon*, 41 N. Y. 235; *Frank & J. G.*

chusetts, however, it is held that the parties do not occupy the relation of pledgor and pledgee under such circumstances, but rather that of parties to an executory contract of purchase and sale.⁹⁸

§ 3905. Necessity for and sufficiency of delivery and possession.

To constitute a valid pledge, possession of the property must be delivered to the pledgee.⁹⁹ "Possession must uniformly accompany a pledge. The right of the pledgee cannot otherwise be consummated."¹ This is true of a pledge of shares of stock. There cannot be a pledge of shares unless they are delivered, so the possession and control of the same is transferred from the pledgor to the pledgee.²

Jenkins, Jr. v. Conklin, 146 App. Div. 301, 130 N. Y. Supp. 778; *Strickland v. Magoun*, 119 App. Div. 113, 104 N. Y. Supp. 425, aff'd 190 N. Y. 545, 83 N. E. 1132.

Pennsylvania. *Wynkoop v. Seal*, 64 Pa. St. 361; *Gilpin v. Howell*, 5 Pa. St. 41, 45 Am. Dec. 720.

Rhode Island. *United Nat. Bank v. Tappan*, 31 R. I. 1, 79 Atl. 946.

"Although the broker may not be strictly a pledgee, as understood at common law, he is, essentially, a pledgee and not the owner of the stock." *Richardson v. Shaw*, 209 U. S. 365, 52 L. Ed. 835, 14 Ann. Cas. 981, aff'g 147 Fed. 659.

This is true though the broker has the right to repledge the stock, or to sell it for his own protection, and notwithstanding the fact that he is not obliged to return the identical certificates pledged, but may substitute others of the same character. *Richardson v. Shaw*, 209 U. S. 365, 52 L. Ed. 835, 14 Ann. Cas. 981, aff'g 147 Fed. 659; *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

This is true although the broker advances the full amount of the purchase price. *Content v. Banner*, 184 N. Y. 121, 6 Ann. Cas. 106, 76 N. E. 913, rev'g judgment 96 N. Y. App. Div. 625, 88 N. Y. Supp. 1095.

⁹⁸ *Chase v. Boston*, 180 Mass. 458, 62 N. E. 1059; *Covel v. Loud*, 135

Mass. 41, 46 Am. Rep. 446; *Wood v. Hayes*, 15 Gray (Mass.) 375. See also *Chase v. Boston*, 193 Mass. 522, 79 N. E. 736; *Weston v. Jordan*, 168 Mass. 401, 47 N. E. 133.

But the contrary is true where the stock is bought by brokers under written orders from their customers with a specific agreement that the ownership shall be in the latter, subject only to a lien in favor of the brokers for any indebtedness due them. *Chase v. Boston*, 193 Mass. 522, 79 N. E. 736.

⁹⁹ *Third Nat. Bank of Buffalo v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, aff'g 162 N. Y. 163, 48 L. R. A. 107, 56 N. E. 521, which rev'd 29 N. Y. App. Div. 137, 51 N. Y. Supp. 667, and 171 N. Y. 670, 64 N. E. 1119, which aff'd 61 N. Y. App. Div. 612, 69 N. Y. Supp. 1129; *Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 233, 33 L. Ed. 589; *National Bank of Commerce in St. Louis v. Equitable Trust Co. of New York*, 227 Fed. 526, rev'g judgment 211 Fed. 688; *Bell v. Mills*, 123 Fed. 24; *Bidstrup v. Thompson*, 45 Fed. 452; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307; *First Nat. Bank of Waterloo v. Bacon*, 113 N. Y. App. Div. 612, 98 N. Y. Supp. 717, aff'd 189 N. Y. 533, 82 N. E. 1126, 216 U. S. 134, 54 L. Ed. 418.

¹ *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307.

² **United States.** *Third Nat. Bank*

Since shares of stock, like choses in action and other incorporeal property, are not capable of manual delivery, possession can only be delivered, and therefore they can only be pledged, by a written transfer of the title.³ "Such transfer of the title performs the same office that the delivery of possession does in case of a pledge of corporeal property. The transfer of the title, like the delivery of possession, constitutes the evidence of the pledgee's right of property in the thing pledged."⁴

of *Buffalo v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, aff'g 162 N. Y. 163, 48 L. R. A. 107, 56 N. E. 521, which rev'd 29 N. Y. App. Div. 137, 51 N. Y. Supp. 667, and 171 N. Y. 670, 64 N. E. 1119, which aff'd 61 N. Y. App. Div. 612, 69 N. Y. Supp. 1129; *Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 233, 33 L. Ed. 589; *National Bank of Commerce in St. Louis v. Equitable Trust Co. of New York*, 227 Fed. 526, rev'g judgment 211 Fed. 688; *Bell v. Mills*, 123 Fed. 24; *Bidstrup v. Thompson*, 45 Fed. 452; *Nisbit v. Macon Bank & Trust Co.*, 12 Fed. 686. See also *Sexton v. Kessler & Co.*, 225 U. S. 90, 56 L. Ed. 995, aff'g 172 Fed. 535.

Arkansas. *Merchants' & Farmers' Bank v. Citizens' Bank*, 125 Ark. 131, 187 S. W. 650.

California. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *Bell v. Mills*, 123 Fed. 24, quoting the California statute.

Connecticut. *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

Illinois. *Atkinson v. Foster*, 134 Ill. 472, 25 N. E. 528.

Louisiana. *Succession of Lanoux*, 46 La. Ann. 1036, 25 L. R. A. 577, 15 So. 708; *Lallande v. Ingram*, 19 La. Ann. 364.

Massachusetts. *Baker v. Davie*, 211 Mass. 429, 37 L. R. A. (N. S.) 944, 97 N. E. 1094; *Robertson v. Robertson*, 186 Mass. 308, 71 N. E. 571.

New Jersey. *Andrews v. Guayaquil & Q. R. Co.*, 73 N. J. Eq. 150, 75

Atl. 812, aff'd 75 N. J. Eq. 535, 72 Atl. 355.

New York. *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307; *First Nat. Bank of Waterloo v. Exchange Nat. Bank of Seneca Falls*, 179 App. Div. 22, 153 N. Y. Supp. 818, aff'd 179 App. Div. 22, 164 N. Y. Supp. 1092; *First Nat. Bank of Waterloo v. Bacon*, 113 App. Div. 612, 98 N. Y. Supp. 717, aff'd 189 N. Y. 533, 82 N. E. 1126, 216 U. S. 134, 54 L. Ed. 418.

Pennsylvania. *Girard Trust Co. v. Mellor*, 156 Pa. St. 579, 27 Atl. 662.

Rhode Island. *United Nat. Bank v. Tappan*, 33 R. I. 1, 79 Atl. 946.

Tennessee. *Winslow v. Harriman Iron Co. (Tenn. Ch. App.)*, 42 S. W. 698.

Texas. *Wagner v. Marple*, 10 Tex. Civ. App. 505, 31 S. W. 691.

Delivery by the president of the pledgor company to himself as vice president of the pledgee company is sufficient in the absence of fraud. *Winslow v. Harriman Iron Co. (Tenn. Ch. App.)*, 42 S. W. 698.

The stock may be delivered to a third person to be held by him for the protection of both parties to the contract. *Peavey v. Wells*, 136 Minn. 180, 161 N. W. 508.

³ *Nisbit v. Macon Bank & Trust Co.*, 12 Fed. 686; *Hall v. Cayot*, 141 Cal. 13, 74 Pac. 299; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

⁴ *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

"In the case of stock there can be no delivery of possession thereof. The

It follows from this that shares of stock may be pledged in any mode which is sufficient to transfer the same to the pledgee as against the pledgor. They may be pledged by a transfer to the pledgee on the books of the corporation,⁵ or, without a transfer on the books,⁶ by delivery of the certificate of stock, with a written assignment and power to transfer the shares on the books, either to the transferee or in blank,⁷ as explained in a former section.⁸

Mere delivery of a certificate of stock, without any written assignment or transfer, may vest an equitable title, or give a lien enforceable in equity;⁹ but since it gives the person to whom the certificate is

scrip is not the stock itself, and as to property not capable of manual delivery a pledge may be created by a written transfer thereof." *First Nat. Bank of Waterloo v. Bacon*, 113 N. Y. App. Div. 612, 98 N. Y. Supp. 717, aff'd 189 N. Y. 533, 82 N. E. 1126, 216 U. S. 134, 54 L. Ed. 418.

A transfer of the legal title to the pledgee is equivalent to the delivery of possession in case of the pledge of corporeal property. *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

⁵ *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307.

⁶ See § 3907, *infra*, and § 3798 *et seq.*, *supra*.

⁷ **California.** *Spreckels v. Nevada Bank of San Francisco*, 113 Cal. 272, 33 L. R. A. 459, 54 Am. St. Rep. 348, 45 Pac. 329; *Goldstein v. Hort*, 30 Cal. 376.

Idaho. *Mapleton Bank v. Standrod*, 8 Idaho 740, 67 L. R. A. 656, 71 Pac. 119.

Massachusetts. *Athol Sav. Bank v. Bennett*, 203 Mass. 480, 89 N. E. 632; *Clews v. Friedman*, 182 Mass. 555, 66 N. E. 201.

Missouri. *McClintock v. Central Bank of Kansas City*, 120 Mo. 127, 24 S. W. 1052.

New Jersey. *Broadway Bank v. McElrath*, 13 N. J. Eq. 24.

New York. *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348, 34 Am. Dec. 317.

Tennessee. *McClung v. Colwell*, 107 Tenn. 592, 89 Am. St. Rep. 961, 64 S. W. 890; *Winslow v. Harriman Iron Co.*, 42 S. W. 698; *Loveman Co. v. Henderson*, 1 Tenn. Ch. App. 749.

Texas. *Davis v. Hardwick*, 43 Tex. Civ. App. 71, 94 S. W. 359.

The Vermont statute provides that a transfer by assignment and delivery of the certificate as collateral security for a valid debt or obligation is a valid transfer of the stock represented by the certificate, as against the transferor, his heirs, executors, administrators and assigns. *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

⁸ See § 3784 *et seq.*, *supra*.

⁹ *Loveman Co. v. Henderson*, 1 Tenn. Ch. App. 749; *Wagner v. Marple*, 10 Tex. Civ. App. 505, 31 S. W. 691.

The simple delivery of the certificate passes an equitable title for the purposes of a pledge. *Bank of Gunter'sville v. United States Fidelity & Guaranty Co.*, — Ala. —, 75 So. 168.

Delivery of the certificate without any written assignment, but with a clear intent thereby to pledge the stock, creates an equitable right in the person to whom the delivery is made, which may be enforced in equity as between the parties. The executor of the person making such a

delivered no control over or possession of the stock, it does not constitute a valid pledge.¹⁰ It has been held, however, that the pledgor may be compelled by a court of equity to execute an assignment after default under such circumstances.¹¹

An assignment of stock on a separate paper, where the certificate remains in the possession and under the control of the assignor, is not a valid pledge,¹² although it is otherwise if the certificate is delivered to the pledgee,¹³ or, according to some courts, if no certificate of the stock has been issued.¹⁴ But it has been held that there can be no pledge where no certificates have been issued, since delivery is impossible under such circumstances.¹⁵ Nor is a pledge created by a written declaration, deposited in a safe-deposit box, that certain stock owned by the signer is held as collateral security for the benefit of a particular creditor.¹⁶

An actual manual delivery is not necessary, but "it is sufficient if there be any of those circumstances which in construction of law are deemed sufficient to pass the possession of the property."¹⁷ So where the stock is in the possession of the pledgee, the making of the contract of pledge operates as a delivery to him.¹⁸ It has also been held

delivery occupies the same position in this regard as did his testator. *Hall v. Cayot*, 141 Cal. 13, 74 Pac. 299.

A pledge by mere delivery of the certificate, without a power of attorney authorizing a transfer on the corporate books, is valid and creates a lien, although it conveys no title. *Brown v. Hotel Ass'n*, 63 Neb. 181, 88 N. W. 175.

That a pledge of stock by delivery without indorsement is subject to the equities of third persons, see *Barnes v. Davis*, 113 Minn. 132, 128 N. W. 1118.

¹⁰ *Nisbit v. Macon Bank & Trust Co.*, 12 Fed. 686; *Wagner v. Marple*, 10 Tex. Civ. App. 505, 31 S. W. 691.

¹¹ *Kelley v. Root*, 74 N. Y. App. Div. 499, 77 N. Y. Supp. 431, aff'g 37 N. Y. Misc. 207, 75 N. Y. Supp. 163.

¹² *Atkinson v. Foster*, 134 Ill. 472, 25 N. E. 528.

¹³ A statement in a collateral note that stock has been deposited as security for the debt, and that on de-

fault the lender may sell the same at public outcry and purchase, is sufficient to give the purchaser at the sale a title which will support a demand for a transfer and a new certificate. *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226.

See also *Clews v. Friedman*, 182 Mass. 555, 66 N. E. 201.

¹⁴ *First Nat. Bank of Davenport v. Gifford*, 47 Iowa 575; *In re Harris' Appeal* (Pa.), 12 Atl. 743.

¹⁵ *Lallande v. Ingram*, 19 La. Ann. 364. See also *Bidstrup v. Thompson*, 45 Fed. 452.

¹⁶ *Girard Trust Co. v. Mellor*, 156 Pa. St. 579, 27 Atl. 662.

¹⁷ *Markham v. Jaudon*, 41 N. Y. 235, rev'g 49 Barb. (N. Y.) 462, quoted in *United Nat. Bank v. Tappan*, 33 R. I. 1, 79 Atl. 946.

¹⁸ *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874; *Markham v. Jaudon*, 41 N. Y. 235, rev'g 49 Barb. (N. Y.) 462;

by some courts that where stock is pledged subject to the lien of a prior pledge, possession by the first pledgee may be regarded as possession of the second pledgee through the agency of the former.¹⁹ But there is authority to the contrary.²⁰

§ 3906. Effect of parting with possession. Generally a pledgee who parts with the possession of the pledge thereby waives his lien.²¹ But the contrary is true where he returns the stock to the pledgor,²² or delivers it to a third person,²³ temporarily and for some special

United Nat. Bank v. Tappan, 33 R. I. 1, 79 Atl. 946.

Where stock sold is retained by the seller as security for the payment of notes given for the purchase price, there is a valid pledge although it is not delivered by the seller to the purchaser and then returned to the seller. *McVay v. Reese*, 62 Wash. 562, 114 Pac. 184.

Where the plaintiff advanced the money with which another person purchased stock, and the latter stated to a third person that he owed the money to the plaintiff, and that the plaintiff held the stock as collateral, it was held that the plaintiff had an equitable lien upon the stock. *Piper v. Hayward*, 71 N. Y. Misc. 41, 127 N. Y. Supp. 240.

An agreement that one to whom a certificate of stock has been delivered, with power of attorney to transfer the same, as security for a note shall hold the same as security for a subsequent note as well, creates a valid pledge of the stock as security for the second note. *Athol Sav. Bank v. Bennett*, 203 Mass. 480, 89 N. E. 632.

¹⁹ *First Nat. Bank of Waterloo v. Exchange Nat. Bank of Seneca Falls*, 179 N. Y. App. Div. 22, 153 N. Y. Supp. 818, aff'd 164 N. Y. Supp. 1092; *First Nat. Bank of Waterloo v. Bacon*, 113 N. Y. App. Div. 612, 98 N. Y. Supp. 717, aff'd 189 N. Y. 533, 82 N. E. 1126, 216 U. S. 134, 54 L. Ed. 418.

An agreement that stock deposited with a bank as security for a loan

shall be held as security for the payment of a note given by the pledgor to a third person constitutes an equitable pledge in favor of the latter, which a court of equity will enforce. *Birch Tree State Bank v. Brown*, 152 Mo. App. 589, 133 S. W. 860.

²⁰ A transfer by the pledgor of stock pledged and in the possession of the pledgee, as security for a debt with authority to the transferee to redeem, is a chattel mortgage and not a pledge, since there is no delivery of possession. *Merchants' & Farmers' Bank v. Citizens' Bank*, 125 Ark. 131, 187 S. W. 650.

²¹ *National Bank of Commerce v. Equitable Trust Co.*, 227 Fed. 526, rev'g judgment 211 Fed. 688; *Hickok v. Cowperthwait*, 210 N. Y. 137, Ann. Cas. 1915 B 1002, 103 N. E. 1111, aff'g judgment 147 N. Y. App. Div. 900, 131 N. Y. Supp. 838, and modifying judgment 147 N. Y. App. Div. 121, 131 N. Y. Supp. 829; *Hickok v. Cowperthwait*, 137 N. Y. App. Div. 94, 122 N. Y. Supp. 78. See also *Bell v. Mills*, 123 Fed. 24.

²² *Hickok v. Cowperthwait*, 210 N. Y. 137, Ann. Cas. 1915 B 1002, 103 N. E. 1111, aff'g judgment 147 N. Y. App. Div. 900, 131 N. Y. Supp. 838, and modifying judgment 147 N. Y. App. Div. 121, 131 N. Y. Supp. 829; *Hickok v. Cowperthwait*, 137 N. Y. App. Div. 94, 122 N. Y. Supp. 78.

²³ *Heimowitz v. Berg*, 72 N. Y. Misc. 404, 130 N. Y. Supp. 157.

purpose, and under an agreement that it is to be returned to him. So he does not lose his lien by redelivering the stock to the pledgor as his agent for the purpose of enabling the pledgor to sell it for the pledgee's benefit,²⁴ or for the purpose of exchanging it for stock in a consolidated corporation,²⁵ or so that the certificates can be exchanged for substituted certificates representing the same shares, which are immediately returned to the pledgee,²⁶ or by loaning the stock to a third person for a short time for the purpose of enabling him to vote it.²⁷

§ 3907. Necessity for registration. As we have seen in former sections, where shares of stock are by charter or statutory provision transferable only on the books of the corporation, a pledgee of shares who fails to have the transfer registered takes the risk of a lien being acquired by the corporation on the shares,²⁸ of rights being acquired by bona fide purchasers or pledgees from the pledgor, who appears on the books of the corporation as owner, or at a sale under an execution against him,²⁹ and, in some jurisdictions, of an attachment or execution by creditors of the pledgor.³⁰ An unregistered pledge, however, is valid as between the parties, and as against the corporation or third persons who deal with the pledgor with notice of the pledge.³¹

²⁴ *Hollister v. Dinsmore*, 191 Ill. App. 377; *McClung v. Colwell*, 107 Tenn. 592, 89 Am. St. Rep. 961, 64 S. W. 890; *Winslow v. Harriman Iron Co.* (Tenn.), 42 S. W. 698. See also *Wilkinson v. Misner*, 158 Mo. App. 551, 138 S. W. 931.

If the pledgor does sell it and appropriates the proceeds, he is guilty of conversion. *Wilkinson v. Misner*, 158 Mo. App. 551, 138 S. W. 931.

The failure or refusal of the pledgor to return either the stock or its proceeds is a conversion. The measure of damages is the value of the stock with interest from the time of the conversion, unless such sum exceeds the amount due from the pledgee. *Hollister v. Dinsmore*, 191 Ill. App. 377.

²⁵ He does not lose his lien by redelivering the stock to the pledgor as his agent for the purpose of exchanging the same for stock in a consolidated corporation. If the pledgor wrongfully procures the new stock to

be issued in his own name, he holds it in trust for the pledgee, and the latter's rights are superior to those of attaching creditors of the pledgor. *McClung v. Colwell*, 107 Tenn. 592, 89 Am. St. Rep. 961, 64 S. W. 890.

²⁶ *Hickok v. Cowperthwait*, 210 N. Y. 137, Ann. Cas. 1915 B 1002, 103 N. E. 1111, aff'g judgment 147 N. Y. App. Div. 900, 131 N. Y. Supp. 838, and modifying judgment 147 N. Y. App. Div. 121, 131 N. Y. Supp. 829.

²⁷ *Heimowitz v. Berg*, 72 N. Y. Misc. 404, 130 N. Y. Supp. 157.

If the person to whom the stock is loaned does not return it as agreed, but turns it over to a third person, the pledgee may sue him for conversion. *Heimowitz v. Berg*, 72 N. Y. Misc. 404, 130 N. Y. Supp. 157.

²⁸ See § 3814, supra.

²⁹ See § 3815, supra.

³⁰ See § 3811, supra.

³¹ *United States. Cecil Nat. Bank v. Watson town Bank*, 105 U. S. 217,

Under some statutes, when stock is transferred as collateral and not absolutely, that fact must be expressed in the entry of the transfer.³² In Iowa the statute provides that when stock is transferred as collateral security, notice to the secretary of the corporation of that fact shall be equivalent to a transfer on the books, although no such transfer is actually made; requires the pledgee to notify the secretary of the corporation as soon as he ceases to hold the stock as collateral; and requires the secretary to keep a record showing such notices, which shall be open to the public.³³ In Massachusetts it is provided that a pledgee of stock transferred as collateral security shall be entitled to a new certificate if the instrument of transfer

26 L. Ed. 1039; *Curtice v. Crawford County Bank*, 110 Fed. 830; *Hotchkiss & Upson Co. v. Union Nat. Bank*, 68 Fed. 76; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369.

California. *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co. of New York*, 174 Cal. 308, 163 Pac. 47; *Spreckels v. Nevada Bank of San Francisco*, 113 Cal. 272, 33 L. R. A. 459, 54 Am. St. Rep. 348, 45 Pac. 329.

Illinois. *Allmon v. Salem Building & Loan Ass'n*, 275 Ill. 336, 114 N. E. 170.

Louisiana. *Factors' & Traders' Ins. Co. v. Marine Dry Dock & Shipyard Co.*, 31 La. Ann. 149; *Smith v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 30 La. Ann. 1378.

New Jersey. *Broadway Bank v. McElrath*, 13 N. J. Eq. 24.

New York. *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348, 34 Am. Dec. 317.

North Carolina. *Bleakley v. Candler*, 169 N. C. 16, Ann. Cas. 1917 A 425, 84 S. E. 1039.

Vermont. *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

See also § 3794, *supra*, where the necessity for registration as between the parties to a transfer of stock is considered at length.

As to the effect of a statute requiring, as against creditors of the transferor, deposit of a certificate of transfers with the county clerk for record in his office, see § 3787, *supra*.

³² *Bleakley v. Candler*, 169 N. C. 16, Ann. Cas. 1917 A 425, 84 S. E. 1039.

³³ *National City Bank of Chicago v. Fairbank State Bank*, 173 Iowa 489, 155 N. W. 963; *Tierney v. Ledden*, 143 Iowa 286, 21 Ann. Cas. 105, 121 N. W. 1050.

The design of this provision "was to enable stockholders to hypothecate their shares of stock without cancellation thereof and the issuance of new stock, and yet protect the pledgee against the claims of the pledgor and the purchaser without notice." *Tierney v. Ledden*, 143 Iowa 286, 21 Ann. Cas. 105, 121 N. W. 1050. See also *National City Bank of Chicago v. Fairbank State Bank*, 173 Iowa 489, 155 N. W. 963.

This method of transfer is not exclusive, but the pledgee may take an absolute transfer of the shares, and have the same entered on the corporate books. *National City Bank of Chicago v. Fairbank State Bank*, 173 Iowa 489, 155 N. W. 963.

In *Perkins v. Lyons*, 111 Iowa 192, 82 N. W. 486, such a provision in regard to transfers to corporations as security was held not to be retroactive.

substantially describes the debt or duty which is intended to be secured thereby, and that such new certificate shall express on its face that it is held as collateral security, and that the name of the pledgor shall be stated thereon, who alone shall be liable as a stockholder, and entitled to vote thereon.³⁴

§ 3908. Scope of lien. The extent of the obligation secured by the pledge depends upon the terms of the contract.³⁵ "The scope of

³⁴Stat. 1903, c. 437, § 28. Athol Sav. Bank v. Bennett, 203 Mass. 480, 89 N. E. 632; Chase v. Boston, 193 Mass. 522, 79 N. E. 736; Holyoke Bank v. Burnham, 11 Cush. (Mass.) 183.

The purpose of this provision is to enable a pledgee to procure a certificate in his own name without assuming the liability of a stockholder. Athol Sav. Bank v. Bennett, 203 Mass. 480, 89 N. E. 632. And also to protect stock so transferred against attachments or other accruing claims against the apparent owner of record. It does not raise the title of a pledgee into an absolute ownership. Chase v. Boston, 193 Mass. 522, 79 N. E. 736. It does not prevent a pledgee to whom the certificate has been delivered with a power of attorney to transfer the same from procuring a new certificate in accordance with the transfer authorized in the power although the debt is not described in the power, but under such circumstances the pledgee assumes as against the corporation all the liabilities of a stockholder. Athol Sav. Bank v. Bennett, 203 Mass. 480, 89 N. E. 632.

³⁵Fourth Nat. Bank of Nashville v. Stahlman, 132 Tenn. 367, L. R. A. 1916 A 568, 178 S. W. 942.

In Shinkle v. Vickery, 130 Fed. 424, aff'g 117 Fed. 916, a pledge was held to be security not only for a loan but also for the payment of the purchase price of the stock in cash in case the seller elected to return certain land, which he took in payment, and receive cash instead, as he had a right to do

under his contract. It was further held that the rights of the pledgee were superior to those of an assignee of the pledgee, and that the pledgee was not estopped to assert them by reason of a memorandum given by him which merely recited that the stock was held as security for the loan, and did not refer to the option agreement. In Leary v. United States, 229 Fed. 660, stock was held to have been pledged to a surety as security to indemnify him against liability on each of several bail bonds successively executed by him.

A pledge to secure the pledgee against "all loss, expense, and liability" he might incur by reason of his purchasing other stock from a third person, was held to extend only to losses, expenses and liabilities incurred under and by virtue of the contract for the purchase of such stock, and not to those incurred by acts and expenditures of the pledgee wholly without its terms. Newlin v. Myers, 23 Cal. App. 482, 138 Pac. 927.

In J. M. Dresser Co. v. Hibernia Bank & Trust Co., 136 La. 314, 67 So. 15, it was held that a pledge was security only for debts of the maker or makers of a certain note.

In Goetzinger v. Donahue, 138 Wis. 103, 119 N. W. 823, the terms of the contract were held to show an intent that the pledge should be limited to securing payment of notes given for the purchase price of stock, and hence that the pledgee had no right to hold the pledged stock as security for pay-

the pledge will not be extended beyond that intended by the pledgor."³⁶ And it has been held that any doubt as to the proper interpretation of the language used in a printed form of pledge furnished by a bank and signed by one pledging stock to it will be construed in favor of the pledgor.³⁷

In the absence of a new agreement to that effect, the pledgee may not withhold the pledge as collateral for a debt other than that to which the pledge was originally made.³⁸ But of course an agreement that he may do so is valid if based on a sufficient consideration.³⁹ So the parties to a pledge to secure a particular debt may agree that the stock may also be held as security for other existing debts or for debts or liabilities subsequently incurred, or for both.⁴⁰ And provisions

ment of damages for breach of a contract whereby he was to be employed by the corporation.

In a suit to enjoin a sale of stock pledged to secure any deficiency on foreclosure of a vendor's lien, the evidence was held not to support a finding that the land was sold for an inadequate price on such foreclosure. *Cattlemen's Trust Co. v. Cantrell*, — Tex. Civ. App. —, 196 S. W. 354.

³⁶ *Norfleet v. Pamlico Insurance & Banking Co.*, 160 N. C. 327, 75 S. E. 937; *Fourth Nat. Bank of Nashville v. Stahlman*, 132 Tenn. 367, L. R. A. 1916 A 568, 178 S. W. 942; *Holston Nat. Bank v. Wood*, 125 Tenn. 6, 140 S. W. 31.

³⁷ *Gillet v. Bank of America*, 160 N. Y. 549, 55 N. E. 292, rev'g judgment 21 N. Y. App. Div. 392, 47 N. Y. Supp. 558; *Fourth Nat. Bank of Nashville v. Stahlman*, 132 Tenn. 367, L. R. A. 1916 A 568, 178 S. W. 942; *Holston Nat. Bank v. Wood*, 125 Tenn. 6, 140 S. W. 31.

³⁸ *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889; *Iowa Nat. Bank v. Cooper (Iowa)*, 101 N. W. 459; *Wilkinson v. Misner*, 158 Mo. App. 551, 138 S. W. 931. And see generally *Lloyd v. Lynchburg Nat. Bank*, 86 Va. 690, 11 S. E. 104.

³⁹ *Wilkinson v. Misner*, 158 Mo. App. 551, 138 S. W. 931.

⁴⁰ *Commercial & Savings Bank v. Robert H. Jenks Lumber Co.*, 194 Fed. 732; *Merchants Nat. Bank of Savannah v. Demere*, 92 Ga. 735, 19 S. E. 38; *Fourth Nat. Bank of Nashville v. Stahlman*, 132 Tenn. 367, L. R. A. 1916 A 568, 178 S. W. 942.

In *Selma Bridge Co. v. Harris*, 132 Ala. 179, 31 So. 508, a pledge of stock to secure payment of a note, "and after its payment to secure any other indebtedness" of the pledgor to the pledgee was held to cover any such debt existing at the maturity of the note whether such debt was in existence when the pledge was made or not.

An agreement that stock held as collateral "shall be applicable in like manner to secure the payment of any other obligations of the undersigned, whether past or future, held by the holder of this obligation," was held to entitle the pledgee to hold the stock as security for the performance of a contract previously made by the pledgor to purchase stock from the pledgee. *Fourth Nat. Bank of Nashville v. Stahlman*, 132 Tenn. 367, L. R. A. 1916 A 568, 178 S. W. 942. In this case it was further held that such an agreement would not authorize another bank to which the pledgee might transfer the note secured by the pledgee with its collaterals to hold the

in a note authorizing the pledgee to hold as security for a general

latter as security for other debts which the pledgor might have contracted with such other bank, since that would extend the scope of the pledge beyond that intended by the pledgor.

In *Harris v. President & Directors of Franklin Bank*, 77 Md. 423, 26 Atl. 523, it was held that a provision in a pledge of stock to a bank that "if I shall come under any other liability, or enter into any other engagement, with said bank, * * * the net proceeds of the sale of the above securities may be applied either on this note, or any other of my liabilities or engagements held by said bank," covered only future liabilities made after the execution of the note to secure which the pledge was made and those entered into at the time of its delivery, and not a pre-existing debt.

In *Gillet v. Bank of America*, 160 N. Y. 549, 55 N. E. 292, rev'g 21 N. Y. App. Div. 392, 47 N. Y. Supp. 558, a provision in a pledge to a bank that collaterals had been deposited as security "for the payment of this or any other liability or liabilities of the undersigned to the said bank, due or to become due, or which may hereafter be contracted or existing," was held to refer only to such liabilities as arose out of the ordinary dealings of the parties as banker and customer, or liabilities of the pledgor which came into the hands of the pledgee in the ordinary course of its banking business, and not to include the pledgor's liability on a note to a third person which was subsequently purchased by the bank.

In *First Nat. Bank of Omaha, Nebraska v. Illinois Trust & Savings Bank*, 84 Fed. 34, a provision that stock had been deposited as collateral security for the payment of a note running to a bank, "and also of all

other present or future demands of any kind of the said bank against the undersigned, due or not due," was held to refer to such demands as might arise in the course of commercial banking, and not to include a previous loan for a term of years on real estate security, which had been assumed by a subsequent purchaser of the property.

In *Hallowell v. Blackstone Nat. Bank*, 154 Mass. 359, 13 L. R. A. 315, 28 N. E. 281, a provision that "any excess of collaterals upon this note shall be applicable to any other note or claim against me held by" the pledgee, bound the excess of the collaterals as security for acceptances of a firm of which the pledgor was a member, discounted by the pledgee before the loan to the pledgor.

In *Torrance v. Third Nat. Bank of Pittsburgh*, 210 Fed. 806, a joint pledge of stock to secure payment of a joint note, "or any other liability or liabilities of the undersigned," was held to refer to joint liabilities only, so that the stock could not be held as security for individual liabilities of the makers on other notes.

In *Mulert v. National Bank of Tarentum*, 210 Fed. 857, a pledge to secure payment of a note or any other liability of the maker to the "holder" of the same was held to give one to whom the pledgee sold the note and delivered the collateral the right to hold the stock as security for an indebtedness of the pledgor to him.

In *Sisson v. Barnum*, 157 N. Y. App. Div. 149, 141 N. Y. Supp. 846, aff'd 220 N. Y. 734, 116 N. E. 1075, a pledge to a firm of bankers and brokers to secure existing and future loans, overdrafts and open accounts was held to be security for a check certified by said firm, but which had not yet been paid.

The application by the pledgee of

indebtedness stock pledged as security for a particular debt are valid.⁴¹

§ 3909. Effect of pledge on title and rights of pledgor. The pledgor continues to be the owner of the stock, notwithstanding the pledge,⁴² or, as is often said, the general property in the stock remains

a sum received from a liquidation agent of the corporation to the payment of the secured debt is a recourse to the collateral within the meaning of a provision that if the pledgee has recourse to the collateral, "any excess of collaterals upon this note shall be applicable to any other note or claim now or hereafter held" by the pledgee against the pledgor. *Haldane v. New York State Nat. Bank of Albany*, — N. Y. App. Div. —, 167 N. Y. Supp. 755.

Whether stock was pledged as security for future advances as well as an existing indebtedness was held to be a question for the jury, where different inferences might be drawn from the testimony on the subject. *Bank of Tupelo v. Thompson*, 186 Ala. 600, 65 So. 147.

See generally *Wilson v. Carothers*, 19 Ky. L. Rep. 1565, 43 S. W. 684; *Brown v. James*, 80 Neb. 475, 114 N. W. 591; *Boney & Harper Milling Co. v. J. C. Stevenson Co.*, 161 N. C. 510, 77 S. E. 676; *Norfleet v. Pamlico Insurance & Banking Co.*, 160 N. C. 327, 75 S. E. 937; *Loyd v. Lynchburg Nat. Bank*, 86 Va. 690, 11 S. E. 104, and standard works on pledges.

⁴¹ *Holston Nat. Bank v. Wood*, 125 Tenn. 6, 140 S. W. 31.

⁴² **United States.** *Pauly v. State Loan & Trust Co.*, 165 U. S. 606, 41 L. Ed. 844; *In re T. A. McIntyre Co.*, 181 Fed. 955; *In re Jacob Barry & Co.*, 146 Fed. 623; *Bell v. Mills*, 123 Fed. 24; *Smith v. Lee*, 77 Fed. 779.

California. *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co. of New York*, 174 Cal. 308, 163 Pac. 47; *Manning v. App Consol.*

Gold Min. Co., 171 Cal. 610, 154 Pac. 501; *Fowles v. National Bank of California*, 167 Cal. 653, 140 Pac. 271; *McAulay v. Moody*, 128 Cal. 202, 60 Pac. 778; *Bell v. Mills*, 123 Fed. 24, construing the California statute.

Iowa. *Pendleton v. Harris-Emery Co.*, 124 Iowa 361, 100 N. W. 117.

Louisiana. *Eisenhauer v. New Orleans Cotton Exchange*, 140 La. 574, 73 So. 685; *State v. North American Land & Timber Co.*, 112 La. 441, 36 So. 488.

Massachusetts. *Chase v. Boston*, 193 Mass. 522, 79 N. E. 736.

Missouri. *National Exch. Bank v. Kilpatric*, 204 Mo. 119, 120 Am. St. Rep. 689, 102 S. W. 499.

New York. *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338; *Booth v. Consolidated Fruit Jar Co.*, 62 Misc. 252, 114 N. Y. Supp. 1000.

Ohio. See *Cleveland City Ry. Co. v. First Nat. Bank*, 68 Ohio St. 582, 67 N. E. 1075.

South Carolina. *Haselden v. Hamer*, 97 S. C. 178, 81 S. E. 424.

Utah. *Hyams v. Bamberger*, 10 Utah 3, 36 Pac. 202.

Virginia. *Scott v. Brame*, 118 Va. 194, 86 S. E. 850.

Under the Washington statute the pledgor is, to all intents and purposes, treated as the owner of the stock as between himself and the corporation and his fellow stockholders. *American Bonding & Trust Co. v. Pacific Brewing & Malting Co.*, 34 Wash. 10, 74 Pac. 826; *Brown v. Union Savings & Loan Ass'n*, 28 Wash. 657, 69 Pac. 383; *Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co.*, 6 Wash. 597, 34 Pac. 155.

in him.⁴³ And this is equally true although, as between the parties, the legal title to the stock is transferred to the pledgee.⁴⁴ He may therefore do whatever he sees fit with it, subject to the lien of the pledge.⁴⁵ So he may assign and transfer his interest in the pledged stock.⁴⁶ And the corporation or other persons may subsequently

A pledge of a customer's stock by brokers to secure their own debt is not a transfer with intent to hinder, delay or defraud their creditors within the meaning of the Bankruptcy Act. *In re Jacob Berry & Co.*, 146 Fed. 623.

A pledge of stock and bonds to a foreign corporation by another corporation leaves the equity within the jurisdiction of the courts of the domestic state. *Kidd v. New Hampshire Traction Co.*, 72 N. H. 273, 66 L. R. A. 574, 56 Atl. 465.

A pledge of stock as collateral does not divest the title of the pledgor, and therefore, in a suit by him to compel a transfer to him from one who is alleged to have obtained it from the pledgee by false representations, it is not necessary to aver or prove that the debt has been paid. *Smith v. Lee*, 77 Fed. 779.

Where the pledgee claims that the pledgor has waived or abandoned his rights in the pledged stock, the burden of proving that fact is on him, and he can only maintain it by proof of clear and unmistakable acts indicating a purpose on the part of the pledgor to repudiate ownership. *Scott v. Brame*, 118 Va. 194, 86 S. E. 850.

⁴³ *California*. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

Colorado. *Ellis v. Gibbons*, 26 Colo. App. 454, 145 Pac. 285.

Missouri. *Ball v. Peper Cotton Press Co.*, 141 Mo. App. 26, 121 S. W. 798.

New York. *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307.

Rhode Island. *United Nat. Bank v. Tappan*, 33 R. I. 1, 79 Atl. 946.

Vermont. *White River Sav. Bank*

v. Capital Sav. Bank & Trust Co., 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

"The general property which the pledgor is said to retain, is nothing more than a legal right to the restoration of the thing pledged on payment of the debt." *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307. Quoted in *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

⁴⁴ *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

The right of property, or the general ownership, remains in the pledgor, subject to the lien of the pledge, even though the stock is transferred to the pledgee on the corporate books. *Booth v. Consolidated Fruit Jar Co.*, 62 N. Y. Misc. 252, 114 N. Y. Supp. 1000.

⁴⁵ *Pendleton v. Harris-Emercy Co.*, 124 Iowa 361, 100 N. W. 117.

⁴⁶ *Baker v. Davie*, 211 Mass. 429, 57 L. R. A. (N. S.) 944, 97 N. E. 1094; *Ball v. Peper Cotton Press Co.*, 141 Mo. App. 26, 121 S. W. 798; *Brown v. Hotel Ass'n*, 63 Neb. 181, 88 N. W. 175. See also *Twelfth Ward Bank City of New York v. Samuels*, 71 N. Y. App. Div. 168, 75 N. Y. Supp. 561, aff'd 176 N. Y. 593, 68 N. E. 1125; *Dexter, Horton & Co. v. McCafferty*, 42 Wash. 221, 84 Pac. 733.

"The assignee, at least if the pledgee has notice of his claim, succeeds to all the rights in the property and against the pledgee possessed by the pledgor." *Brown v. Hotel Ass'n*, 63 Neb. 181, 88 N. W. 175.

In case of the death of the pledgor,

acquire a lien thereon.⁴⁷ And he may also enter into agreements with the corporation or the other stockholders in respect to the stock, subject to the lien of the pledge.⁴⁸ The stock is taxable to him.⁴⁹ And his interest may be reached by a creditor's bill in some jurisdictions,⁵⁰ and under some statutes is subject to attachment,⁵¹ or garnishment,⁵² or levy and sale under execution.⁵³

He may also sue in equity to prevent the destruction or impairment of the stock by the wrongful acts of the directors of the corporation.⁵⁴ "The unauthorized and intentional appropriation to itself by

the stock may be sold by the executor or administrator subject to the lien of the pledge. *Bell v. Mills*, 123 Fed. 24.

The right of the purchaser is subordinate to the lien of the pledge. *Shinkle v. Vickery*, 130 Fed. 424, aff'g 117 Fed. 916; *Deal v. Erie Coal & Coke Co.*, 244 Pa. 622, 90 Atl. 915.

⁴⁷ *Athol Sav. Bank v. Bennett*, 203 Mass. 480, 89 N. E. 632; *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

⁴⁸ He may enter into an agreement with the corporation by which the character of the stock is changed from preferred to common, subject, of course, to the lien of the pledge. *Pendleton v. Harris-Emery Co.*, 124 Iowa 361, 100 N. W. 117.

But neither the pledgee nor those who purchase the stock at foreclosure sale are bound by a voting trust agreement made by the pledgor after making the pledge. *Colonial Coal & Coke Co. v. Ream*, 114 Va. 800, 77 S. E. 508.

⁴⁹ *Chase v. Boston*, 193 Mass. 522, 79 N. E. 736; *Waltham Bank v. Inhabitants of Waltham*, 10 Metc. (Mass.) 334; *Tucker v. Aiken*, 7 N. H. 113; *Ratterman v. Ingalls*, 48 Ohio St. 468, 28 N. E. 168.

⁵⁰ *Ball v. Peper Cotton Press Co.*, 141 Mo. App. 26, 121 S. W. 798. See also *Nabring v. Bank of Mobile*, 58 Ala. 204.

And see § 3438, *supra*.

⁵¹ *Mapleton Bank v. Standrod*, 8 Idaho 740, 67 L. R. A. 656, 71 Pac. 119; *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896; *State Banking & Trust Co. v. Taylor*, 25 S. D. 577, 29 L. R. A. (N. S.) 523, 127 N. W. 590.

See also § 3441, *supra*.

⁵² The pledgee may be garnished in respect to the stock at the instance of the pledgor's creditors, and where, after the service of the garnishment summons, the corporation sells all its property and distributes the proceeds ratably among its stockholders, and the pledgee receives the pledgor's share, he must account to the garnishing creditor for any surplus thereof above the amount of the debt. *Coolley v. Janes*, 71 Kan. 297, 80 Pac. 596.

See also § 3441, *supra*.

⁵³ *Cushing v. Building Ass'n Society of New or Practical Psychology*, 165 Cal. 731, 134 Pac. 324; *Ellis v. Gibbons*, 26 Colo. App. 454, 145 Pac. 285.

One who purchases the pledgor's interest at execution sale stands in his shoes, and is bound by the terms of the contract of pledge and entitled to rest on its terms if the pledgee has notice of his rights. *Cushing v. Building Ass'n Society of New or Practical Psychology*, 165 Cal. 731, 134 Pac. 324.

See also § 3441, *supra*.

⁵⁴ *Fisher v. Patton*, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096.

a corporation of collateral securities in its possession or under its control with full knowledge of the interest of the pledgor therein, although with the voluntary transfer, consent, acquiescence, negligence, or laches of the pledgee, is both a tort and a breach of trust, and the pledgor may maintain at his option a suit in equity for their recovery, or an action at law for the value of his interest therein."⁵⁵

§ 3910. Title and rights of pledgee—In general. The pledgee has a special property in the pledged stock,⁵⁶ although, as we have seen, the general property remains in the pledgor.⁵⁷ But he acquires no greater rights in it or as a stockholder than the pledgor possesses at the time of the pledge.⁵⁸ The pledge creates a trust, and the pledgee is a trustee.⁵⁹

The pledgee is entitled to retain possession of the stock until the pledgor pays or tenders to him the amount due on the debt secured.⁶⁰

⁵⁵ *Wilson v. Colorado Min. Co.*, 227 Fed. 721.

⁵⁶ *United States. Florida Nat. Bank of Gainesville, Florida v. Merchants' & Farmers' Bank of Claxton, Georgia*, 227 Fed. 714.

California. *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co. of New York*, 174 Cal. 308, 163 Pac. 47; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

New York. *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896.

Utah. *Hyams v. Bamberger*, 10 Utah 3, 36 Pac. 202.

Vermont. *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

⁵⁷ See § 3909, *supra*.

⁵⁸ *Chicago Ry. Equipment Co. v. National Hollow Brake Beam Co.*, 173 Ill. App. 573.

⁵⁹ *United States. Pauly v. State Loan & Trust Co.*, 165 U. S. 606, 41 L. Ed. 844.

Alabama. *Adams v. Adams*, 73 So. 984.

California. *Hudgens v. Chamberlain*, 161 Cal. 710, 120 Pac. 422.

Illinois. *Wetherell v. Johnson*, 208 Ill. 247, 70 N. E. 229.

Missouri. *Schaaf v. Fries*, 90 Mo. App. 111. See also *Dibert v. D'Arcy*, 248 Mo. 617, 154 S. W. 1116.

New York. *Gillet v. Bank of America*, 160 N. Y. 549, 55 N. E. 292, *rev'g* judgment 21 App. Div. 392, 47 N. Y. Supp. 558.

Pennsylvania. *Dwight v. Singer*, 27 Pa. Super. Ct. 119.

⁶⁰ *United States. Skud v. Tillinghast*, 195 Fed. 1.

Georgia. *Loveless v. Bridges*, 136 Ga. 338, 71 S. E. 166; *Reid v. Caldwell*, 120 Ga. 718, 48 S. E. 191.

Michigan. *Allen v. Hook*, 164 N. W. 384.

New York. *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896; *Jones v. Seaman*, 133 App. Div. 127, 117 N. Y. Supp. 288, *aff'd* 200 N. Y. 553, 93 N. E. 1123; *Tompkins v. Morton Trust Co.*, 91 App. Div. 274, 86 N. Y. Supp. 520, *aff'd* 181 N. Y. 578, 74 N. E. 1126.

South Carolina. *Haselden v. Hamer*, 97 S. C. 178, 81 S. E. 424.

In an action for conversion the pledgee may show that the debt se-

He cannot be deprived of his security by the substitution of other stock for that pledged without his consent, express or implied.⁶¹ But of course he may consent to such substitution;⁶² and, by agreement, he may retain his lien on stock as a continuing lien, although the corporation is reorganized or consolidated with another corporation, and stock of the new corporation is substituted for that of the old.⁶³

The lien may be released by agreement,⁶⁴ and the pledgee may consent to the cancellation of the stock, in which case it ceases to be available as security.⁶⁵ But a mere renewal of the notes secured by the pledge without surrendering the certificate⁶⁶ does not discharge

cured by the pledge has not been paid. *Loveless v. Bridges*, 136 Ga. 338, 71 S. E. 166.

If it be true that a national bank is without power to secure title to stock in another corporation pledged to it as security for a loan, the pledgor, nevertheless, cannot retake the stock without payment of the loan. *Fulton v. National Bank of Denison*, 26 Tex. Civ. App. 115, 62 S. W. 84.

As to the scope of the pledge and the extent of the indebtedness secured thereby, see § 3908, *supra*.

⁶¹ *Ikelheimer v. Consolidated Tobacco Co.* (N. J. Ch.), 59 Atl. 363.

⁶² *Leary v. United States*, 229 Fed. 660; *Ikelheimer v. Consolidated Tobacco Co.* (N. J. Ch.), 59 Atl. 363.

The lien on the stock originally pledged is not lost until the exchange is actually made and possession of the stock given up. *National Bank of Commerce v. Equitable Trust Co.*, 227 Fed. 526, *rev'g judgment* 211 Fed. 688.

In *Fuller v. Perkins*, 30 R. I. 3, 73 Atl. 372, an agreement under which the pledgor transferred additional stock in a corporation in process of liquidation and received back his note with the understanding that, if in liquidation the property of the company would more than pay the secured debt, any balance was to be turned over to him, it was held that

the pledgor was only entitled to have his share of the corporate property, on a pro rata distribution thereof among all the stockholders after payment of the debts, applied on the note, and not all the assets of the company after payment of its debts.

⁶³ *McClung v. Colwell*, 107 Tenn. 592, 89 Am. St. Rep. 961, 64 S. W. 890; *Dexter, Horton & Co. v. McCafferty*, 42 Wash. 221, 84 Pac. 733.

⁶⁴ In *Weischopt v. Newman*, 24 Ky. L. Rep. 36, 65 S. W. 808, an agreement whereby the pledgee of a majority of the stock of a corporation was given control of its business for the purpose of enabling him to realize the amount of his debt out of the accruing profits was held not to have released the lien of the pledge, and not to bar a suit to foreclose it.

⁶⁵ *Corning v. Bridgewater Gas Co.*, 100 Ill. App. 221.

⁶⁶ *Warrior Coal & Coke Co. v. National Bank of Augusta* (Ala.), 53 So. 997; *Twelfth Ward Bank City of New York v. Samuels*, 71 N. Y. App. Div. 168, 75 N. Y. Supp. 561, *aff'd* 176 N. Y. 593, 68 N. E. 1125; *First Nat. Bank of St. Johnsville v. Jones*, 37 N. Y. Misc. 68, 74 N. Y. Supp. 772.

"It is the debt which is secured, the note is mere evidence of the debt, and no amount of evidence of the debt could destroy the security." *Warrior Coal & Coke Co. v. Nation-*

the lien. Nor will an extension of the time of payment of the note have that effect.⁶⁷

The pledgee may lawfully purchase the stock from the pledgor without any violation of duty,⁶⁸ or they may agree that he shall take the stock in satisfaction of the debt secured by the pledge.⁶⁹ But prior to the satisfaction of the debt for which stock has been pledged, or discharge of the lien in some other way, he cannot assert that he holds the stock adversely, and thereby acquire title under the statute of limitations.⁷⁰

§ 3911. — Right to transfer of stock on corporate books. It has repeatedly been held that a pledgee of shares to whom the certificate has been assigned with a power of attorney to transfer the same on the books of the corporation, or who holds the certificate with an assignment and power of attorney in blank, has a right to have the stock transferred on the books, and doing so does not constitute a conversion.⁷¹ On the other hand, it has been held that where a statute

al Bank of Augusta (Ala.), 53 So. 997.

⁶⁷ An indefinite extension of the time for payment of the note upon condition that the pledgor is to keep the debt safe and to pay interest in advance, does not preclude a sale of the stock on breach of the conditions. Louisville Banking Co. v. W. H. Thomas & Son Co., 24 Ky. L. Rep. 811, 69 S. W. 1073, 24 Ky. L. Rep. 115, 68 S. W. 2.

⁶⁸ Wetherell v. Johnson, 208 Ill. 247, 70 N. E. 229.

⁶⁹ Wetherell v. Johnson, 208 Ill. 247, 70 N. E. 229.

As to the admissibility of evidence to show such an agreement, see Dunham v. Boyd, 64 Conn. 397, 30 Atl. 62.

⁷⁰ Cross v. Eureka Lake & Y. Canal Co., 73 Cal. 302, 2 Am. St. Rep. 808, 14 Pac. 885.

⁷¹ United States. Hubbell v. Drexel, 11 Fed. 115; Heath v. Griswold, 18 Blatchf. 555, 5 Fed. 573.

Colorado. Farmers' Pawnee Canal Co. v. Henderson, 46 Colo. 37, 102 Pac. 1063.

Connecticut. Skiff v. Stoddard, 63

Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

Illinois. Johnson v. Milmine, 150 Ill. App. 208.

Iowa. National City Bank of Chicago v. Fairbank State Bank, 173 Iowa 489, 155 N. W. 963.

Louisiana. Eisenhower v. New Orleans Cotton Exchange, 140 La. 574, 73 So. 685.

Maryland. Rich v. Boyce, 39 Md. 314.

Massachusetts. Athol Sav. Bank v. Bennett, 203 Mass. 480, 89 N. E. 632; Fitchburg Sav. Bank v. Torrey, 134 Mass. 239; Day v. Holmes, 103 Mass. 306; Fay v. Gray, 124 Mass. 500.

Michigan. Osborne v. Detroit Kraut Co., 193 Mich. 664, 160 N. W. 442.

Nebraska. Brown v. Hotel Ass'n, 63 Neb. 181, 88 N. W. 175.

New York. Horton v. Morgan, 19 N. Y. 170, 75 Am. Dec. 311.

Ohio. Cleveland City Ry. Co. v. First Nat. Bank, 68 Ohio St. 582, 67 N. E. 1075.

Oregon. See First Nat. Bank v. Multnomah State Bank, 87 Ore. 423, 170 Pac. 534.

requires transfers of stock to be registered on the books of the corporation, or provides that no transfer shall be valid, except as between the parties, unless it is so entered on the books of the corporation, a pledgee of shares is entitled to have a proper entry made on the books showing that he holds the stock as pledgee, as this is necessary to protect him against purchasers and other third persons without notice; but that, where the contract is silent on the subject, a pledgee of stock has no right, prior to maturity of the debt, to have the stock transferred to him as owner on the books of the corporation, and a new certificate issued in his name, and that an attempt to do so may be prevented by injunction.⁷²

Tennessee. Union & Planters' Bank of Memphis v. Farrington, 13 Lea 333; Cornick v. Richards, 3 Lea 1.

Texas. Davis v. Hardwick, 43 Tex. Civ. App. 71, 94 S. W. 359.

Wisconsin. Heath v. Silverthorn Lead Mining & Smelting Co., 39 Wis. 146.

It follows that the marking of pledged stock "canceled" by the pledgee, and the causing of new stock to be issued in his name, is not necessarily a conversion of the stock, since such use of it is entirely consistent with the reciprocal rights of pledgor and pledgee. Davis v. Hardwick, 43 Tex. Civ. App. 71, 94 S. W. 359.

He may compel the corporation to transfer the stock to him on the corporate books, where registration is necessary to protect his rights as against creditors of the pledgor or subsequent purchasers from him. Farmers' Pawnee Canal Co. v. Henderson, 46 Colo. 37, 102 Pac. 1063; Brown v. Hotel Ass'n, 63 Neb. 181, 88 N. W. 175.

He is entitled to recover damages from the corporation if it refuses to register the transfer. Eisenhauer v. New Orleans Cotton Exchange, 140 La. 574, 73 So. 685.

He is entitled to a new certificate in accordance with the transfer authorized in the power of attorney, in which case he assumes as against the

corporation all the liabilities of a stockholder. Athol Sav. Bank v. Bennett, 203 Mass. 480, 89 N. E. 632.

But a pledgee who admits that he is not the owner of the stock and who neither alleges nor proves facts which would entitle him to become its owner under the terms of the pledge, cannot compel a transfer thereof to him on the books and the issuance of new certificates to him as its owner. State v. North American Land & Timber Co., 112 La. 441, 36 So. 488.

Where there is no power of attorney to make the transfer, the pledgor alone has the right to compel the transfer until there has been a valid sale or foreclosure. Brown v. Hotel Ass'n, 63 Neb. 181, 88 N. W. 175.

⁷² Spreckels v. Nevada Bank of San Francisco, 113 Cal. 272, 33 L. R. A. 459, 54 Am. St. Rep. 348, 45 Pac. 329, followed in Welch v. Gillelen, 147 Cal. 571, 82 Pac. 248. See also Manning v. App Consol. Gold Min. Co., 171 Cal. 610, 154 Pac. 301; West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622.

The Washington statutes do not contemplate a transfer of the stock on the corporate books from the pledgor to the pledgee, but the contemplation is directly the opposite. Brown

§ 3912. — Right to use pledged stock. Ordinarily the pledgee has no right to use the pledged stock, in the absence of an agreement to the contrary.⁷³ So, in the absence of such an agreement, he has no right to sell it.⁷⁴ Nor has he a right to repledge it as security for his own debt, unless expressly or impliedly authorized by the pledgor to do so, and if he does so without such authority, he is guilty of conversion.⁷⁵

Of course the contract may give the pledgee a right to repledge the stock.⁷⁶ And it has been held that a custom of the market in which

v. Union Savings & Loan Ass'n, 28 Wash. 657, 69 Pac. 383. And in that state a conditional transfer of the stock to the pledgee on the corporate books is not authorized. American Bonding & Trust Co. v. Pacific Brewing & Malting Co., 34 Wash. 10, 74 Pac. 826.

See also § 3907, *supra*.

⁷³ Lawrence v. Maxwell, 53 N. Y. 19.

⁷⁴ California. Fowles v. National Bank of California, 167 Cal. 653, 140 Pac. 271.

Louisiana. Eisenhauer v. New Orleans Cotton Exchange, 140 La. 574, 73 So. 685.

Massachusetts. Fay v. Gray, 124 Mass. 500.

Michigan. Allen v. Dubois, 117 Mich. 115, 72 Am. St. Rep. 557, 75 N. W. 443.

New York. Lawrence v. Maxwell, 53 N. Y. 19; Strickland v. Magoun, 119 App. Div. 113, 104 N. Y. Supp. 425, aff'd 190 N. Y. 545, 83 N. E. 1132; Dykers v. Allen, 7 Hill 497, 42 Am. Dec. 87, aff'g 3 Hill 593.

Oregon. Morgan v. Johns, 84 Ore. 557, 165 Pac. 369.

"An authority to sell the pledge would be inconsistent with the very essence of a bailment by way of pledge, as that recognizes the general property of the bailor and his right to redeem and have the thing pledged." Lawrence v. Maxwell, 53 N. Y. 19.

The fact that the pledgee after-

wards purchases other stock to replace that wrongfully sold does not relieve him from liability. Dykers v. Allen, 7 Hill (N. Y.) 497, 42 Am. Dec. 87, aff'g 3 Hill 593.

⁷⁵ United States. In re Stringer, 230 Fed. 177; In re T. A. McIntyre & Co., 181 Fed. 955.

California. Fowles v. National Bank of California, 167 Cal. 653, 140 Pac. 271.

Connecticut. Skiff v. Stoddard, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

Maryland. Merchants' Nat. Bank v. Williams, 110 Md. 334, 72 Atl. 1114; German Sav. Bank of Baltimore City v. Renshaw, 78 Md. 475, 28 Atl. 281.

Massachusetts. Fay v. Gray, 124 Mass. 500.

Minnesota. Upham v. Barbour, 65 Minn. 364, 68 N. W. 42.

Pennsylvania. Van Voorhis v. Rea, 153 Pa. St. 19, 25 Atl. 800.

The second pledgee is also guilty of conversion if he takes with notice of such want of authority. Merchants' Nat. Bank v. Williams, 110 Md. 334, 72 Atl. 1114.

If the pledgee has an option to purchase the stock at a specified price, the pledgor may elect to consider the conversion as an exercise of such option and sue to recover such price. Upham v. Barbour, 65 Minn. 364, 68 N. W. 42.

⁷⁶ Thomas v. Taggart, 209 U. S. 385, 52 L. Ed. 845, aff'g In re Jacob Berry & Co., 149 Fed. 176; Richardson

the transaction is to be carried out giving brokers a right to repledge stock bought and carried for their customers upon margin becomes a part of the contract between the customer and the broker and gives the latter implied authority to repledge⁷⁷ for an amount not exceeding the indebtedness secured by the original pledge.⁷⁸ But he has no right to mingle the pledged stock with other securities and repledge the whole for an amount exceeding the original indebtedness,⁷⁹ or to

v. Shaw, 209 U. S. 365, 52 L. Ed. 835, 14 Ann. Cas. 981, aff'g 147 Fed. 659; Oregon & Transcontinental Co. v. Hilmers, 20 Fed. 717; Chase v. Boston, 193 Mass. 522, 79 N. E. 736; Wilson v. Hawley, 158 Mass. 250, 33 N. E. 522; Lawrence v. Maxwell, 53 N. Y. 19; United Nat. Bank v. Tappan, 33 R. I. 1, 79 Atl. 946.

⁷⁷ **United States.** Oregon & Transcontinental Co. v. Hilmers, 20 Fed. 717.

Connecticut. Skiff v. Stoddard, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

Maryland. See German Sav. Bank of Baltimore City v. Renshaw, 78 Md. 475, 28 Atl. 281.

Michigan. Austin v. Hayden, 171 Mich. 38, Ann. Cas. 1915 B 894, 137 N. W. 317.

New York. In re Mills, 125 App. Div. 730, 110 N. Y. Supp. 314, modifying judgment 57 Misc. 315, 107 N. Y. Supp. 1057, judgment aff'd 193 N. Y. 626, 86 N. E. 1128; Tompkins v. Morton Trust Co., 91 App. Div. 274, 86 N. Y. Supp. 520, aff'd 181 N. Y. 578, 74 N. E. 1126; Douglas v. Carpenter, 17 App. Div. 329, 45 N. Y. Supp. 219. But see Dykers v. Allen, 7 Hill 497, 42 Am. Dec. 87, aff'g 3 Hill 593.

Oregon. See Morgan v. Johns, 84 Ore. 557, 165 Pac. 369, where an instruction including a statement that the pledgee has a right to repledge without the pledgor's consent was approved.

Wisconsin. Wahl v. Tracy, 139 Wis. 668, 121 N. W. 660.

⁷⁸ **Douglas v. Carpenter**, 17 N. Y. App. Div. 329, 45 N. Y. Supp. 219.

A broker who has agreed to purchase and carry stock for a customer and to hold the same as security for the amount due on the purchase price has a right to hypothecate the stock to secure the money necessary to carry out his contract. In re Mills, 125 N. Y. App. Div. 730, 110 N. Y. Supp. 314, modifying judgment 57 N. Y. Misc. 315, 107 N. Y. Supp. 1057, judgment aff'd 193 N. Y. 626, 86 N. E. 1128; Tompkins v. Morton Trust Co., 91 N. Y. App. Div. 274, 86 N. Y. Supp. 520, aff'd 181 N. Y. 578, 74 N. E. 1126.

⁷⁹ **Strickland v. Magoun**, 119 N. Y. App. Div. 113, 104 N. Y. Supp. 425, aff'd 190 N. Y. 545, 83 N. E. 1132; Douglas v. Carpenter, 17 N. Y. App. Div. 329, 45 N. Y. Supp. 219; Van Woert v. Olmstead, 71 N. Y. Supp. 431. See this case as to the manner of distributing a surplus arising on the sale of the stock under such circumstances.

He has no right to mingle the pledged stock with his own and raise money thereon generally as though it were his own, since such use is utterly inconsistent with the contract of pledge. Oregon & Transcontinental Co. v. Hilmers, 20 Fed. 717.

He has no right to pledge the stock for an amount in excess of the amount due from the pledgor, and to make a secret profit out of the transaction by charging the pledgee a higher rate of interest than that paid by the pledgor. Batterson v. Raymond, 87 N. Y. Misc. 229, 149 N. Y. Supp. 706,

repledge the stock for his own debt at a time when the pledgor owes him nothing,⁸⁰ and his act in so doing constitutes a conversion, at least unless at all times he has in his possession securities of like kind and amount. But in the absence of an agreement to the contrary, where a person pledges stock, and allows the shares to go, without any distinguishing mark, in with other shares belonging to him or others in the hands of the pledgee, the pledgee is not required to keep and return the identical shares pledged, but it is enough if he has at all times under his control the requisite number of shares of the same stock, ready to be transferred to the pledgor when legally demanded.⁸¹ It is otherwise, however, where the stock is distinctive in its character, and capable of being distinguished, or where a mark is put upon it

aff'd 165 N. Y. App. Div. 954, 150 N. Y. Supp. 1076.

⁸⁰ Van Voorhis v. Rea, 153 Pa. St. 19, 25 Atl. 800.

A broker to whom stock is pledged as security for possible future indebtedness has no right to repledge it at a time when the pledgor owes him nothing, but when he is indebted to the pledgor, and his action in so doing is larceny of the stock. In re T. A. McIntyre & Co., 181 Fed. 955.

⁸¹ United States. Gorman v. Littlefield, 229 U. S. 19, 57 L. Ed. 1047; Sexton v. Kessler & Co., 225 U. S. 90, 56 L. Ed. 995, aff'g 172 Fed. 535, 40 L. R. A. (N. S.) 639; Richardson v. Shaw, 209 U. S. 365, 52 L. Ed. 835, 14 Ann. Cas. 981, aff'g 147 Fed. 659.

California. Bell v. Bank of California, 153 Cal. 234, 94 Pac. 889; Atkins v. Gamble, 42 Cal. 86, 10 Am. Rep. 282.

Connecticut. Skiff v. Stoddard, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

Maryland. German Sav. Bank of Baltimore City v. Renshaw, 78 Md. 475, 28 Atl. 281; Price v. Gover, 40 Md. 102.

Michigan. Austin v. Hayden, 171 Mich. 38, Ann. Cas. 1915 B 894, 137 N. W. 317. Compare, however, Allen

v. Dubois, 117 Mich. 115, 72 Am. St. Rep. 557, 75 N. W. 443.

Nevada. Boylan v. Huguet, 8 Nev. 345.

New York. Carlisle v. Morris, 215 N. Y. 400, Ann. Cas. 1917 A 429, 109 N. E. 564, aff'g 157 App. Div. 313, 142 N. Y. Supp. 393; Mayo v. Knowlton, 134 N. Y. 250, 31 N. E. 985; Caswell v. Putnam, 120 N. Y. 153, 24 N. E. 287; Horton v. Morgan, 19 N. Y. 170, 75 Am. Dec. 311, 6 Duer 61; Strickland v. Magoun, 119 App. Div. 113, 104 N. Y. Supp. 425, aff'd 190 N. Y. 545, 83 N. E. 1132; Douglas v. Carpenter, 17 App. Div. 329, 45 N. Y. Supp. 219; Nourse v. Prime, 4 Johns. Ch. 490, 8 Am. Dec. 606. See also Allen v. Dykers, 3 Hill. 593, aff'd 7 Hill. 497, 42 Am. Dec. 87.

Pennsylvania. Wynkoop v. Seal, 64 Pa. St. 361; Gilpin v. Howell, 5 Pa. 41, 45 Am. Dec. 720.

In such a case, however, the pledgee must at all times have sufficient shares to cover the pledge. Fay v. Gray, 124 Mass. 500; Taussig v. Hart, 58 N. Y. 425; Saltus v. Genin, 3 Bosw. (N. Y.) 257.

That it is not enough that he has a right to recall sufficient shares which have been hypothecated by him, see Saltus v. Genin, 3 Bosw. (N. Y.) 257.

with a view to identifying the shares so pledged.⁸²

An authorized repledge does not change the character of the stock as being hypothecated for debt.⁸³ "If the pledgee may use the thing pledged he must do so at his peril, and so use it as not to affect the ultimate right and ability of the pledgor to have it again when the lien shall be discharged."⁸⁴ "And no evidence of usage is admissible which would destroy the contract."⁸⁵ The right to repledge, when it exists, "may deprive the pledgor of his remedy against third persons who have the property in possession, but will not affect the rights and remedies of the original parties to the pledge upon payment of the debt secured. The right to use, as well as the right to retain the pledge ceases the instant the lien is discharged by the tender or payment of the debt, or the performance of the covenant or engagement for which the security is given."⁸⁶ If the stock is then lawfully out of the pledgee's possession at the time of the tender and demand, it is his duty at once to regain possession thereof and to restore the same to the pledgor, and a neglect or refusal to do so gives the pledgor a right of action against him for conversion.⁸⁷

It has been held that the pledgee of stock may lease it, subject, of course, to the pledgor's right of redemption.⁸⁸

§ 3913. — Negligence or misconduct in use or care of stock. The pledgee owes a duty to the pledgor to be reasonably careful that no harm shall come, through his custody, to the pledged stock, and he

⁸² *Allen v. Dubois*, 117 Mich. 115, 72 Am. St. Rep. 557, 75 N. W. 443; *Gilpin v. Howell*, 5 Pa. St. 41, 45 Am. Dec. 720.

⁸³ *Morgan v. Johns*, 84 Ore. 557, 165 Pac. 369.

⁸⁴ *Lawrence v. Maxwell*, 53 N. Y. 19.

⁸⁵ *Oregon & Transcontinental Co. v. Hilmers*, 20 Fed. 717; *German Sav. Bank of Baltimore City v. Renshaw*, 78 Md. 475, 28 Atl. 281. See also to the same effect *Lawrence v. Maxwell*, 53 N. Y. 19; *Dykers v. Allen*, 7 Hill (N. Y.) 497, 42 Am. Dec. 87, aff'g 3 Hill 593.

⁸⁶ *Lawrence v. Maxwell*, 53 N. Y. 19. And see to the same effect *German Sav. Bank of Baltimore City v. Renshaw*, 78 Md. 475, 28 Atl. 281.

⁸⁷ *German Sav. Bank of Baltimore City v. Renshaw*, 78 Md. 475, 28 Atl. 281; *Lawrence v. Maxwell*, 53 N. Y. 19.

This is true regardless of whether the stock was rehypothecated by the pledgee for the benefit of the pledgor's transactions or for his own purposes. *Lawrence v. Maxwell*, 53 N. Y. 19.

If the pledgee uses the stock in such a manner that he cannot at once regain it and restore it to the pledgor when the obligation of the latter is discharged, he is liable for conversion. *Oregon & Transcontinental Co. v. Hilmers*, 20 Fed. 717.

⁸⁸ *Eisenhauer v. New Orleans Cotton Exchange*, 140 La. 574, 73 So. 685.

is liable to him for any damage resulting from his negligence or misconduct in this regard.⁸⁹ The diligence required of him in any particular case depends upon the character of the thing pledged, and the means of protection possessed by the pledgee.⁹⁰

89 United States. *Wilson v. Colorado Min. Co.*, 227 Fed. 721; *Ritchie v. McMullen*, 79 Fed. 522.

Arkansas. *Loeb v. German Nat. Bank*, 88 Ark. 108, 113 S. W. 1017.

Connecticut. See *Dunham v. Boyd*, 64 Conn. 397, 30 Atl. 62.

Iowa. *Loomis v. Reimers*, 119 Iowa 169, 93 N. W. 95. See also *Iowa Nat. Bank v. Cooper*, 101 N. W. 459.

Missouri. *National Exch. Bank v. Kilpatrick*, 204 Mo. 119, 120 Am. St. Rep. 689, 102 S. W. 499.

New Hampshire. See *Haskell v. Africa*, 68 N. H. 421, 41 Atl. 73.

Pennsylvania. See *First Nat. Bank of Reading v. Ferguson*, 224 Pa. 397, 73 Atl. 551.

"The appropriation to himself or the loss of collateral securities by a pledgee, either intentionally or by culpable negligence, is both a tort and a breach of the contract of pledge, and the pledgor may maintain an independent action either in tort or upon the contract at his option, against the pledgee for the value of the securities of which he is deprived." *Wilson v. Colorado Min. Co.*, 227 Fed. 721.

Where the pledgee, through fault of his own, fails to preserve the pledge, he, in effect, discharges the debt to the extent of the value of the stock. *Skud v. Tillinghast*, 195 Fed. 1.

The amount of the loss will be credited on the note secured by the pledge. *National Exch. Bank v. Kilpatrick*, 204 Mo. 119, 120 Am. St. Rep. 689, 102 S. W. 499.

Where one with whom stock is pledged as security for a note transfers the note and the stock to another as security, he cannot hold the transferee liable for loss of the security

resulting from a sale thereof by the original pledgor on the ground that the transferee was negligent in failing to have the transfer from the original pledgee recorded, since the duty of procuring a transfer on the books rested primarily upon the original pledgee if recording was necessary to his own protection or that of his transferee. *Loeb v. German Nat. Bank*, 88 Ark. 108, 113 S. W. 1017.

A pledgee of a contract for the purchase of a controlling interest in a railway cannot be held liable as for a failure to conserve collateral pledged because he does not enforce the contract, where the contract is a mere option, which the purchaser has a right to abandon at any time on forfeiting what he has paid. Nor is he liable for depreciation in the value of the railway resulting from the fact that the holder of the option abandons it and builds a railway of his own. *Citizens' Bank & Trust Co. v. Rudebeck*, 90 Wash. 612, 156 Pac. 831.

Where notes secured by a pledge of stock are assigned without recourse, and without a transfer of the security, which remains in the possession of the original payee and is afterwards exchanged by him with the pledgor for other collateral, the fact that the latter collateral has been lost is no defense to an action by the assignee on the note, since the negligence, if any, in the care of the stock, was not his negligence. *Haskell v. Africa*, 68 N. H. 421, 41 Atl. 73.

90 *Loomis v. Reimers*, 119 Iowa 169, 93 N. W. 95.

Whether he has exercised due diligence is a question of law when the

It has been held that, where the pledgor directs the pledgee to sell the stock at a time when it can be sold, and to apply the proceeds on the debt, but the pledgee refuses to do so, and the stock afterwards becomes worthless, the pledgee, rather than the pledgor, must bear the loss.⁹¹

A pledgee of stock is under no duty to protect the same against forfeiture or sale by the corporation for nonpayment of calls or assessments thereon,⁹² for, as between him and the pledgor, the latter is bound to pay assessments, in the absence of an agreement to the contrary. But he may pay them in order to protect and keep available his security, and if he does so is entitled to a lien on the stock for the amount so paid.⁹³ It has been held that a pledgee is not negligent in failing to defend an action of replevin brought by a third person to recover possession of the pledged stock, where he consults an attorney who advises him that he could not do so successfully.⁹⁴

"The fact that the pledgee of stock owns other stock in the same company, or is a director or officer therein, does not impose any greater duty upon him, in respect to the stock pledged, than if he had no relation to the company at all."⁹⁵ And he is not responsible to the pledgor for a loss in the value of the stock due to his negligence in acting as a director or to the ill-advised or negligent manner in which he votes other stock owned by him.⁹⁶ Nor, where he acts honestly, is he responsible for the destruction of the value of the entire stock of the company as a consequence of the action of its directors in changing the nature of its business which he was in a position to prevent.⁹⁷ But if he uses his position as director and his

facts are ascertained. *National Exch. Bank v. Kilpatric*, 204 Mo. 119, 120 Am. St. Rep. 689, 102 S. W. 499.

⁹¹ *National Exch. Bank v. Kilpatric*, 204 Mo. 119, 120 Am. St. Rep. 689, 102 S. W. 499.

⁹² *Thomas v. Gilbert*, 55 Ore. 14, Ann. Cas. 1912 A 516, 104 Pac. 888, 101 Pac. 393; *Southwestern Railroad Bank v. Douglas*, 2 Speers (S. C.) 329.

He is not legally bound to pay an assessment, but may surrender the stock to the corporation and thus escape liability. *Corbin Banking Co. v. Mitchell*, 141 Ky. 172, 31 L. R. A. (N. S.) 446, 132 S. W. 426.

⁹³ See § 3914, *infra*.

⁹⁴ *Loomis v. Reimers*, 119 Iowa 169, 93 N. W. 95.

⁹⁵ *Ritchie v. McMullen*, 79 Fed. 522.

See *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786, where it was held that directors to whom stock was pledged were justified in not declaring a dividend out of surplus assets, and could not be compelled to account to the pledgor for his proportionate share of such assets in a suit to enjoin a foreclosure of the pledge.

⁹⁶ *Ritchie v. McMullen*, 79 Fed. 522.

⁹⁷ This is particularly true where the action complained of was taken before the making of the pledge.

vote as a stockholder intentionally to depreciate the value of the pledged stock with the dishonest purpose of acquiring ownership of the same at forced sale, this is a direct injury to the pledgor for which the latter may hold him liable.⁹⁸ Pledgees of a majority of the stock are not responsible, as mortgagees in possession of the corporation, for the acts of corporate officers elected by them.⁹⁹

Where the pledgor and the pledgee sell the stock to a third person at a price to be determined by an appraisement of the corporate assets, the purchaser agreeing to pay to the pledgee the amount of his claim and to the pledgor the excess, if any, a compromise by the pledgee with the buyer of his claim for less than the full amount due is a conversion of the purchaser's obligation, and the pledgor has the election either to sue the pledgee in damages for the conversion, or the buyer for any balance due over and above the pledgee's claims. If the buyer takes an assignment of the claim, he must give the pledgor credit thereon for the face value of the pledged stock, rather than the amount paid in the compromise.¹

§ 3914. — Right to incur expense to protect lien. The pledgee may incur reasonable expense necessary to maintain and keep the collateral available, and have a lien on the stock for the amount so paid.² So he may pay reasonable assessments for the purpose of protecting and keeping available his security, and if he does so is entitled to a lien on the stock for the amount paid.³ And he is also entitled to

First Nat. Bank of Reading v. Ferguson, 224 Pa. 397, 73 Atl. 551.

⁹⁸ As where several directors to whom stock has been pledged by the same pledgor combine together and wrongfully depreciate its value, with the intention of buying it in at less than its actual value. Ritchie v. McMullen, 79 Fed. 522. See also First Nat. Bank of Reading v. Ferguson, 224 Pa. 397, 73 Atl. 551.

A defense of this character to an action on notes secured by the pledge must be pleaded. Dunham v. Boyd, 64 Conn. 397, 30 Atl. 62.

⁹⁹ Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362.

¹ Kentucky Title Sav. Bank & Trust Co. v. McClarty, 174 Ky. 171, 191 S. W. 892.

² Iowa Nat. Bank v. Cooper (Iowa),

101 N. W. 459; Wells, Fargo & Co.'s Express v. Walker, 9 N. M. 456, 54 Pac. 875; Work v. Tibbits, 87 Hun (N. Y.) 352, 34 N. Y. Supp. 308; Reynolds v. Cridge, 131 Pa. St. 189, 18 Atl. 1010.

In a suit to redeem, the burden is on the pledgee to establish any proper disbursements made on account of the stock. Collins v. Denny Clay Co., 41 Wash. 136, 82 Pac. 1012.

³ California. Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073.

Georgia. McCalla v. Clark, 55 Ga. 53.

Iowa. Iowa Nat. Bank v. Cooper, 101 N. W. 459.

Kentucky. Corbin Banking Co. v. Mitchell, 141 Ky. 172, 31 L. R. A. (N. S.) 446, 132 S. W. 426.

New Mexico. Wells, Fargo & Co.'s

hold the stock as security for money advanced by him to pay assessments at the request of the pledgor.⁴ He is also entitled to be reimbursed for expenses incurred in clearing or defending the pledgor's title.⁵ But this does not entitle him to be reimbursed for defending an action by a third person to recover possession of the stock in which the latter is held to be the owner of the stock, but the pledgee's right to a lien is upheld on the ground that he took the stock in good faith from one in possession thereof and who was clothed with apparent ownership.⁶

§ 3915. — Right to sue to preserve security or for damages. The pledgee has such an interest as will entitle him to sue in equity to preserve the stock and to protect his interests therein, to the same extent, at least, as the pledgor might do.⁷ And he may sue in equity to set aside a sale of the stock under a void assessment,⁸ or to restrain the enforcement of an illegal assessment.⁹

He is also interested in the preservation of the corporate property and in preventing it from passing out of the hands of the corporation, and has a right to maintain suits for that purpose.¹⁰ So, in a proper

Express v. Walker, 9 N. M. 456, 54 Pac. 875.

But a pledgee is not authorized to pay an assessment which amounts to six times the actual value of the stock, and hence cannot have such payment made a superior lien on the stock. *Iowa Nat. Bank v. Cooper* (Iowa), 101 N. W. 459.

⁴*Iowa Nat. Bank v. Cooper*, 131 Iowa 556, 107 N. W. 625.

⁵See *Work v. Tibbits*, 87 Hun (N. Y.) 352, 34 N. Y. Supp. 308.

⁶Under such circumstances the action is of no benefit to the pledgor, and the defense cannot be regarded as being undertaken in his behalf. *Work v. Tibbits*, 87 Hun (N. Y.) 352, 34 N. Y. Supp. 308.

⁷*Gorman-Wright Co. v. Wright*, 134 Fed. 363; *First Nat. Bank v. Multnomah State Bank*, 87 Ore. 423, 170 Pac. 534; *Enterprise Trading Co. v. Bank of Crowell*, — Tex. Civ. App. —, 167 S. W. 296.

⁸*Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143.

⁹*Farmers' Pawnee Canal Co. v. Henderson*, 46 Colo. 37, 102 Pac. 1063; *First Nat. Bank v. Multnomah State Bank*, 87 Ore. 423, 170 Pac. 534.

¹⁰*Georgia. Andrews Co. v. National Bank of Columbus*, 129 Ga. 53, 121 Am. St. Rep. 186, 12 Ann. Cas. 616, 58 S. E. 633.

Illinois. Green v. Hedenberg, 159 Ill. 489, 50 Am. St. Rep. 178, 42 N. E. 851.

Minnesota. Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261, 263.

New York. See Campbell v. American Zylonite Co., 122 N. Y. 455, 11 L. R. A. 596, 25 N. E. 853.

Texas. Enterprise Trading Co. v. Bank of Crowell, — Tex. Civ. App. —, 167 S. W. 296.

Washington. Kneeland Inv. Co. v. Berendes, 81 Wash. 372, 142 Pac. 869. See also *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 60 Pac. 141.

A pending suit by the pledgee is not abated by reason of the fact that he forecloses the pledge and bids in

case, he may maintain a suit for the appointment of a receiver for the corporation and the distribution of its assets.¹¹ He may also sue in equity to prevent a fraudulent sale and transfer of the assets of the corporation, whereby the stock pledged would be rendered valueless,¹² or to remove a cloud on the title of the corporation to real property,¹³ or to cancel a mortgage given by the corporation upon all its property,¹⁴ or for relief against a misappropriation of the corporate property by its officers.¹⁵ It has been held in a number of cases that he may maintain such suits in his own name, although a stockholder could not do so, since he is not a stockholder, and hence cannot exercise the control over the corporation which stockholders may exercise, or compel it to act as they may do.¹⁶ It has also been held that he is not obliged to first appeal to the corporation or its officers to bring the suit.¹⁷ And in any event he is not bound to make such a demand

the property for the full amount of the debt. *Kneeland Inv. Co. v. Berendes*, 81 Wash. 372, 142 Pac. 869..

11 A pledgee of the majority of the stock may maintain a suit for the appointment of a receiver of the corporation on the ground that its property is being managed and controlled by one not a stockholder in such a way as to impair the value of the stock. *Chafee v. Quidnick Co.*, 14 R. I. 75. See also *Gorman-Wright Co. v. Wright*, 134 Fed. 363.

12 *Andrews Co. v. National Bank of Columbus*, 129 Ga. 53, 121 Am. St. Rep. 186, 12 Ann. Cas. 616, 58 S. E. 633.

He may sue in equity to prevent the corporation and those acting for it from removing its assets from the place of its domicile, and transmuting its property into the stock of another corporation. *Enterprise Trading Co. v. Bank of Crowell*, — Tex. Civ. App. —, 167 S. W. 296.

13 *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261, 263.

14 *Kneeland Inv. Co. v. Berendes*, 81 Wash. 372, 142 Pac. 869.

It is not necessary to allege in such an action that the mortgagee intends or threatens to foreclose, where the

mortgage is valid on its face and proof of extrinsic circumstances is required to show its invalidity. *Kneeland Inv. Co. v. Berendes*, 81 Wash. 372, 142 Pac. 869.

15 *Green v. Hedenberg*, 159 Ill. 489, 50 Am. St. Rep. 178, 42 N. E. 851; *Cream City Mirror Plate Co. v. Coggeshall*, 142 Wis. 651, 135 Am. St. Rep. 1091, 126 N. W. 44.

An action to compel directors to restore funds lost through their mismanagement may properly be brought in the name of the corporation, rather than in the name of the pledgee, where the control of the corporation has passed into friendly hands. *Cream City Mirror Plate Co. v. Coggeshall*, 142 Wis. 651, 135 Am. St. Rep. 1091, 126 N. W. 44.

16 *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261, 263; *Enterprise Trading Co. v. Bank of Crowell*, — Tex. Civ. App. —, 167 S. W. 296; *Kneeland Inv. Co. v. Berendes*, 81 Wash. 372, 142 Pac. 869.

17 *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261, 263; *Enterprise Trading Co. v. Bank of Crowell*, — Tex. Civ. App. —, 167 S. W. 296; *Kneeland Inv. Co. v. Berendes*, 81 Wash. 372, 142 Pac. 869.

where it is reasonably certain that it would not be complied with.¹⁸

The pledgee is entitled to have his security protected from fraudulent dissipation by the pledgor, where the latter practically controls the corporation, and this is true even though it does not appear that the debt will not be paid at maturity.¹⁹

The pledgee may sue a third person for conversion of the stock,²⁰ and may also maintain an action for damages against any one who wrongfully destroys the subject of the pledge.²¹ So where a building and loan association cancels certificates of stock wrongfully without requiring a return of the certificates, a pledgee thereof may maintain action against the association therefor although he has not secured the title to the stock by legal process.²² If he is liable to account to the pledgor for the value of the property destroyed, he may recover its full value, and if not so liable, he may recover the actual damages suffered by him up to the value of the chattel destroyed.²³

§ 3916. — Right to purchase at sale under paramount lien. There is a real or apparent conflict in the authorities as to the right of the pledgee of stock or other property to purchase the same at a sale made under a paramount lien.²⁴ In any event, if he does so purchase at a sale made at public auction, after notice, the sale is at most merely voidable and not void. It may be ratified by the pledgor, and such ratification may be implied from circumstances, as where the sale is made with his consent or acquiescence; or where, with full knowledge

¹⁸ *Green v. Hedenberg*, 159 Ill. 489, 50 Am. St. Rep. 178, 42 N. E. 851; *Kneeland Inv. Co. v. Berendes*, 81 Wash. 372, 142 Pac. 869.

¹⁹ *Cream City Mirror Plate Co. v. Coggeshall*, 142 Wis. 651, 135 Am. St. Rep. 1091, 126 N. W. 44.

²⁰ *Florida Nat. Bank of Gainesville, Florida v. Merchants' & Farmers' Bank of Claxton, Georgia*, 227 Fed. 714.

If he sues for a conversion of a part only of the pledged stock, he must set out the amount of the debt secured by the pledge, since otherwise it will not appear whether he was damaged or in what amount. *Florida Nat. Bank of Gainesville, Florida v. Merchants' & Farmers' Bank of Claxton, Georgia*, 227 Fed. 714.

²¹ *Brown v. Union Savings & Loan*

Ass'n, 28 Wash. 657, 69 Pac. 383.

²² *Allmon v. Salem Building & Loan Ass'n*, 275 Ill. 336, 114 N. E. 170; *Brown v. Union Savings & Loan Ass'n*, 28 Wash. 657, 69 Pac. 383.

A notice of the pledge is not necessary to protect the corporation under such circumstances, since it need not pay off or cancel the stock without a return of the certificate. *Allmon v. Salem Building & Loan Ass'n*, 275 Ill. 336, 114 N. E. 170; *Brown v. Union Savings & Loan Ass'n*, 28 Wash. 657, 69 Pac. 383.

²³ *Brown v. Union Savings & Loan Ass'n*, 28 Wash. 657, 69 Pac. 383.

²⁴ See *Thomas v. Gilbert*, 55 Ore. 14, Ann. Cas. 1912 A 516, 104 Pac. 888, 101 Pac. 393.

See generally standard works on pledges.

of the circumstances, he accepts the proceeds thereof as a credit on the indebtedness; ²⁵ "or where the conditions of the pledge or the increase in value of the pledged property have so changed as to render it inequitable or unjust for the pledgor to be permitted to disaffirm it." ²⁶ "And an unreasonable delay after notice of sale in redeeming the pledged property will be regarded as an affirmance thereof. What constitutes such a delay will, of course, depend upon the circumstances of each case." ²⁷

§ 3917. — Effect of death of pledgor. The pledgee's lien and right to the possession of the pledged stock are in no way affected by the death of the pledgor, ²⁸ and the pledged stock constitutes no part of the pledgor's estate until the debt secured by the pledge is paid. ²⁹ So long as his claim remains unsatisfied the pledgee is entitled to hold it as against the executor or administrator of the pledgor, and to receive and enforce dividends and other benefits attached thereto, ³⁰ and his rights in this regard are superior to the claim of the surviving widow for a year's allowance and in lieu of homestead as well as the expenses of the pledgor's last illness. ³¹

§ 3918. — Title or lien of pledgee as against third persons—In general. As was shown in a former section, in dealing with transfers generally, certificates of stock are not negotiable instruments, and, in the absence of elements of estoppel, a bona fide pledgee of a certificate from one who has no title or authority to pledge the same acquires no title or lien as against the true owner. ³² The pledgor may follow

²⁵ Thomas v. Gilbert, 55 Ore. 14, Ann. Cas. 1912 A 516, 104 Pac. 888, 101 Pac. 393.

²⁶ As where bank stock, which was practically worthless when it was sold for nonpayment of assessments, has greatly increased in value. Thomas v. Gilbert, 55 Ore. 14, Ann. Cas. 1912 A 516, 104 Pac. 888, 101 Pac. 393.

²⁷ Thomas v. Gilbert, 55 Ore. 14, Ann. Cas. 1912 A 516, 104 Pac. 888, 101 Pac. 393.

A delay of five years before any attempt is made to repudiate the purchase of stock by a pledgee at a sale for nonpayment of assessments has been held to be unreasonable. Thomas v. Gilbert, 55 Ore. 14, Ann. Cas. 1912 A

516, 104 Pac. 888, 101 Pac. 393.

²⁸ Bell v. Mills, 123 Fed. 24; Clarke v. First State Bank of Dallas, — Tex. Civ. App. —, 150 S. W. 203.

See also § 3932, *infra*.

²⁹ Bell v. Mills, 123 Fed. 24; Clarke v. First State Bank of Dallas, — Tex. Civ. App. —, 150 S. W. 203.

³⁰ Bell v. Mills, 123 Fed. 24; Savings Union Bank & Trust Co. v. Crowley, — Cal. —, 169 Pac. 67; Fulton v. National Bank of Denison, 26 Tex. Civ. App. 115, 62 S. W. 84.

³¹ Clarke v. First State Bank of Dallas, — Tex. Civ. App. —, 150 S. W. 203.

³² See § 3834, *supra*.

the stock into the hands of one to whom the pledgee has wrongfully sold or repledged it,³³ provided he can trace and identify it,³⁴ and provided he has not estopped himself from denying the latter's right by clothing his pledgee with the apparent title to the stock.³⁵ And he does not waive his right to do so by presenting his claim to the trustee in bankruptcy of the pledgee.³⁶ But by reason of the equitable doctrine of estoppel, a bona fide pledgee of a certificate of stock from one whom the true owner has clothed with the apparent title, or with apparent authority to pledge the same, acquires a title or lien as against the true owner.³⁷ And a bona fide pledgee takes free from any latent or secret equities or liens in favor either of the corporation or of third persons, if he has no notice thereof, but not otherwise.³⁸ He also takes it free of liens or claims that may subsequently arise in favor of the corporation if it has notice of the pledge, although no demand for a transfer of the stock to the pledgee on the corporate books has been made.³⁹ And his rights are superior to those of a subsequent purchaser with notice of the pledge.⁴⁰ But he takes subject to existing statutory liens, of which he is bound to take notice.⁴¹

Where a corporation or an officer for whose act it is responsible issues a certificate of stock which is valid on its face, it will be liable thereon to a bona fide pledgee, by reason of estoppel, although the certificate may have been illegally or fraudulently issued, and may in fact be fictitious.⁴²

Where it appears that stock is held by a person as trustee, either from the certificate of stock, or from the books of the corporation, where the stock is transferable only on the books, pledgees of the stock are chargeable with notice of the trust, and that the holder probably has no authority to pledge the stock, and if a loan is made and a pledge of the stock taken without inquiry, the pledgee acts at his peril.⁴³ But

³³ See § 3834, *supra*.

³⁴ See § 3941, *infra*.

³⁵ See § 3853, *supra*.

³⁶ *Mould v. Importers' & Traders' Nat. Bank*, 72 N. Y. App. Div. 30, 76 N. Y. Supp. 148.

³⁷ See § 3853, *supra*.

³⁸ See § 3854, *supra*.

³⁹ See § 3608 and § 3814, *supra*.

⁴⁰ *Schwind v. Boyce*, 94 Md. 510, 51 Atl. 45; *New Jersey Trust & Safe Deposit Co. v. Bodine* (N. J. Ch.), 60 Atl. 387.

The purchaser is charged with the knowledge of his agent through whom

the purchase is made, acquired by such agent in the course of his employment. *Schwind v. Boyce*, 94 Md. 510, 51 Atl. 45.

Where the transfer is entered on the corporate books, subsequent purchasers from the pledgor are charged with notice of the pledge, and of a foreclosure and sale thereunder. *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546.

⁴¹ See § 3600, *supra*.

⁴² See § 3497, *supra*.

⁴³ See § 3837, *supra*.

a pledgee of stock from one who has the apparent absolute title does not take subject to a trust of which he has neither actual nor constructive notice.⁴⁴ A guardian has no authority to pledge certificates of stock standing in the name of his ward, or in his own name as guardian, and pledgees who take with notice of the character in which he holds are not protected.⁴⁵

Unlike other trustees, an executor has the power, not only to sell, but also to pledge shares belonging to the estate for the purposes of the estate, and a bona fide pledgee from an executor will be protected, therefore, although the pledge may in fact have been a breach of trust.⁴⁶ This does not apply, however, where the executor pledges the stock for his own purposes, and the breach of trust is known to the pledgee, or the circumstances are such as to put him on inquiry which would result in such knowledge.⁴⁷ All persons who take stock from an executor, knowing that he holds it as such, are chargeable with notice of the contents of the will.⁴⁸

An agent or trustee with authority merely to sell stock has no authority to pledge it, and if he does so, the pledgee, unless there is some element of estoppel, acquires no title or lien as against the principal or cestui que trust.⁴⁹

The advances must have been made on the faith of the security to give the pledgee any rights as against the true owner.⁵⁰ By the weight of authority, a pledgee of shares does not occupy the position of a bona fide purchaser for value, where he takes the same merely as security for a pre-existing debt, not contracted on the faith of the security, and neither surrenders any right nor gives any new consideration.⁵¹ But the contrary is true where there is a new consideration for the pledge, as where an extension of time is granted and a new

⁴⁴ See § 3837, *supra*.

⁴⁵ See § 3842, *supra*.

⁴⁶ See § 3840, *supra*.

⁴⁷ See § 3840, *supra*.

⁴⁸ See § 3840, *supra*.

⁴⁹ See § 3836, *supra*.

⁵⁰ See *Barnes v. Davis*, 113 Minn. 132, 128 N. W. 1118.

⁵¹ *Alabama*. *Bank of Tupelo v. Thompson*, 186 Ala. 600, 65 So. 147.

Kentucky. *Schuster v. Jones*, 22 Ky. L. Rep. 568, 58 S. W. 595.

Michigan. *Bronson Elec. Co. v. Rheubottom*, 122 Mich. 608, 81 N. W. 563. See also *Just v. State Sav. Bank*, 132 Mich. 600, 94 N. W. 200.

Missouri. *Darling v. Potts*, 118 Mo. 506, 24 S. W. 461; *Watson v. Woody Printing Co.*, 56 Mo. App. 145.

Ohio. *Cleveland v. State Bank of Ohio*, 16 Ohio St. 236, 88 Am. Dec. 445.

Oklahoma. *State Nat. Bank v. Scales*, 159 Pac. 925.

Pennsylvania. *Crawford v. Dollar Sav. Fund & Trust Co.*, 236 Pa. 206, 84 Atl. 694; *King v. Mellon Nat. Bank of Pittsburg*, 227 Pa. 22, 75 Atl. 832; *Kisterbock's Appeal*, 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381.

See also § 3783, *supra*.

note is taken by the creditor in consideration of the pledge,⁵² or where the pledgee surrenders existing securities,⁵³ or where the pledge covers future indebtedness and the pledgee subsequently extends further credit on the strength of the collateral.⁵⁴ Some courts, however, hold that one who takes a pledge of stock to secure a pre-existing debt is a bona fide purchaser for value.⁵⁵ And it has also been held that a pledgee is a bona fide purchaser for value, though the consideration of the note secured by the pledge is, in part, a payment of a pre-existing debt.⁵⁶ The trustee in bankruptcy of the pledgor is not a bona fide purchaser for value, but takes the bankrupt's property in the same condition and subject to the same conditions as the bankrupt himself held it.⁵⁷

§ 3919. — Marshaling securities. If a broker pledges stock of his own and that of his customers, which he has a right to repledge, to secure his own debt, the relation of principal and surety arises, the broker being the principal and the customers his sureties, at least to the extent to which the stock of each of them exceeds in value the amount of the broker's lien upon it. The stock belonging to the broker personally should be first applied to the payment of his indebtedness, under such circumstances, and the stock belonging to his cus-

⁵² *Just v. State Sav. Bank*, 132 Mich. 600, 94 N. W. 200; *Watson v. Woody Printing Co.*, 56 Mo. App. 145; *Johnson v. First Nat. Bank of Franklin*, 132 N. Y. App. Div. 524, 117 N. Y. Supp. 39, aff'd 200 N. Y. 593, 94 N. E. 1095; *American Nat. Bank v. Dew*, — N. C. —, 94 S. E. 708.

There is no new consideration for the pledge of stock to secure a note payable on demand for a pre-existing debt, although the payee agrees by parol to forbear bringing suit for a time in consideration of its receipt, since the parol agreement could not be shown as a defense to an immediate suit on the note. *Bronson Elec. Co. v. Rheubottom*, 122 Mich. 608, 81 N. W. 563.

⁵³ *Crawford v. Dollar Sav. Fund & Trust Co.*, 236 Pa. 206, 84 Atl. 694; *King v. Mellon Nat. Bank of Pittsburgh*, 227 Pa. 22, 75 Atl. 832.

⁵⁴ This is true although such collat-

eral was not the sole security for the subsequent advances. *Bank of Tupelo v. Thompson*, 186 Ala. 600, 65 So. 147.

⁵⁵ *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87.

This is the rule in Illinois and in the federal courts. *National City Bank of Chicago v. Wagner*, 216 Fed. 473.

A pledgee who takes the stock as security for a note given for the cancellation of a pre-existing indebtedness is, prima facie at least, a pledgee for value. *Fowles v. National Bank of California*, 167 Cal. 653, 140 Pac. 271.

⁵⁶ *Gurley v. Reed* 190 Mass. 509, 77 N. E. 642.

⁵⁷ *First Nat. Bank of Waterloo v. Bacon*, 113 N. Y. App. Div. 612, 98 N. Y. Supp. 717, aff'd 198 N. Y. 533, 82 N. E. 1126, 216 U. S. 134, 54 L. Ed. 418.

tomers should then contribute pro rata to the payment of the balance. If this is not done, but a part of the property is sold for an amount sufficient to satisfy the broker's debt, which is greater than the aggregate amount of the indebtedness due him from all of the customers whose stock is repledged, and exceeds that aggregate indebtedness by more than the total value of the broker's own property included in the pledge, the customers are entitled to the portion of the pledge remaining unsold and to the surplus proceeds of that sold as against the general creditors and the trustee in bankruptcy of the broker, and to this end are entitled to be subrogated to the rights of the second pledgee.⁵⁸ It has been held that in such case it is not necessary for the customers whose stocks have been sold to be able to trace their holdings into the cash surplus realized by the second pledgee in order to recover such surplus, since they have merely contract rights, and not the rights of beneficiaries under a trust.⁵⁹ The burden incident to the discharge of any sub-pledge made with the authority of the original pledgors must be averaged among all the stocks and securities held in such pledge.⁶⁰ If a person pledges stock of his own and stock belonging to another which he has no right to pledge, the latter, after notifying the pledgee of his rights, is entitled to have the stock of the pledgor first applied to the indebtedness.⁶¹ And similarly, if a broker

⁵⁸ *United Nat. Bank v. Tappan*, 33 R. I. 1, 79 Atl. 946.

⁵⁹ *United Nat. Bank v. Tappan*, 33 R. I. 1, 79 Atl. 946.

⁶⁰ *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

Where stock is loaned by its owner to brokers to be used by them in their business, and is pledged by them with other stock as security for a loan, which is satisfied by the sale of part of the other collateral, and is then returned by the pledgee to the trustee in bankruptcy of the brokers, it must contribute with the other securities, sold and unsold, to the payment of the debt for which it was rightfully pledged, but only on the basis of its value at the time of the adjudication in bankruptcy. *In re T. A. McIntyre & Co.*, 181 Fed. 955. See also *In re Stringer*, 230 Fed. 177.

⁶¹ *Le Marchant v. Moore*, 150 N. Y.

209, 44 N. E. 770; *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338.

The owner of the stock pledged without authority stands as a simple surety for the payment of the loan to the pledgee. *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338.

Defendant purchased certain stock on the strength of information furnished him by the plaintiff, and agreed to carry a part of it for the plaintiff. It was agreed that the stock should all be transferred in the defendant's name and that the money to pay for the plaintiff's shares should be borrowed by the defendant and that said shares and other collateral belonging to the defendant should be pledged as security for the loan, which was done. Later defendant took up the note for the money so borrowed and notes given for money borrowed to pay for his own shares, and gave a new note for the whole secured by a pledge of

pledges stock of his own, stock of customers which he has a right to repledge, and stock of a customer which he has no right to repledge, the owner of the latter may compel the second pledgee to first resort to the property of the broker and that of the other customers.⁶²

§ 3920. Relative rights of pledgor and pledgee as stockholders.

Until the stock is transferred to the pledgee on the corporate books, he does not become a stockholder,⁶³ and hence is not entitled to notice of corporate meetings which the statute requires to be given to stockholders.⁶⁴ In the absence of statutory provision or agreement to the contrary, a pledgee of stock is entitled to vote the same at corporate meetings, if he appears as the holder of the stock on the books of the corporation, while the pledgor is entitled to vote the stock if it continues to be registered in his name.⁶⁵ As between the pledgor and pledgee, the pledgor has the privilege of subscribing for or purchasing the new stock upon an increase of the capital stock of the corporation.⁶⁶

In the absence of a provision in the contract to the contrary, the pledgee has a right to receive dividends declared on the pledged stock, although he must account therefor to the pledgor.⁶⁷ But the corpora-

all of the stock. The pledgee did not know of the plaintiff's interest. The plaintiff tendered the amount of the loan made to purchase his share to the defendant at its maturity, but defendant refused it on the ground that the loan had been renewed, and the plaintiff thereupon made a tender to the pledgee, which was also refused. In the meantime the stock had greatly increased in value. In a suit by the plaintiff to redeem it was held that if the renewal note was not paid at maturity, the pledgee would be required to resort first to the stock belonging to the defendant before selling that belonging to the plaintiff. *Clayton v. Smith*, — Md. —, 102 Atl. 925.

Where the owner notifies the pledgee of his title, and the latter, after the pledgor has made an assignment for the benefit of creditors, sells the stock, and, after applying the proceeds to his claim against the pledgor, turns over the balance to the

assignee, the owner is entitled to recover such balance from the pledgee. *Le Marchant v. Moore*, 150 N. Y. 209, 44 N. E. 770.

⁶² *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

⁶³ *Osborne v. Detroit Kraut Co.*, 193 Mich. 664, 160 N. W. 442; *Cleveland City Ry. Co. v. First Nat. Bank*, 68 Ohio St. 582, 67 N. E. 1075.

An unregistered pledge does not effect a novation of membership, nor place the pledgee in privity with the other shareholders. *Elyea v. Lehigh Salt Min. Co.*, 169 N. Y. 29, 61 N. E. 992, aff'g 45 N. Y. App. Div. 231, 60 N. Y. Supp. 1050.

⁶⁴ See § 1637, *supra*.

⁶⁵ See § 1664, *supra*.

⁶⁶ *Miller v. Illinois Cent. R. Co.*, 24 Barb. (N. Y.) 312. See also §§ 3462, 3463, *supra*.

⁶⁷ See § 3704, *supra*.

tion is not liable for paying them to the pledgor, where the stock stands in the latter's name on the corporate books, unless it has notice of the pledge.⁶⁸

Where the pledgor has a statutory right to vote the stock, he has a right as a stockholder to inspect the books of the corporation, even though the stock has been transferred to the pledgee on the books, at least where the officer of whom the inspection is demanded has knowledge or notice of the nature of the transaction as between the pledgor and the pledgee.⁶⁹ The pledgee has no right to such inspection where the statute makes the pledgor the owner of the stock since under such circumstances he is not a stockholder in any proper sense of the term.⁷⁰ But it has been held in Wisconsin that where an insolvent trust company is in the hands of the commissioner of banking for the purpose of liquidation, it is proper for the court to permit an examination of its books, business documents, accounts and securities by a pledgee of shares of its stock, although the same have not been transferred to him on the books.⁷¹

§ 3921. Liability of pledgee as stockholder. Unless there is some statutory provision to the contrary, a pledgee of shares, if he appears on the books of the corporation as owner, is liable to the corporation or to creditors, as the case may be, for a balance due on the stock,⁷² unless the stock was issued as full paid, and he is in the position of a bona fide purchaser.⁷³ He is also liable, in the absence of statutory provision to the contrary, under a statute imposing upon stockholders an additional liability to creditors of the corporation.⁷⁴ As between the pledgor and the pledgee, the pledgee is not personally liable for assessments on the pledged stock.⁷⁵ But he may pay reasonable

⁶⁸ See § 3704, *supra*.

⁶⁹ This is true where the statute requires a pledgee, who has had the stock recorded in his own name, to give the pledgor a proxy to vote it, and where the corporation is itself the pledgee, and hence knows that the transferrer is still vested with the general ownership and right of property in the stock. *Booth v. Consolidated Fruit Jar Co.*, 62 N. Y. Misc. 252, 114 N. Y. Supp. 1000.

See also § 2833, *supra*.

⁷⁰ *In re First Nat. Bank of Brooklyn*, 28 N. Y. Misc. 662, 59 N. Y. Supp.

1042, *aff'd* 44 N. Y. App. Div. 635, 60 N. Y. Supp. 1138.

⁷¹ *In re Citizens' Savings & Trust Co.*, 156 Wis. 277, 145 N. W. 646. See also § 2833, *supra*.

⁷² See § 3814, *supra*, and § 4112, *infra*.

⁷³ See § 3918, *supra*.

⁷⁴ See § 4193, *infra*.

⁷⁵ *California*. *Mabb v. Stewart*, 147 Cal. 413, 81 Pac. 1073.

Iowa. *Tierney v. Ledden*, 143 Iowa 286, 21 Ann. Cas. 105, 121 N. W. 1050; *Iowa Nat. Bank v. Cooper*, 101 N. W. 459.

assessments and hold the stock as security for the amount so paid.⁷⁶

§ 3922. Rights and remedies on default—In general. On default in payment of the debt for which the stock has been pledged as collateral security, the pledgee has a choice of remedies. He may enforce the pledge by a sale of the stock without any judicial proceedings whatever, whether such a sale is expressly authorized by the contract of pledge or not.⁷⁷ Or, instead of doing so, he may file a bill in equity to foreclose and sell the stock.⁷⁸ Or he may proceed against the pledgee personally on the debt without regard to the security.⁷⁹ But since his remedies by a suit to foreclose or a sale without judicial proceedings are adequate, it has been held that he cannot maintain a suit to compel the corporation to transfer the stock to him on the books and to issue a new certificate to him, and to enjoin it from paying dividends to the pledgor.⁸⁰

Where stock is pledged to secure performance of an agreement by the pledgor to resell at a profit other stock previously sold by him to the pledgee, the latter cannot have the pledge foreclosed and at the same time keep the stock which the pledgor agreed to resell.⁸¹

If the pledgee holds more than one security for the same debt, he may proceed against either or all of them.⁸²

§ 3923. — Pledgee not bound to foreclose. The pledgee is not bound to sell the stock immediately on default by the pledgor, unless required by the contract. The pledgor cannot compel him to sell, either by notice or request to do so, or by suit, nor, because of failure to sell, can he be held liable for any depreciation in the value of the

Kentucky. *Corbin Banking Co. v. Mitchell*, 141 Ky. 172, 31 L. R. A. (N. S.) 446, 132 S. W. 426.

Oregon. *Thomas v. Gilbert*, 55 Ore. 14, Ann. Cas. 1912 A 516, 104 Pac. 888, 103 Pac. 393.

South Carolina. *Southwestern Railroad Bank v. Douglas*, 2 Speers 329.

Texas. *First State Bank of Montgomery v. First Nat. Bank of Nava-sota*, — Tex. Civ. App. —, 145 S. W. 691.

A pledgee is not a purchaser within the meaning of an agreement between the corporation and the pledgor exempting the stock of the former from

liability to assessment until sold to others. *Farmers' Pawnee Canal Co. v. Henderson*, 46 Colo. 37, 102 Pac. 1063.

⁷⁶ See § 3914, *supra*.

⁷⁷ See § 3925, *infra*.

⁷⁸ See § 3931, *infra*.

⁷⁹ See § 3935, *infra*.

⁸⁰ *American Bonding & Trust Co. v. Pacific Brewing & Malting Co.*, 34 Wash. 10, 74 Pac. 826.

⁸¹ *Jones v. Dimmick*, 178 Ala. 296, 59 So. 623.

⁸² *Weiscept. v. Newman*, 24 Ky. L. Rep. 36, 65 S. W. 808.

stock since accrual of his right to sell.⁸³ Of course the contract between the parties may expressly make it incumbent upon the pledgee to sell, but he is not bound to sell merely because the contract expressly authorizes him to do so,⁸⁴ or because it dispenses with notice to redeem before sale.⁸⁵

§ 3924. — Forfeiture. The pledgee does not acquire an absolute title to the stock by failure of the pledgor to pay the debt or redeem the property at the time limited,⁸⁶ even though he has a power of

⁸³ **United States.** *Simonton v. Sibley*, 122 U. S. 220, 30 L. Ed. 1225.

Arkansas. *Lake v. Little Rock Trust Co.*, 77 Ark. 53, 3 L. R. A. (N. S.) 1199, 7 Ann. Cas. 394, 90 S. W. 847.

Georgia. *Thornton v. Martin*, 116 Ga. 115, 42 S. E. 348; *Napier v. Central Georgia Bank*, 68 Ga. 637.

Illinois. *Furness v. Union Nat. Bank of Chicago*, 147 Ill. 570, 35 N. E. 624; *Rozet v. McClellan*, 48 Ill. 345, 95 Am. Dec. 551.

Iowa. *Robinson v. Hurley*, 11 Iowa 410, 79 Am. Dec. 497.

Massachusetts. *Butman v. Howell*, 144 Mass. 66, 10 N. E. 504; *Newsome v. Davis*, 133 Mass. 343; *Fisher v. Fisher*, 98 Mass. 303; *Taylor v. Cheever*, 6 Gray 146.

Michigan. *Allen v. Hook*, 164 N. W. 384.

Minnesota. *Minneapolis & N. Elevator Co. v. Betcher*, 42 Minn. 210, 44 N. W. 5.

New York. *De Cordova v. Barnum*, 130 N. Y. 615, 27 Am. St. Rep. 538, 29 N. E. 1099; *Lawrence v. Maxwell*, 53 N. Y. 19.

Oklahoma. *Dunbar v. Commercial Electrical Supply Co.*, 32 Okla. 634, 123 Pac. 417.

Pennsylvania. *Fullerton v. Mobley*, 15 Atl. 856; *O'Neill v. Whigham*, 87 Pa. St. 394.

Texas. *Sinclair v. Weekes* (Tex. Civ. App.), 41 S. W. 107.

Wisconsin. *Palmer v. Hawes*, 73 Wis. 46, 40 N. W. 676.

A sale is not invalid because made long after maturity of the debt. *Thornton v. Martin*, 116 Ga. 115, 42 S. E. 348.

The pledgor cannot complain of the pledgee's failure to sell the stock immediately on default, and the pledgee is not liable for any depreciation in the value of the stock between the date of the default and the date of the sale. *Dunbar v. Commercial Electrical Supply Co.*, 32 Okla. 634, 123 Pac. 417.

⁸⁴ *Rozet v. McClellan*, 48 Ill. 345, 95 Am. Dec. 551.

A bona fide purchaser of a note secured by the pledge may sue an indorser without first resorting to the security notwithstanding an agreement between the indorser and the pledgee that in case of default the stock should be sold, where the purchaser was not a party to, and did not know of such agreement, especially where the stock was canceled with the consent of the indorser. *Corning v. Bridgewater Gas Co.*, 100 Ill. App. 221.

⁸⁵ *Robinson v. Hurley*, 11 Iowa 410, 79 Am. Dec. 497.

⁸⁶ **Missouri.** *Colonial Trust Co. v. McMillan*, 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933; *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171.

New Jersey. *Endicott v. Marvel*, 83 N. J. Eq. 632, 92 Atl. 373, aff'g 81 N. J. Eq. 378, 87 Atl. 230.

Rhode Island. *United Nat. Bank v. Tappan*, 33 R. I. 1, 79 Atl. 946.

sale.⁸⁷ And this is generally held to be true even where the contract of pledge provides for a forfeiture on default.⁸⁸ Unlike the case of a mortgage, there is no forfeiture, and the pledgee has no right to a strict foreclosure,⁸⁹ but his only interest is a special property to retain the stock for his security until the debt is paid.⁹⁰ He cannot cut off the pledgor's right to redeem simply by a notice to pay within a certain time,⁹¹ but can do so only by a lawful sale of the stock.⁹² And until the stock is lawfully sold, the pledgor has a continuing right to redeem.⁹³

§ 3925. — Sale of stock—Right to sell. On default in the payment of the debt for which stock has been pledged as collateral security, the pledgee, in the absence of any special agreement to the contrary, may enforce the pledge by a sale of the stock without any judicial proceedings, whether a sale is expressly authorized or not.⁹⁴ Of course

South Carolina. *Haselden v. Hamier*, 97 S. C. 178, 81 S. E. 424.

Vermont. *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

⁸⁷ *United Nat. Bank v. Tappan*, 33 B. I. 1, 79 Atl. 946.

⁸⁸ See § 3938, *infra*.

⁸⁹ *Hyams v. Bamberger*, 10 Utah 3, 36 Pac. 202; *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

⁹⁰ *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

⁹¹ *Groeltz v. Cole*, 128 Iowa 340, 103 N. W. 977.

⁹² *Colonial Trust Co. v. McMillan*, 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933; *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

As to his right to sell, see § 3925 *et seq.*, *infra*.

⁹³ See § 3936, *infra*.

⁹⁴ **United States.** *Easton v. German-American Bank*, 127 U. S. 532, 32 L. Ed. 210; *First Nat. Bank of Omaha, Nebraska v. Illinois Trust & Savings Bank*, 84 Fed. 34; *Canfield v. Minne-*

apolis Agricultural & Mechanical Ass'n, 14 Fed. 801.

Alabama. *Warrior Coal & Coke Co. v. National Bank of Augusta*, 53 So. 997.

California. *Griffin v. Smith*, 171 Pac. 92; *McAulay v. Moody*, 128 Cal. 202, 60 Pac. 778.

Georgia. *American Nat. Bank of Atlanta v. East Atlanta Bank*, 95 S. E. 286.

Illinois. *Stokes v. Frazier*, 52 Ill. 428.

Iowa. *Croft v. Colfax Elec. Light & Power Co.*, 113 Iowa 455, 85 N. W. 761; *Robinson v. Hurley*, 11 Iowa 410, 79 Am. Dec. 497.

Kansas. *Water Power Co. v. Brown*, 23 Kan. 676.

Louisiana. *Rasch v. His Creditors*, 1 La. Ann. 31.

Massachusetts. *Guinzburg v. H. W. Downs Co.*, 165 Mass. 467, 52 Am. St. Rep. 525, 43 N. E. 195; *Union Cattle Co. v. International Trust Co.*, 149 Mass. 492, 21 N. E. 962.

Nebraska. *Brown v. Hotel Ass'n*, 63 Neb. 181, 88 N. W. 175.

New Jersey. *Morris Canal & Banking Co. v. Lewis*, 12 N. J. Eq. 323.

New York. *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 27 L. R. A. (N.

the pledgee cannot lawfully sell, without authority from the pledgor, before the debt is due.⁹⁵ But the contract may, and often does, authorize him to sell before that time on the happening of certain contingencies, as where the pledged stock declines in value and the pledgor fails to furnish additional security.⁹⁶

If the pledge is for an indefinite time the pledgor may call on the pledgee to redeem at any time, and if he fails to do so may then proceed to foreclose.⁹⁷

S.) 843, 90 N. E. 834, rev'g judgment 126 App. Div. 936, 110 N. Y. Supp. 1123, which aff'd 57 Misc. 195, 107 N. Y. Supp. 584; *Markham v. Jaudon*, 41 N. Y. 235, rev'g 49 Barb. 462; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307; *Wallace v. Berdell*, 24 Hun 379; *Brown v. Ward*, 3 Duer 660.

Pennsylvania. *Finney's Appeal*, 59 Pa. St. 398; *Diller v. Brubaker*, 52 Pa. St. 498, 91 Am. Dec. 177; *Sitgreaves v. Farmers' & Mechanics' Bank*, 49 Pa. St. 359.

Texas. *W. B. King & Co. v. Texas Banking & Insurance Co.*, 58 Tex. 669.

Vermont. *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

Virginia. *Alexandria, L. & H. R. Co. v. Burke*, 22 Gratt. 264.

Washington. *Nagel v. Ham*, *Yearsley & Ryrie*, 88 Wash. 99, 152 Pac. 520; *American Bonding & Trust Co. v. Pacific Brewing & Malting Co.*, 34 Wash. 10, 74 Pac. 826; *Washington Nat. Building, Loan & Investment Ass'n v. Saunders*, 24 Wash. 321, 64 Pac. 546.

In *Kelley v. Root*, 74 N. Y. App. Div. 499, 77 N. Y. Supp. 431, aff'g 37 N. Y. Misc. 207, 75 N. Y. Supp. 163, it was held that a provision that the pledgee should not "dispose of, hypothecate, or pledge such stock, or any portion thereof, in any manner whatsoever," was designed to operate before default only, and did not preclude a sale after default.

In *Smith v. Becker*, 129 Wis. 396,

109 N. W. 131, it was held that a sale of shares from a single certificate covering shares pledged and shares owned by the pledgee was, under the evidence, a sale of the pledged stock. It was further held that even if there was an agreement to keep separate the stock of each of three pledgors, who were each liable for the whole debt, they subsequently assented to the mingling of the stock.

⁹⁵ *Cushing v. Building Ass'n Society of New or Practical Psychology*, 165 Cal. 731, 134 Pac. 324; *National Bank of Illinois v. Baker*, 128 Ill. 533, 4 L. R. A. 586, 21 N. E. 510; *Dykens v. Allen*, 7 Hill (N. Y.) 497, 42 Am. Dec. 87, aff'g 3 Hill 593.

⁹⁶ *Cushing v. Building Ass'n Society of New or Practical Psychology*, 165 Cal. 731, 134 Pac. 324; *National Bank of Illinois v. Baker*, 128 Ill. 533, 4 L. R. A. 586, 21 N. E. 510; *Manning v. Shriver*, 79 Md. 41, 28 Atl. 899; *Dunbar v. Commercial Electrical Supply Co.*, 32 Okla. 634, 123 Pac. 417.

Authority to sell before maturity of the debt in case the security depreciates in market value authorizes a sale only in case the security becomes less valuable after it is pledged than it was at the time when it was pledged, and not where its marketable condition remains the same, although it was worthless at the time of the pledge and has since remained so. *National Bank of Illinois v. Baker*, 128 Ill. 533, 4 L. R. A. 586, 21 N. E. 510.

⁹⁷ *Eichbaum v. Sample*, 213 Pa. 216,

If the pledgee has notice of the rights of a purchaser of the pledgor's interest at execution sale, he cannot sell the pledged property, except as authorized by the contract, without such purchaser's consent. And the consent of the pledgee, under such circumstances, will not affect the purchaser's rights.⁹⁸

The pledgee's right to sell the stock is not affected by the appointment of a receiver for the pledgor,⁹⁹ or by the filing of a petition in bankruptcy against him, providing the stock was pledged more than four months before such petition was filed.¹ And since his power to sell is a power coupled with an interest, it is not revoked by the death of the pledgor.²

The right to sell the pledged stock may be exercised by one to whom the pledgee has assigned the debt and the security.³

§ 3926. — Demand and notice. Before selling, the pledgee must demand payment of the debt, unless the time of payment is fixed,⁴

62 Atl. 837; *Sitgreaves v. Farmers' & Mechanics' Bank*, 49 Pa. St. 359.

⁹⁸ *Cushing v. Building Ass'n. Society of New or Practical Psychology*, 165 Cal. 731, 134 Pac. 324.

⁹⁹ *Fidelity Insurance, Trust & Safe-Deposit Co. v. Roanoke Iron Co.*, 81 Fed. 439.

¹ *Griffin v. Smith*, — Cal. —, 171 Pac. 92.

² *Warrior Coal & Coke Co. v. National Bank of Augusta (Ala.)*, 53 So. 997.

Under the California statute the pledgee may sell the stock in the statutory manner notwithstanding the death of the pledgor, and is not obliged to institute a proceeding for that purpose in the probate court. *Bell v. Mills*, 123 Fed. 24.

³ *Greene v. Faber*, 158 N. Y. App. Div. 149, 143 N. Y. Supp. 27.

⁴ **California.** *Bell v. Mills*, 123 Fed. 24, construing the California statute.

Illinois. *National Bank of Illinois v. Baker*, 128 Ill. 533, 4 L. R. A. 586, 21 N. E. 510; *Hughes v. Barrell*, 167 Ill. App. 100.

New York. *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338; *Wilson v. Little*,

2 N. Y. 443, 51 Am. Dec. 307. See *Franklin Nat. Bank, City of New York v. Newcombe*, 1 App. Div. 294, 37 N. Y. Supp. 271.

Pennsylvania. *Sitgreaves v. Farmers' & Mechanics' Bank*, 49 Pa. St. 359.

Rhode Island. *Earle v. Grant*, 14 R. I. 228.

Demand is necessary where, on maturity of the note secured by the pledge, the payee gives an indefinite extension of time on the debt. *Louisville Banking Co. v. W. H. Thomas & Son Co.*, 24 Ky. L. Rep. 811, 69 S. W. 1078, 24 Ky. L. Rep. 115, 68 S. W. 2.

This is particularly true where a sale is made before maturity of the debt. *National Bank of Illinois v. Baker*, 128 Ill. 533, 4 L. R. A. 586, 21 N. E. 510.

Under the California statute, if the pledgor is dead, the demand should be made upon his executor or administrator rather than upon his heirs. *Bell v. Mills*, 123 Fed. 24.

The demand of payment need not be formal. It is implied, for example, in a notice that the stock will be sold if the debt is not paid. *Nabring v.*

and give the pledgor reasonable notice of the time and place of sale, unless such demand and notice is waived, and if he fails to do so the sale will constitute a conversion.⁵

Bank of Mobile, 58 Ala. 204. And see *Carson v. Iowa City Gas-Light Co.*, 80 Iowa 638, 45 N. W. 1068; *Goodrich v. Willard*, 2 Gray (Mass.) 203.

A provision in the contract that the pledgor may sell without a demand is valid. *Smith v. Lee*, 84 Fed. 557.

California. *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84; *Gay v. Moss*, 34 Cal. 125; *Bell v. Mills*, 123 Fed. 24, construing the California statute. See also *Colton v. Oakland Bank of Savings*, 137 Cal. 376, 70 Pac. 225.

Connecticut. *Stevens v. Hurlbut Bank*, 31 Conn. 146.

Illinois. *National Bank of Illinois v. Baker*, 128 Ill. 533, 4 L. R. A. 586, 21 N. E. 510; *McDowell v. Chicago Steel Works*, 124 Ill. 491, 7 Am. St. Rep. 381, 16 N. E. 854; *Cushman v. Hayes*, 46 Ill. 145; *Hughes v. Barrell*, 167 Ill. App. 100; *Whipple v. Tucker*, 123 Ill. App. 223.

Iowa. *Carson v. Iowa City Gas-Light Co.*, 80 Iowa 638, 45 N. W. 1068.

Kentucky. *Louisville Banking Co. v. W. H. Thomas & Son Co.*, 24 Ky. L. Rep. 811, 69 S. W. 1078, 24 Ky. L. Rep. 115, 68 S. W. 2.

Maryland. *Bryson v. Rayner*, 25 Md. 424, 90 Am. Dec. 69.

Massachusetts. *Guinzburg v. H. W. Downs Co.*, 165 Mass. 467, 52 Am. St. Rep. 525, 43 N. E. 195; *Fowle v. Ward*, 113 Mass. 548, 18 Am. Rep. 534.

Michigan. *Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928; *Hempfling v. Burr*, 59 Mich. 294, 26 N. W. 496.

Nebraska. *Brown v. Hotel Ass'n*, 63 Neb. 181, 88 N. W. 175.

New York. *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 27 L. R. A. (N. S.) 843, 90 N. E. 834, rev'g judgment

126 App. Div. 936, 110 N. Y. Supp. 1123, which aff'd 57 Misc. 195, 107 N. Y. Supp. 584; *Content v. Banner*, 184 N. Y. 124, 6 Ann. Cas. 106, 76 N. E. 913, rev'g judgment 96 App. Div. 625, 88 N. Y. Supp. 1095; *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338; *Gillett v. Whiting*, 120 N. Y. 402, 24 N. E. 790; *Stratford v. Jones*, 97 N. Y. 586; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Markham v. Jaudon*, 41 N. Y. 235, rev'g 49 Barb. 462; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307; *Smith v. Staten Island Land Co.*, 175 App. Div. 588, 162 N. Y. Supp. 681; *Furber v. National Metal Co.*, 118 App. Div. 263, 103 N. Y. Supp. 490, aff'd 193 N. Y. 622, 86 N. E. 1124; *Treadwell v. Clark*, 114 App. Div. 493, 100 N. Y. Supp. 1, judgment aff'd 190 N. Y. 51, 82 N. E. 505; *McCutecheon v. Dittman*, 23 App. Div. 285, 48 N. Y. Supp. 360, judgment modified on other grounds 164 N. Y. 355, 58 N. E. 97; *Lewis v. Graham*, 4 Abb. Pr. 106; *Genet v. Howland*, 45 Barb. 560; *Brass v. Worth*, 40 Barb. 648; *Stearns v. Marsh*, 4 Den. 227, 47 Am. Dec. 248.

Oklahoma. *Ardmore State Bank v. Mason*, 30 Okla. 568, 39 L. R. A. (N. S.) 292, 120 Pac. 1080.

Pennsylvania. *Jeanes' Appeal*, 116 Pa. St. 573, 2 Am. St. Rep. 624, 11 Atl. 862; *Conyngham's Appeal*, 57 Pa. St. 474; *Diller v. Brubaker*, 52 Pa. St. 498, 91 Am. Dec. 177; *Sitgreaves v. Farmers' & Mechanics' Bank*, 49 Pa. St. 359.

Rhode Island. *Earle v. Grant*, 14 R. I. 228.

Washington. *Richardson v. Foster*, 170 Pac. 321; *Nagel v. Ham, Yearsley & Rynie*, 88 Wash. 99, 152 Pac. 520.

West Virginia. *Crawford v. Le Fevre*, 78 W. Va. 73, 88 S. E. 1087.

In the event of his inability to give

The pledgor is entitled to actual personal notice of the time and place of sale.⁶ But "actual knowledge of the time and place of sale has the same effect as personal service."⁷

such notice, his remedy is an action to foreclose the lien. *Treadwell v. Clark*, 114 N. Y. App. Div. 493, 100 N. Y. Supp. 1, judgment aff'd 190 N. Y. 51, 82 N. E. 505.

If no notice is given, the purchaser cannot compel the corporation to transfer the stock to him on the corporate books. *Nagel v. Ham*, *Yearsley & Ryrie*, 88 Wash. 99, 152 Pac. 520.

Notice by a broker of an intent to sell pledged stock is not rendered unnecessary by reason of a custom among brokers to sell without notice (*Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Lawrence v. Maxwell*, 53 N. Y. 19; *Markham v. Jaudon*, 41 N. Y. 235, rev'g 49 Barb. 462; *Wheeler v. Newbould*, 16 N. Y. 392), unless such custom is expressly made a part of the contract between the parties. *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80.

Under the California statute, if the pledgor is dead, the notice should be given to his executor or administrator rather than to his heirs. *Bell v. Mills*, 123 Fed. 24.

Where the pledgee sells without notice he is liable for the resulting damage which may be recovered in a special action on the case. *Hughes v. Barrell*, 167 Ill. App. 100.

Where the pledgee sells without the necessary notice, the pledgor, after offering to pay the amount of the debt, may maintain replevin to recover the stock or its value. *Furber v. National Metal Co.*, 118 N. Y. App. Div. 263, 103 N. Y. Supp. 490, aff'd 193 N. Y. 622, 86 N. E. 1124.

An attempted sale, to constitute a conversion, must have been actually made, and the stock must have been parted with. A pledgee, therefore, is not guilty of a conversion of stock pledged to him if he attempts to sell it

without notice to the pledgor, and reports the sale as being made to another person, who surrenders the certificate and obtains a new one in his own name, where such person never pays anything, and his name is used by the pledgee merely to effect a sale in the latter's interest, and the pledgee, who has not parted with the possession of the stock, on learning that the sale is invalid for want of notice to the pledgor, afterwards gives notice, and under such notice makes a valid sale, and applies the proceeds to payment of the debt secured. *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 30 Am. St. Rep. 87, 9 So. 299.

⁶ It is not enough to publish the notice in a newspaper, at least unless it affirmatively appears that it was read. *Lewis v. Graham*, 4 Abb. Pr. (N. Y.) 106.

Nor is it enough to leave a notice with the clerk or manager at the pledgor's office, unless it appears that it was actually received by the pledgor. *Bryan v. Baldwin*, 52 N. Y. 232.

Nor is it sufficient to send the pledgee a copy of a published notice of a sale of various stocks and bonds, including some stock of the kind pledged, where the notice in no way indicates an intention to sell the pledged shares, or that the sale is to be made to foreclose the pledge, or that the pledgee is in any way interested in it. *McCutcheon v. Dittman*, 23 N. Y. App. Div. 285, 48 N. Y. Supp. 360, judgment modified on other grounds 164 N. Y. 355, 58 N. E. 97.

A notice by mail is sufficient although it is not actually received until after the sale. *Worthington v. Tormey*, 24 Md. 182.

⁷ *Crawford v. Le Fevre*, 78 W. Va.

The notice must be given a reasonable time before the sale.⁸ It must state the time and place of sale,⁹ and must be such in form as to notify the pledgor that the particular stock pledged will be sold at the time and place specified.¹⁰

The contract may provide for a sale without notice, and in such a case no notice is necessary;¹¹ but a provision authorizing a sale on nonpayment of the debt, without expressly requiring notice, will not be given that effect.¹² And consent that the pledgee may sell with-

73, 88 S. E. 1087. And see to the same effect *Earle v. Grant*, 14 R. I. 228.

⁸ As to the sufficiency of notice in this respect, see *Stevens v. Hurlbut Bank*, 31 Conn. 146; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779; *Guinzburg v. H. W. Downs Co.*, 165 Mass. 467, 52 Am. St. Rep. 525, 43 N. E. 195; *Lewis v. Graham*, 4 Abb. Pr. (N. Y.) 106; *Bryan v. Baldwin*, 7 Lans. (N. Y.) 174, 52 N. Y. 232; *Richardson v. Foster*, — Wash. —, 170 Pac. 321.

The pledgor must be given a reasonable opportunity to redeem after notice to do so. *Crawford v. Le Fevre*, 78 W. Va. 73, 88 S. E. 1087.

Ten days' notice is reasonable. *Crawford v. Le Fevre*, 78 W. Va. 73, 88 S. E. 1087.

⁹ *Content v. Banner*, 184 N. Y. 124, 6 Ann. Cas. 106, 76 N. E. 913, rev'g judgment 96 N. Y. App. Div. 625, 88 N. Y. Supp. 1095.

In *Worthington v. Tormey*, 34 Md. 182, it was held that the notice need not specify the place of sale.

¹⁰ See *McCutcheon v. Dittman*, 23 N. Y. App. Div. 285, 48 N. Y. Supp. 360.

¹¹ **United States.** *Arbogast v. American Exch. Nat. Bank of Chicago*, 125 Fed. 518; *Smith v. Lee*, 84 Fed. 557.

Arkansas. *Fitzgerald v. Blocher*, 32 Ark. 742, 29 Am. Rep. 3.

California. *Williams v. Parker*, 30 Cal. App. 71, 157 Pac. 550.

Connecticut. *Stevens v. Hurlbut Bank*, 31 Conn. 146.

Georgia. *Thornton v. Martin*, 116 Ga. 115, 42 S. E. 348.

Illinois. *McDowell v. Chicago Steel Works*, 124 Ill. 491, 7 Am. St. Rep. 381, 16 N. E. 854.

Iowa. *Carson v. Iowa City Gas-Light Co.*, 80 Iowa 638, 45 N. W. 1068.

Maryland. *Bryson v. Rayner*, 25 Md. 424, 90 Am. Dec. 69; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779.

Missouri. *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171; *Chouteau v. Allen*, 70 Mo. 290; *Schaaf v. Fries*, 90 Mo. App. 111.

New York. *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 27 L. R. A. (N. S.) 843, 90 N. E. 834, rev'g judgment 126 App. Div. 936, 110 N. Y. Supp. 1123, which aff'd 57 Misc. 195, 107 N. Y. Supp. 584; *Williams v. United States Trust Co. of New York*, 133 N. Y. 660, 31 N. E. 29; *Stenton v. Jerome*, 54 N. Y. 480; *Wheeler v. Newbould*, 16 N. Y. 392; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307; *Genet v. Howland*, 45 Barb. 560.

Pennsylvania. *Jeanes' Appeal*, 116 Pa. St. 573, 2 Am. St. Rep. 624, 11 Atl. 862.

Wisconsin. *Smith v. Becker*, 129 Wis. 396, 109 N. W. 131.

¹² *Stevens v. Hurlbut Bank*, 31 Conn. 146.

It has been held, however, that notice of sale is waived where the contract expressly gives the pledgee the power to sell if the debt is not paid, "without further notice" (*Maryland*

out giving notice does not dispense with the necessity for demanding payment of the debt, when such demand is necessary.¹³

Since the requirement of notice is for the benefit of the pledgor, he alone can complain of its omission.¹⁴ He may waive defects in a notice, or a failure to give any notice at all,¹⁵ or may ratify a sale without notice, either expressly or by implication.¹⁶ He is not bound to object, and until he does so the sale and credit of the proceeds on the debt bind the creditor.¹⁷ Hence an assignment by the creditor before he does so cannot carry the claim, except as to any excess remaining after such credit is given, on the theory that the sale is void and the debt remains undiminished. Nor will the effect of such an assignment as between the assignor and the assignee be enlarged by the subsequent act of the pledgor in seeking to set aside the sale.¹⁸ A waiver of notice is not affected by mere delay in making the sale, where there is no valid extension of the note which the stock is pledged to secure.¹⁹ If after giving notice of sale the pledgee waives the right

Fire Ins. Co. v. Dalrymple, 25 Md. 242, 89 Am. Dec. 779); or to sell on a specified day, if the debt is not paid on that day (Bryson v. Rayner, 25 Md. 424, 90 Am. Dec. 69). See also McDowell v. Chicago Steel Works, 124 Ill. 491, 7 Am. St. Rep. 381, 16 N. E. 854; Jeanes' Appeal, 116 Pa. St. 573, 2 Am. St. Rep. 624, 11 Atl. 862, and other cases cited in the note preceding.

¹³ Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307; Lewis v. Graham, 4 Abb. Pr. (N. Y.) 106; Brass v. Worth, 40 Barb. (N. Y.) 648.

¹⁴ Colton v. Oakland Bank of Savings, 137 Cal. 376, 70 Pac. 225.

¹⁵ Child v. Hugg, 41 Cal. 519.

The pledgor waives notice where he is present and bids at the sale. Earle v. Grant, 14 R. I. 228.

Where a broker sold stock purchased by him for a customer, without giving notice of the time and place of sale, but afterwards sent the customer an account of the sale, crediting him with the amount realized, and the customer promised to pay the balance shown by the account without making any objection to the sale

or want of notice, it was held that he waived the failure to give the notice of the sale, and could not afterwards object on that ground. Gillett v. Whiting, 141 N. Y. 71, 38 Am. St. Rep. 762, 35 N. E. 939.

A pledgor of stock waives defects in a notice of sale by the pledgee, or want of notice, where he afterwards, as an officer of the corporation, transfers the stock to the purchaser at the sale. Downer v. Whittier, 144 Mass. 448, 11 N. E. 585. See also Hill v. Finigan, 77 Cal. 267, 11 Am. St. Rep. 279, 19 Pac. 494; McDowell v. Chicago Steel Works, 124 Ill. 491, 7 Am. St. Rep. 381, 16 N. E. 854.

See also Hughes v. Barrell, 167 Ill. App. 100, where it was held that there was no waiver.

¹⁶ Colton v. Oakland Bank of Savings, 137 Cal. 376, 70 Pac. 225; Child v. Hugg, 41 Cal. 519; Earle v. Grant, 14 R. I. 228.

¹⁷ Colton v. Oakland Bank of Savings, 137 Cal. 376, 70 Pac. 225.

¹⁸ Colton v. Oakland Bank of Savings, 137 Cal. 376, 70 Pac. 225.

¹⁹ Thornton v. Martin, 116 Ga. 115, 42 S. E. 348.

to exact strict performance of the contract and grants the pledgor an indulgence by postponing the sale for an indefinite period, he cannot thereafter sell the stock without notice to the pledgee.²⁰

A sale without notice is good as against an innocent purchaser for value, and he gets a good title.²¹

§ 3927. — Manner of sale in general. The sale must be conducted fairly, and with a view to make the stock sell to the advantage of the pledgor,²² and to obtain what it is worth at the time of the sale.²³ And the pledgee must account for any loss resulting from his

²⁰ *Furber v. National Metal Co.*, 118 N. Y. App. Div. 263, 103 N. Y. Supp. 490, *aff'd* 193 N. Y. 622, 86 N. E. 1124.

²¹ *Smith v. Staten Island Land Co.*, 175 N. Y. App. Div. 588, 162 N. Y. Supp. 681.

²² *United States. Arbogast v. American Exch. Nat. Bank of Chicago*, 125 Fed. 518; *Smith v. Lee*, 84 Fed. 557.

Alabama. *Adams v. Adams*, 73 So. 984.

California. *Hudgens v. Chamberlain*, 161 Cal. 710, 120 Pac. 422.

Massachusetts. *Jennings v. Moore*, 189 Mass. 197, 75 N. E. 214; *Newsome v. Davis*, 133 Mass. 343.

Missouri. *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171; *Schaaf v. Fries*, 90 Mo. App. 111. See also *Dibert v. D'Arcy*, 248 Mo. 617, 154 S. W. 1116.

Pennsylvania. *McKee v. Smith*, 219 Pa. 490, 68 Atl. 1026; *Sitgreaves v. Farmers' & Mechanics' Bank*, 49 Pa. St. 359; *Dwight v. Singer*, 27 Pa. Super. Ct. 119.

The pledgee "must have due regard to the rights and interests of the pledgor, and must not knowingly or carelessly make a sale which will result in injury to the interests of the pledgor." *Smith v. Lee*, 84 Fed. 557.

The pledgee must use the same care, prudence and diligence in the sale of the stock that a prudent man would exercise in the sale of his own prop-

erty. *Newsome v. Davis*, 133 Mass. 343.

That the contract authorizes the pledgee to sell at public or private sale, without notice, and to himself become the purchaser, does not release him from the obligation to exercise good faith in its disposal. *Hudgens v. Chamberlain*, 161 Cal. 710, 120 Pac. 422; *Dwight v. Singer*, 27 Pa. Super. Ct. 119.

Where the contract permits the pledgee to himself become the purchaser, this affords an additional reason why he will be held to the strictest good faith in making the sale. *Hudgens v. Chamberlain*, 161 Cal. 710, 120 Pac. 422.

²³ *Jennings v. Moore*, 189 Mass. 197, 75 N. E. 214; *Newsome v. Davis*, 133 Mass. 343.

Even in the case of an authorized private sale without notice, it is the duty of the pledgee to get the highest price he can under the circumstances. *Schaaf v. Fries*, 90 Mo. App. 111.

A finding that the sale was not conducted with due care is warranted by proof that it was held in a city where the stock was not known, and that shortly before the sale it had been sold in another city for much more than the price received, and that it was worth much more at the time of the sale. *Jennings v. Moore*, 189 Mass. 197, 75 N. E. 214.

failure to use due care to realize its value,²⁴ or any want of good faith on his part.²⁵ A collusive sale for his own benefit or that of the vendee constitutes a conversion.²⁶

But he may sell the stock at market rates at any time after default, and the mere fact that the market is then depressed, so that the shares bring a low price, affords no ground for complaint on the part of the pledgor.²⁷ And this is true even though the pledgee exercises the

²⁴ *Adams v. Adams*, — Ala. —, 73 So. 984.

He is liable for the difference between what he received and what he would have received had he used due care. *Jennings v. Moore*, 189 Mass. 197, 75 N. E. 214.

But where he exercises proper care he is not liable in damages because the stock, on account of unusual conditions, is subsequently sold by the purchaser at a large advance. *Louisville Banking Co. v. W. H. Thomas & Son Co.*, 24 Ky. L. Rep. 811, 69 S. W. 1078, 24 Ky. L. Rep. 115, 68 S. W. 2.

²⁵ Where with knowledge that the stock is worth its face, and can be sold for that amount in the market, he causes it to be sold for a grossly inadequate price, he will be required to account for its market value. *Dwight v. Singer*, 27 Pa. Super. Ct. 119.

Where two independent pledgees enter into a conspiracy to place the stock on the market in such large quantities as to create a panic and force down the price, so that they will be able to buy it in at less than its ordinary market value, which they proceed to do, they are liable in damages to the pledgor. And they may be joined as defendants in an action to recover such damages. *Hudgens v. Chamberlain*, 161 Cal. 710, 120 Pac. 422.

²⁶ Where he makes a collusive sale for his own benefit or that of the vendee, it constitutes a breach of the contract of bailment, which the pledgee may treat as a conversion and

sue for damages or to recover possession. *Schaaf v. Fries*, 90 Mo. App. 111.

Where, by a collusive arrangement between the pledgee and the purchaser, the latter bids a sum much less than the amount of the debt, but secretly agrees to, and does, pay the pledgee a much larger amount for the stock, there is in reality a sale at the latter price, and the pledgee must account for the difference even though he afterwards refunds to the purchaser a part of the excess. *McKee v. Smith*, 219 Pa. 490, 68 Atl. 1026.

²⁷ *California*. *Griffin v. Smith*, 171 Pac. 92; *Hudgens v. Chamberlain*, 161 Cal. 710, 120 Pac. 422; *Williams v. Parker*, 30 Cal. App. 71, 157 Pac. 550.

Louisiana. *Rasch v. His Creditors*, 1 La. Ann. 31.

Massachusetts. *Newsome v. Davis*, 133 Mass. 343.

New York. *Greene v. Faber*, 158 App. Div. 149, 143 N. Y. Supp. 27.

Texas. *W. B. King & Co. v. Texas Banking & Insurance Co.*, 58 Tex. 669.

"The pledgee is under no obligation to take any chances on the market, or wait for a more favorable one than exists when he elects to sell." *Hudgens v. Chamberlain*, 161 Cal. 710, 120 Pac. 422.

Where he acts in good faith, and sells in the manner provided by law and in accordance with the terms of the contract, he may take the market as he finds it and exercise his power of sale accordingly. *Williams v. Parker*, 30 Cal. App. 71, 157 Pac. 550.

right given him by the contract to himself purchase the stock,²⁸ and thereafter sells it at a profit.²⁹

The fact that the sale is attended by only one bidder does not render it invalid.³⁰

An unauthorized or invalid sale does not destroy the lien of the pledge.³¹ The purchaser, under such circumstances, at least succeeds to the rights of the pledgee, and the pledgor or his successor cannot take the property from him without discharging or offering to discharge the original obligation.³² If the pledgee himself is the purchaser, the pledgor or his successor may treat the sale as a nullity, and insist that the pledgee still holds the property as pledgee.³³ But the pledgor or his successor cannot at the same time treat the sale as ineffectual to transfer the property and as effectual to extinguish the obligation secured by the pledge.³⁴

§ 3928. — Time and place of sale; public and private sales. The time and place fixed for the sale must be reasonable.³⁵

The contract may expressly authorize the pledgee to sell at private sale, or to sell either at public or private sale, at his option.³⁶ Unless

The sale will not be enjoined merely because it is not a favorable time to sell the stock. *Greene v. Faber*, 158 N. Y. App. Div. 149, 143 N. Y. Supp. 27.

The pledgor is not justified in asking that the exercise of the pledgee's right to sell be deferred indefinitely to await a purely problematical increase in the price which might be realized at a sale, nor are his general creditors entitled to this indulgence when he is adjudged a bankrupt. *Griffen v. Smith*, — Cal. —, 171 Pac. 92.

²⁸ *Hudgens v. Chamberlain*, 161 Cal. 710, 120 Pac. 422.

That the contract may give him such a right, see § 3930, *infra*.

²⁹ *Colonial Trust Co. v. Central Trust Co.*, 243 Pa. 268, 90 Atl. 189. See also *McKee v. Smith*, 219 Pa. 490, 68 Atl. 1026.

³⁰ *Guinzburg v. H. W. Downs Co.*, 165 Mass. 467, 52 Am. St. Rep. 525, 43 N. E. 195.

³¹ *Cushing v. Building Ass'n Soci-*

ety of New or Practical Psychology, 165 Cal. 731, 134 Pac. 324; *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84.

As to the effect in this regard of a purchase by the pledgee at his own sale, see § 3930, *infra*.

³² *Cushing v. Building Ass'n Society of New or Practical Psychology*, 165 Cal. 731, 134 Pac. 324; *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84.

³³ *Cushing v. Building Ass'n Society of New or Practical Psychology*, 165 Cal. 731, 134 Pac. 324. See also § 3930, *infra*.

³⁴ *Cushing v. Building Ass'n Society of New or Practical Psychology*, 165 Cal. 731, 134 Pac. 324.

³⁵ *Stevens v. Hurlbut Bank*, 31 Conn. 146; *Guinzburg v. H. W. Downs Co.*, 165 Mass. 467, 52 Am. St. Rep. 525, 43 N. E. 195; *Markham v. Jaudon*, 41 N. Y. 235, rev'g 49 Barb. (N. Y.) 462; *W. B. King & Co. v. Texas Banking & Insurance Co.*, 58 Tex. 669.

³⁶ *United States. Arbogast v.*

a private sale is thus authorized, however, he must sell at public auction, and a private sale will constitute a conversion.³⁷

If the sale is a public one, the pledgee must pursue those methods ordinarily adopted in making public sales,³⁸ such a sale must be held at a public place, to which the public may have access,³⁹ and after public notice.⁴⁰

American Exch. Nat. Bank of Chicago, 125 Fed. 518; **Smith v. Lee,** 84 Fed. 557.

Georgia. **Thornton v. Martin,** 116 Ga. 115, 42 S. E. 348.

Maryland. **Bryson v. Rayner,** 25 Md. 424, 90 Am. Dec. 69.

Missouri. **Hagan v. Continental Nat. Bank,** 182 Mo. 319, 81 S. W. 171; **Schaaf v. Fries,** 90 Mo. App. 111.

New York. **Brooklyn Bank v. Barnaby,** 197 N. Y. 210, 27 L. R. A. (N. S.) 843, 90 N. E. 834, rev'g judgment 126 App. Div. 936, 110 N. Y. Supp. 1123, which aff'd 57 Misc. 195, 107 N. Y. Supp. 584; **Williams v. United States Trust Co. of New York,** 133 N. Y. 660, 31 N. E. 29; **Greene v. Faber,** 158 App. Div. 149, 143 N. Y. Supp. 27.

Oklahoma. **Ardmore State Bank v. Mason,** 30 Okla. 568, 39 L. R. A. (N. S.) 292, 120 Pac. 1080.

Pennsylvania. **Colonial Trust Co. v. Central Trust Co.,** 243 Pa. 268, 90 Atl. 189.

Utah. **Foote v. Utah Commercial & Savings Bank,** 17 Utah 283, 54 Pac. 104.

Wisconsin. **Smith v. Becker,** 129 Wis. 396, 109 N. W. 131.

³⁷ **California.** **Brittan v. Oakland Bank of Savings,** 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84.

Maryland. **Bryson v. Rayner,** 25 Md. 424, 90 Am. Dec. 69.

New York. **Ogden v. Lathrop,** 65 N. Y. 158; **Wheeler v. Newbould,** 16 N. Y. 400; **Treadwell v. Clark,** 114 App. Div. 493, 100 N. Y. Supp. 1, judgment aff'd 190 N. Y. 51, 82 N.

E. 505; **Genet v. Howland,** 45 Barb. 560; **Dykers v. Allen,** 7 Hill 497, 42 Am. Dec. 87.

Pennsylvania. **Jeanes' Appeal,** 116 Pa. St. 573, 2 Am. St. Rep. 624, 11 Atl. 862; **Conyngnam's Appeal,** 57 Pa. St. 474; **Diller v. Brubaker,** 52 Pa. St. 498, 91 Am. Dec. 177; **Sitgreaves v. Farmers' & Mechanics' Bank,** 49 Pa. St. 359.

Rhode Island. **Earle v. Grant,** 14 R. I. 228.

South Carolina. **Ex parte Fisher,** 20 S. C. 179.

Washington. **Richardson v. Foster,** — Wash. —, 170 Pac. 321; **Nagel v. Ham, Yearsley & Ryrie,** 88 Wash. 99, 152 Pac. 520.

³⁸ **Hagan v. Continental Nat. Bank,** 182 Mo. 319, 81 S. W. 171.

³⁹ **Hagan v. Continental Nat. Bank,** 182 Mo. 319, 81 S. W. 171.

⁴⁰ **Bell v. Mills,** 123 Fed. 24, construing the California statute; **Hagan v. Continental Nat. Bank,** 182 Mo. 319, 81 S. W. 171; **Richardson v. Foster,** — Wash. —, 170 Pac. 321; **Nagel v. Ham, Yearsley & Ryrie,** 88 Wash. 99, 152 Pac. 520.

When the contract under which stock is pledged gives the pledgee the option to sell either at public or private sale, and he sells at public sale, he must comply with the law governing public sales in so far as publicity is concerned. **Foote v. Utah Commercial & Savings Bank,** 17 Utah 283, 54 Pac. 104.

A provision that the sale may be made without notice to the pledgor does not dispense with the necessity for giving public notice of a public

The intention of the parties, as evidenced by their written contract, governs as to the place of sale.⁴¹ The contract may authorize a sale at the board of brokers or stock exchange, although no one but a member can bid at the sale,⁴² but such a sale is not authorized in the absence of an agreement or a custom forming a part of the contract,⁴³ or unless the room is opened to the public when the sale occurs, and the sale is advertised to be at public auction.⁴⁴

Statutes relating to the place of sale under executions have no application where the sale is made under a power.⁴⁵

The pledgee may waive objections to the time and place of sale specified in the notice,⁴⁶ or the fact that the sale was made at the board of brokers.⁴⁷

sale. *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171.

In Missouri the notice must refer to or state the power and authority under which the sale is to be made. *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171.

Under the California statute providing that the sale shall be made "in the manner and upon notice to the public usual at the place of sale," the published notice need not state that the shares to be sold were pledged shares, or that they belonged to the estate of the deceased pledgor. It is sufficient if the notice describes the shares and gives notice that they are to be sold at public auction at a specified time and place. *Bell v. Mills*, 123 Fed. 24.

The notice need not name either the pledgor or the pledgee. *Earle v. Grant*, 14 R. I. 228.

⁴¹ *Thornton v. Martin*, 116 Ga. 115, 42 S. E. 348.

The parties will be deemed to have intended the sale to be made in the county where the note secured by the pledge was dated and made payable, and where the maker resided, rather than in another county where the corporation is located, in the absence of any specific provision on the subject. *Thornton v. Martin*, 116 Ga. 115, 42 S. E. 348.

⁴² *Brooklyn Bank v. Barnaby*, 197

N. Y. 210, 27 L. R. A. (N. S.) 843, 90 N. E. 834, rev'g judgment 126 N. Y. App. Div. 936, 110 N. Y. Supp. 1123, which aff'd 57 N. Y. Misc. 195, 107 N. Y. Supp. 584; *Wicks v. Hatch*, 62 N. Y. 535; *Greene v. Faber*, 158 N. Y. App. Div. 149, 143 N. Y. Supp. 27; *Dykers v. Allen*, 7 Hill (N. Y.) 497, 42 Am. Dec. 87, aff'g 3 Hill 593.

If the contract requires or authorizes a sale at the board of brokers or stock exchange, the sale must be a public sale, and not a private sale at such place. *Wheeler v. Newbould*, 16 N. Y. 400; *Dykers v. Allen*, 7 Hill (N. Y.) 497, 42 Am. Dec. 87, aff'g 3 Hill 593.

⁴³ *Brass v. Worth*, 40 Barb. (N. Y.) 648; *Rankin v. McCullough*, 12 Barb. (N. Y.) 103. Compare *Bryson v. Rayner*, 25 Md. 424, 90 Am. Dec. 69; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779.

A merchants' exchange is not a public place, and a sale there is not a valid exercise of a power to sell at public sale. *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171.

⁴⁴ *Earle v. Grant*, 14 R. I. 228.

⁴⁵ *Thornton v. Martin*, 116 Ga. 115, 42 S. E. 348.

⁴⁶ *Guinzburg v. H. W. Downs Co.*, 165 Mass. 467, 52 Am. St. Rep. 525, 43 N. E. 195; *Willoughby v. Comstock*, 3 Hill (N. Y.) 389.

⁴⁷ *Child v. Hugg*, 41 Cal. 519.

§ 3929. — **Sale in separate lots or in gross.** If the subject of the pledge is susceptible of division, only so much of it should be sold as is necessary to satisfy the debt, and if the pledgee sells more than is necessary he is liable to the pledgor for any resulting damage.⁴⁸ If two certificates in different corporations are pledged for the same debt, the pledgee has the right to sell either, or both if the proceeds of the sale of one does not satisfy the debt,⁴⁹ but he is not obliged to divide either certificate up into small lots for the purposes of the sale, even if a prudent owner, having regard solely to his own interests, would have done so.⁵⁰

Where different shares are pledged at different times to secure separate debts, and the pledge is foreclosed by suit, it is error to order a sale in gross and direct the application of the proceeds to the payment of the entire indebtedness.⁵¹ But if shares of different corporations are pledged to secure the same debt, the court may direct them to be sold together as one parcel, where it finds that such a course will be for the best interests of all parties concerned.⁵²

§ 3930. — **Right of pledgee to purchase.** When a pledgee of stock sells the same either at public or private sale, he cannot himself become the purchaser, either directly or indirectly, without the consent of the pledgor; ⁵³ although the pledgor may consent and authorize

⁴⁸ *Fitzgerald v. Blocher*, 32 Ark. 742, 29 Am. Rep. 3.

⁴⁹ *Newsome v. Davis*, 133 Mass. 343.

⁵⁰ *Newsome v. Davis*, 133 Mass. 343.

⁵¹ *Mahoney v. Caperton*, 15 Cal. 313.

⁵² *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87.

⁵³ *United States. First Nat. Bank of Kansas City v. Rush*, 85 Fed. 539.

California. *Hudgens v. Chamberlain*, 161 Cal. 710, 120 Pac. 422; *Hill v. Finigan*, 77 Cal. 267, 11 Am. St. Rep. 279, 19 Pac. 494.

Georgia. *Reid v. Caldwell*, 110 Ga. 481, 35 S. E. 684.

Illinois. *Wetherell v. Johnson*, 208 Ill. 247, 70 N. E. 229.

Maine. *Appleton v. Turnbull*, 84 Me. 72, 24 Atl. 592.

Maryland. *Manning v. Shriver*, 79 Md. 41, 28 Atl. 899; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779.

Missouri. *Greer v. Lafayette County Bank*, 128 Mo. 559, 30 S. W. 319; *Schaaf v. Fries*, 90 Mo. App. 111. See also *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171.

New York. *Sisson v. Barnum*, 157 App. Div. 149, 141 N. Y. Supp. 846, aff'd 220 N. Y. 734, 116 N. E. 1075; *Cammann v. Huntington*, 89 App. Div. 99, 85 N. Y. Supp. 434.

Oregon. See *Thomas v. Gilbert*, 55 Ore. 14, Ann. Cas. 1912 A 516, 104 Pac. 888, 101 Pac. 393.

Pennsylvania. *Rosenblatt v. Weinman*, 230 Pa. 536, 79 Atl. 710.

Rhode Island. *Earle v. Grant*, 14 R. I. 228.

Tennessee. *Holston Nat. Bank v. Wood*, 125 Tenn. 6, 140 S. W. 31.

Utah. *Hyams v. Bamberger*, 10 Utah 3, 36 Pac. 202.

The reason for this rule is that the pledgee is a trustee and has a duty

the pledgee to purchase by a provision in the contract of pledge or otherwise.⁵⁴

If the pledgee does purchase without such consent, he is not guilty of a conversion so long as he has the stock,⁵⁵ but the sale is voidable at the option of the pledgor. In such a case, the pledgor may treat the sale as valid and binding,⁵⁶ or he may treat it as absolutely void, in which event it will be the same as if no sale had been made.⁵⁷ This

to perform in relation to the property which is inconsistent with the character of a purchaser. *Wetherell v. Johnson*, 208 Ill. 247, 70 N. E. 229.

See *Sitgreaves v. Farmers' & Mechanics' Bank*, 49 Pa. St. 359, where a private sale to officers of the pledgee corporation was held to be illegal.

⁵⁴ **California.** *Hudgens v. Chamberlain*, 161 Cal. 710, 120 Pac. 422.

Louisiana. *Barry v. American White Lead & Color Works*, 107 La. 236, 31 So. 733.

Maine. *Appleton v. Turnbull*, 84 Me. 72, 24 Atl. 592.

Maryland. *Manning v. Shriver*, 79 Md. 41, 28 Atl. 899; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779.

Missouri. *Chouteau v. Allen*, 70 Mo. 290.

New York. *Franklin Nat. Bank, City of New York v. Newcombe*, 1 App. Div. 294, 37 N. Y. Supp. 271.

Pennsylvania. *Colonial Trust Co. v. Central Trust Co.*, 243 Pa. 268, 90 Atl. 189; *McKee v. Smith*, 219 Pa. 490, 68 Atl. 1026; *Dwight v. Singer*, 27 Pa. Super. Ct. 119.

See *Holston Nat. Bank v. Wood*, 125 Tenn. 6, 140 S. W. 31, where such a provision in the contract was held not to apply to stock subsequently deposited with the pledgee by way of further security.

⁵⁵ *First Nat. Bank of Kansas City v. Rush*, 85 Fed. 539; *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 30 Am. St. Rep. 87, 9 So. 299; *Bryan v. Baldwin*, 52 N. Y. 232; *First Nat. Bank of Kansas City v. Hall*, 22 N.

Y. App. Div. 356, 47 N. Y. Supp. 1054; *Holston Nat. Bank v. Wood*, 125 Tenn. 6, 140 S. W. 31.

⁵⁶ **United States.** *First Nat. Bank of Kansas City v. Rush*, 85 Fed. 539. **California.** *Hill v. Finigan*, 77 Cal. 267, 11 Am. St. Rep. 279, 19 Pac. 494. **Illinois.** *Wetherell v. Johnson*, 208 Ill. 247, 70 N. E. 229.

Louisiana. *Succession of Lanaux*, 47 La. Ann. 643, 17 So. 200.

Maine. *Appleton v. Turnbull*, 84 Me. 72, 24 Atl. 592.

New York. *Cammann v. Huntington*, 89 App. Div. 99, 85 N. Y. Supp. 434.

Tennessee. *Holston Nat. Bank v. Wood*, 125 Tenn. 6, 140 S. W. 31.

Utah. *Hyams v. Bamberger*, 10 Utah 3, 36 Pac. 202.

A pledgor loses the right to treat a purchase of the pledged stock by the pledgee as invalid if he fails to exercise his option within a reasonable time after being informed of the purchase. *Hill v. Finigan*, 77 Cal. 267, 11 Am. St. Rep. 279, 19 Pac. 494.

See also cases cited in the note following.

⁵⁷ **United States.** *Easton v. German-American Bank*, 127 U. S. 532, 32 L. Ed. 210; *Minneapolis Ass'n v. Canfield*, 121 U. S. 295, 30 L. Ed. 962; *First Nat. Bank of Kansas City v. Rush*, 85 Fed. 539; *Leahy v. Lobdell*, *Farwell & Co.*, 80 Fed. 665; *Rush v. First Nat. Bank of Kansas City*, 71 Fed. 102.

Alabama. *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 30 Am. St. Rep. 87, 9 So. 299; *Sharpe v. National*

rule is not, however, applicable to a judicial sale in a suit to foreclose.⁵⁸

§ 3931. — Foreclosure in equity. The pledgee may file a bill in equity to foreclose the pledge and sell the stock.⁵⁹ And this remedy

Bank of Birmingham, 87 Ala. 644, 7 So. 106.

California. Hill v. Finigan, 77 Cal. 267, 11 Am. St. Rep. 279, 19 Pac. 494.

Georgia. Reid v. Caldwell, 110 Ga. 481, 35 S. E. 684.

Maine. Appleton v. Turnbull, 84 Me. 72, 24 Atl. 592.

Maryland. Manning v. Shriver, 79 Md. 41, 28 Atl. 899; Bryson v. Rayner, 25 Md. 424, 90 Am. Dec. 69; Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242, 89 Am. Dec. 779.

Missouri. Greer v. Lafayette County Bank, 128 Mo. 559, 30 S. W. 319 (where the note secured, with the stock as collateral, had been sold by the pledgee before the sale).

New York. Bryan v. Baldwin, 52 N. Y. 232; Sisson v. Barnum, 157 App. Div. 149, 141 N. Y. Supp. 846, aff'd 220 N. Y. 734, 116 N. E. 1075; Cammann v. Huntington, 89 App. Div. 99, 85 N. Y. Supp. 434; First Nat. Bank of Kansas City v. Hall, 22 App. Div. 356, 47 N. Y. Supp. 1054; Star Fire Ins. Co. v. Palmer, 41 N. Y. Super. Ct. 267 (where the pledgee was a corporation, and the stock was purchased by an officer for it).

Oregon. Thomas v. Gilbert, 55 Ore. 14, Ann. Cas. 1912 A 516, 104 Pac. 888, 101 Pac. 393.

Tennessee. Holston Nat. Bank v. Wood, 125 Tenn. 6, 140 S. W. 31.

Utah. Hyams v. Bamberger, 10 Utah 3, 36 Pac. 202.

A purchase of pledged stock by the pledgee, without the consent of the pledgor, is merely voidable, and, if the pledgor repudiates the sale, the pledgee is entitled to hold the stock under the original pledge, and is liable therefor only on payment of the

debt, or on a conversion of the same by wrongfully parting with the possession. First Nat. Bank of Kansas City, Missouri v. Rush, 85 Fed. 539.

Nothing passes by the sale, but the pledgee still holds the stock under his original lien, and is liable to account for it and to deliver it to the pledgor upon payment of the debt. Thomas v. Gilbert, 55 Ore. 14, Ann. Cas. 1912 A 516, 104 Pac. 888, 101 Pac. 393.

⁵⁸ **Pewabic Min. Co. v. Mason**, 145 U. S. 349, 36 L. Ed. 732.

⁵⁹ **United States.** Land Title & Trust Co. v. Asphalt Co. of America, 127 Fed. 1; Merritt v. American Steel-Barge Co., 79 Fed. 228.

Alabama. Jones v. Dimmick, 178 Ala. 296, 59 So. 623.

California. Griffin v. Smith, 171 Pac. 92.

Illinois. Stokes v. Frazier, 72 Ill. 428.

Iowa. Croft v. Colfax Elec. Light & Power Co., 113 Iowa 455, 85 N. W. 761; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497.

Kentucky. Ray v. Ellis, 162 Ky. 517, 172 S. W. 951.

Nebraska. Brown v. Hotel Ass'n, 63 Neb. 181, 88 N. W. 175.

New York. Merchants' Nat. Bank of Whitehall v. Hall, 83 N. Y. 338, 38 Am. Rep. 434; Coffin v. Chicago Northern Pac. Const. Co., 4 Hun 625; Page v. Boguess, 41 Misc. 46, 83 N. Y. Supp. 569; Vanpell v. Woodward, 2 Sandf. Ch. 143.

Oregon. Irving Park Ass'n v. Watson, 41 Ore. 95, 67 Pac. 945.

Pennsylvania. Sitgreaves v. Farmers' & Mechanics' Bank, 49 Pa. St. 359.

is not barred by the fact that his contract expressly authorizes him to sell.⁶⁰

As a rule any one who has a right to pay the debt and redeem is

Tennessee. *Cornick v. Richards*, 3 Lea 1.

Vermont. *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

Washington. *Nagel v. Ham, Yearsley & Ryrie*, 88 Wash. 99, 152 Pac. 520; *American Bonding & Trust Co. v. Pacific Brewing & Malting Co.*, 34 Wash. 10, 74 Pac. 826; *Washington Nat. Building, Loan & Investment Ass'n v. Saunders*, 24 Wash. 321, 64 Pac. 546; *State v. Superior Court King Co.*, 13 Wash. 607, 46 Pac. 342, 43 Pac. 887. See also *American Bonding Co. v. Loeb*, 50 Wash. 104, 126 Am. St. Rep. 891, 96 Pac. 692, 47 Wash. 447, 92 Pac. 282.

Wisconsin. *Plankinton v. Hildebrand*, 89 Wis. 209, 61 N. W. 839.

"Proceedings in equity are peculiarly appropriate where * * * neither the time of redemption nor the manner and time of sale are specified in the contract and the pledgee's rights or powers are being questioned or denied by the corporation which issued the stock pledged, itself claiming a priority of lien thereon. In a court of equity, the pledgee's trust can be made available with proper regard for the rights of all concerned." *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

A suit to foreclose a pledge given to secure the unpaid balance due on a subscription to the stock may be maintained regardless of the solvency or insolvency of the other stockholders, and no right of contribution between stockholders can be enforced therein. Nor can the other stockholders be compelled to account to the

corporation in such a suit for rebates and commissions received by them from the owner of land purchased by the corporation. *Irving Park Ass'n v. Watson*, 41 Ore. 95, 67 Pac. 945.

The remedy given by the Alabama statute for enforcing pledges is cumulative, and does not prevent a resort to equity. *Jones v. Dimmick*, 178 Ala. 296, 59 So. 623.

It is not necessary that the pledgee have his damages assessed at law before coming into chancery, but that may be done in the chancery proceeding. *Jones v. Dimmick*, 178 Ala. 296, 59 So. 623.

The courts of New York have jurisdiction of a suit by a citizen of that state to foreclose a lien on stock of a foreign corporation where the certificates are on deposit with a domestic corporation. *Page v. Boggess*, 41 N. Y. Misc. 46, 83 N. Y. Supp. 569.

The fact that the defendant in such an action sets up a paramount title does not give the plaintiff the right to dismiss on the ground that he does not elect to try his title in that form of action. *Washington Nat. Building, Loan & Investment Ass'n v. Saunders*, 24 Wash. 321, 64 Pac. 546.

In *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197, such a suit was held not to be barred by laches as against the holder of a subsequent lien.

⁶⁰ *Land Title & Trust Co. v. Asphalt Co. of America*, 127 Fed. 1; *Rozet v. McClellan*, 48 Ill. 345, 95 Am. Dec. 551; *Coffin v. Chicago Northern Pac. Const. Co.*, 4 Hun (N. Y.) 625; *Cornick v. Richards*, 3 Lea (Tenn.) 1. See also cases cited in the preceding note.

a necessary party to a suit to foreclose,⁶¹ including the pledgor,⁶² or his personal representatives in case of his death,⁶³ and his assignees, where the pledgee has notice of the assignment.⁶⁴ The decree in such a suit should adjudge the pledgee a lien on the stock and direct its sale.⁶⁵ The lien of the pledge is merged in the decree of foreclosure, and thereafter the pledgee is not entitled to possession of the certificate, but only to have the judgment carried into execution. The only right of the pledgor under such circumstances is the right of redemption, and the clerk of the court is the proper custodian of the certificate until redemption or sale.⁶⁶

§ 3932. — Effect of death or insolvency of pledgor. On the death or insolvency of a pledgor of stock, the pledgee is not bound to enforce the pledge by a sale of the stock before proving his claim against the estate; nor is he bound to surrender the stock before payment.⁶⁷ And he is not bound to prove his claim against the estate in the probate proceedings unless he seeks recourse against other property of the estate.⁶⁸ If he sells the stock, he is entitled to prove against the estate for any deficiency.⁶⁹

⁶¹ A decree in the absence of such a person is nugatory. *Brown v. Hotel Ass'n*, 63 Neb. 181, 88 N. W. 175.

⁶² If the pledgor is not made a party, a judgment foreclosing his interest would be a nullity. *Carthage Nat. Bank v. Poole*, 160 Mo. App. 133, 141 S. W. 729.

Generally the pledgor is a necessary party to such a suit, but the contrary is true where he consents in writing that the stock may be sold pursuant to the decree and the proceeds applied first to the payment of the debt secured by the pledge, and that any balance remaining may be applied to the payment of the debt of a subsequent lien holder. *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

⁶³ *Wadlinger v. First Nat. Bank*, 209 Pa. 197, 58 Atl. 359.

⁶⁴ *Brown v. Hotel Ass'n*, 63 Neb. 181, 88 N. W. 175.

⁶⁵ A judgment which gives the plaintiff the stock without giving the

pledgor credit therefor on the personal judgment rendered against him on the note secured by the pledge is erroneous. *Ray v. Ellis*, 162 Ky. 517, 172 S. W. 951.

⁶⁶ *American Bonding Co. v. Loeb*, 50 Wash. 104, 126 Am. St. Rep. 891, 96 Pac. 692.

⁶⁷ *Wheeler v. Walton & Whann Co.*, 72 Fed. 966; *Furness v. Union Nat. Bank of Chicago*, 147 Ill. 570, 35 N. E. 624; *People v. E. Remington & Sons*, 121 N. Y. 328, 8 L. R. A. 458, 24 N. E. 793.

The fact that his claim on the debt is barred by the statute of nonclaim, because of his failure to sue thereon within the prescribed time after its rejection by the administrator, is not a bar to an action to foreclose the pledge. *Piper v. Hayward*, 71 N. Y. Misc. 41, 127 N. Y. Supp. 240.

⁶⁸ *Savings Union Bank & Trust Co. v. Crowley*, — Cal. —, 169 Pac. 67; *Clarke v. First State Bank of Dallas*, — Tex. Civ. App. —, 150 S. W. 203.

⁶⁹ *Philadelphia Warehouse Co. v.*

A pledgee who proves his claim in bankruptcy proceedings as an unsecured one and receives a dividend as an unsecured creditor, waives his lien.⁷⁰

§ 3933. — Statute of limitations. The statute of limitations may bar an action on a debt secured by a pledge of stock,⁷¹ but the fact that an action is barred does not affect the right of the pledgee to retain the stock, or to enforce the pledge by a sale thereof, or by foreclosure.⁷²

It has been held that the pledgee of stock is not the agent of the pledgor for the purpose of extending the statute of limitations, and hence that the fact that he credits the proceeds of the sale of the pledged stock on the note secured by the pledge will not prevent the running of the statute as against the right to collect the balance remaining unpaid. And this has been held to be true, although the contract of pledge gives the pledgee the right to sell at public or private sale, with or without notice, and to sell at a board of brokers, and though the pledgor therein expressly agrees to pay any deficiency which may exist after a sale of the collateral and the application of the proceeds on the note. And it has also been held that the failure of the pledgor to object, when notified of the sale of the stock and the application of the proceeds upon the note, does not amount to a new promise preventing the running of the statute.⁷³

Anniston Pipe Works, 106 Ala. 357, 18 So. 43; *Furness v. Union Nat. Bank of Chicago*, 147 Ill. 570, 35 N. E. 624. Compare *State v. Nebraska Sav. Bank*, 40 Neb. 342, 58 N. W. 976.

⁷⁰ *First Nat. Bank of Waterloo v. Exchange Nat. Bank of Seneca Falls*, 179 N. Y. App. Div. 22, 153 N. Y. Supp. 818, aff'd 164 N. Y. Supp. 1092.

⁷¹ *Hartranft's Estate*, 153 Pa. St. 530, 34 Am. St. Rep. 717, 26 Atl. 104.

Whether the debt is barred depends on the statutes of the state where the contract was made and the parties resided. In the absence of proof, it will be presumed that the common law prevails in a state other than that of the forum, and at common law there is no presumption of payment under 20 years. *Warrior Coal & Coke Co. v. National Bank of Augusta (Ala.)*, 53 So. 997.

In Louisiana it is held that the pledge is a constant acknowledgment of the debt secured thereby which constantly interrupts prescription. *First Nat. Bank of Lake Charles v. Bell*, 141 La. 53, 74 So. 628.

⁷² *United States. Miller v. Houston City St. Ry. Co.*, 55 Fed. 366.

California. *Savings Union Bank & Trust Co. v. Crowley*, 169 Pac. 67; *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786.

New York. *Piper v. Hayward*, 71 Misc. 41, 127 N. Y. Supp. 240.

Pennsylvania. *Wadlinger v. First Nat. Bank*, 209 Pa. 197, 58 Atl. 359; *Hartranft's Estate*, 153 Pa. St. 530, 34 Am. St. Rep. 717, 26 Atl. 104.

Texas. *Tombler v. Palistine Ice Co.*, 17 Tex. Civ. App. 596, 43 S. W. 896.

⁷³ *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 27 L. R. A. (N. S.) 843, 90

§ 3934. — Effect of sale or foreclosure; surplus or deficiency. The foreclosure does not affect agreements in personam between the pledgee and third persons relative to the pledged property.⁷⁴

Where a pledgee of stock sells the same, and does not realize enough to satisfy the debt, he may proceed against the pledgor personally, or against his estate, for any deficiency,⁷⁵ unless there is an agreement to the contrary.⁷⁶ On the other hand, any surplus remaining after the satisfaction of the debt belongs to the pledgor or those claiming under him.⁷⁷

§ 3935. — Right to sue on debt without foreclosure. Instead of foreclosing the pledge, the pledgee may bring a suit against the pledgor personally on the debt, in which event he is not bound to return or offer to return the stock before the debt is paid,⁷⁸ although he may

N. E. 834, rev'g judgment 126 N. Y. App. Div. 936, 110 N. Y. Supp. 1123, which aff'd 57 N. Y. Misc. 195, 107 N. Y. Supp. 584.

⁷⁴ An agreement by the pledgee to assign an interest in a corporation pledged to him to a third person at the latter's option on tender of the debt secured by the pledge was held to be in personam, and hence not to have been affected by a foreclosure and the bidding in of the pledged property by the pledgee at the sale, so that, where the pledgee thereafter refused to carry it out, and sold the property to others, he was guilty of conversion, and was liable to such third person for the difference between the amount of the debt secured by the pledge and the value of the pledged property, with interest. *Fetzer v. South Side Lumber Co. of Chicago*, 202 Fed. 878.

⁷⁵ *New York Security & Trust Co. v. Lombard Inv. Co.*, 73 Fed. 537; *Philadelphia Warehouse Co. v. Anniston Pipe Works*, 106 Ala. 357, 18 So. 43; *Furness v. Union Nat. Bank of Chicago*, 147 Ill. 570, 35 N. E. 624; *Wallace v. Berdell*, 24 Hun (N. Y.) 379.

⁷⁶ The fact that a note recites that a certificate of stock is "deposited as

collateral, without recourse," does exclude personal liability of the pledgee on the note. *Rathburn v. Jones*, 47 S. C. 206, 25 S. E. 214.

⁷⁷ *Alabama*. *Adams v. Adams*, 73 So. 984.

Missouri. *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171.

Nebraska. *Palmer v. Parmele*, 101 Neb. 691, 164 N. W. 705, 848.

New York. *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338; *Twelfth Ward Bank City of New York v. Samuels*, 71 App. Div. 168, 75 N. Y. Supp. 561, aff'd 176 N. Y. 593, 68 N. E. 1125; *Gauntlett v. Patton*, 96 App. Div. 627, 89 N. Y. Supp. 385, where conflicting claims to a surplus were determined.

Vermont. *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

If he refuses to pay over such surplus he is guilty of conversion. *Palmer v. Parmele*, 101 Neb. 691, 164 N. W. 705, 848.

⁷⁸ *United States*. *Skud v. Tillinghast*, 195 Fed. 1.

California. *Williams v. Parker*, 30 Cal. App. 71, 157 Pac. 550.

Georgia. *American Nat. Bank of Atlanta v. East Atlanta Bank*, 95 S. E. 286.

be compelled to release or reassign the security when his claim is satisfied.⁷⁹ And in a proper case he may proceed by action on the debt and attachment of the stock,⁸⁰ although by so doing he waives the pledge.⁸¹

§ 3936. — Redemption—Right to redeem. When the debt for which stock is pledged as collateral security becomes due, the pledgor has

Illinois. Rozet v. McClellan, 48 Ill. 345, 95 Am. Dec. 551; Corning v. Bridgewater Gas Co., 100 Ill. App. 221.

Iowa. Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497.

Massachusetts. Butman v. Howell, 144 Mass. 66, 10 N. E. 504; Taylor v. Cheever, 6 Gray 146.

Michigan. Allen v. Hook, 164 N. W. 384; Reid v. Detroit Ideal Paint Co., 132 Mich. 528, 94 N. W. 3.

New Jersey. Donnell v. Wyckoff, 49 N. J. L. 48, 7 Atl. 672.

New York. De Cordova v. Barnum, 130 N. Y. 615, 27 Am. St. Rep. 538, 29 N. E. 1099; Frank & J. G. Jenkins, Jr. v. Conklin, 146 App. Div. 301, 130 N. Y. Supp. 778; Robertson v. Sully, 2 App. Div. 152, 37 N. Y. Supp. 935, rev'd 157 N. Y. 624, 52 N. E. 668.

Pennsylvania. Sitgreaves v. Farmers' & Mechanics' Bank, 49 Pa. St. 359; Fullerton v. Mobley, 2 Monag. 726, 15 Atl. 856.

South Carolina. Rathburn v. Jones, 47 S. C. 206, 25 S. E. 214.

Texas. Sinclair v. Weekes (Tex. Civ. App.), 41 S. W. 107.

Vermont. White River Sav. Bank v. Capital Sav. Bank & Trust Co., 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

He is under no obligation to sell the stock before bringing suit, and cannot be charged with negligence in failing to do so. Allen v. Hook, — Mich. —, 164 N. W. 384.

The right to sue the maker of a note personally is not excluded by the fact that it recites that a certificate

of stock is "deposited as collateral, without recourse." Rathburn v. Jones, 47 S. C. 206, 25 S. E. 214.

In an action by a corporate creditor on the debt, the corporation cannot offset the value of stock taken by him as security. Reid v. Detroit Ideal Paint Co., 132 Mich. 528, 94 N. W. 3.

"This rule, of course, proceeds upon the theory that the pledgee is in possession of the collaterals, and is entitled to retain them until his claim is paid." Skud v. Tillinghast, 195 Fed. 1.

⁷⁹ Skud v. Tillinghast, 195 Fed. 1.

Where the stock is negotiable by the pledgee, he should be required to produce it at the trial unless he insists on proceeding after being charged with the face value of the collateral. Frank & J. G. Jenkins, Jr. v. Conklin, 146 N. Y. App. Div. 301, 130 N. Y. Supp. 778.

⁸⁰ H. B. Clafin Co. v. Bretzfelder, 69 Ark. 271, 62 S. W. 905; Parberry v. Woodson Sheep Co., 18 Mont. 317, 45 Pac. 278.

⁸¹ H. B. Clafin Co. v. Bretzfelder, 69 Ark. 271, 62 S. W. 905; Parberry v. Woodson Sheep Co., 18 Mont. 317, 45 Pac. 278. See also Hudson v. Bank of Piné Bluff, 75 Ark. 493, 87 S. W. 1177.

This is true although the attachment proceeding is ineffectual. "The rights acquired by a pledge and an attachment are inconsistent, and cannot be maintained by the same person at the same time." H. B. Clafin Co. v. Bretzfelder, 69 Ark. 271, 62 S. W. 905.

a right to redeem the stock by payment.⁸² And this right extends to holders of subsequent liens on the pledged stock,⁸³ and to subsequent purchasers of the pledgor's interest.⁸⁴ A pledgee holding a prior lien may also redeem from a subsequent pledge constituting a second lien, although he is not obliged to do so.⁸⁵

A valid tender of the amount due releases the pledge, whether the pledgee accepts it or not.⁸⁶ And under some statutes the amount

82 United States. *New York Assets Realization Co. v. McKinnon*, 209 Fed. 791.

Missouri. *Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943.

New York. *Roberts v. Sykes*, 30 Barb. 173.

Pennsylvania. *Eichbaum v. Sample*, 213 Pa. 216, 62 Atl. 837.

Rhode Island. *United Nat. Bank v. Tappan*, 33 R. I. 1, 79 Atl. 946.

South Carolina. *Haselden v. Hamer*, 97 S. C. 178, 81 S. E. 424.

Utah. *Hyams v. Bamberger*, 10 Utah 3, 36 Pac. 202.

Vermont. *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

Wisconsin. *Whitney v. Whitney Bros. Co.*, 152 Wis. 453, 140 N. W. 35.

The pledgor has a continuing right to redeem up to the time when the power of sale is exercised or the pledge is foreclosed by judicial proceedings instituted for that purpose. *United Nat. Bank v. Tappan*, 33 R. I. 1, 79 Atl. 946.

It is the duty of the pledgee to redeliver the pledged stock to the pledgor when the latter complies with the conditions of the contract. *Smith v. Staten Island Land Co.*, 175 N. Y. App. Div. 588, 162 N. Y. Supp. 681; *Houston & T. C. R. Co. v. Conner*, 29 Tex. Civ. App. 259, 67 S. W. 773.

⁸³ A corporation which has acquired a lien on the pledgor's interest, subject to the pledge, may redeem. *White River Sav. Bank v. Capital Sav.*

Bank & Trust Co., 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

The holder of a subsequent pledge, which is a second lien, may redeem. *Athol Sav. Bank v. Bennett*, 203 Mass. 480, 89 N. E. 632.

⁸⁴ *McKee v. Bernheim*, 130 N. Y. App. Div. 424, 114 N. Y. Supp. 1080, aff'd 198 N. Y. 575, 92 N. E. 1091.

When the pledgor of stock has assigned the same, the assignee may tender the amount of the debt when due, and may maintain trover for conversion if the pledgee refuses to deliver the stock. *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. Rep. 435, 15 Pac. 773, 14 Pac. 369.

A purchaser of the pledgor's interest in the stock at execution sale has a right to redeem. *Cushing v. Building Ass'n Society of New or Practical Psychology*, 165 Cal. 731, 134 Pac. 324.

⁸⁵ *Athol Sav. Bank v. Bennett*, 203 Mass. 480, 89 N. E. 632.

⁸⁶ **United States.** *New York Assets Realization Co. v. McKinnon*, 209 Fed. 791.

California. *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. Rep. 435, 15 Pac. 773, 14 Pac. 369.

Colorado. *Tom Boy Gold Mines Co. v. Green*, 11 Colo. App. 447, 53 Pac. 845.

Missouri. See *Merriam v. Childs*, 93 Mo. 131, 5 S. W. 615.

New York. *Lawrence v. Maxwell*, 53 N. Y. 19; *Sisson v. Barnum*, 157 App. Div. 149, 141 N. Y. Supp. 846, aff'd 220 N. Y. 734, 116 N. E. 1075; *Furber v. National Metal Co.*, 118 App. Div. 263, 103 N. Y. Supp. 490,

of the debt is extinguished by a due offer of payment if the amount is immediately deposited with a bank in the name of the creditor and notice thereof is given to him.⁸⁷

If the pledgee wrongfully refuses to return the stock after payment or tender, he is guilty of a conversion, and also of a breach of contract, and the pledgor may maintain trover, or he may waive the tort, and maintain assumpsit.⁸⁸

aff'd 193 N. Y. 622, 86 N. E. 1124.

Oregon. *Morgan v. Johns*, 84 Ore. 557, 165 Pac. 369.

Utah. *Hyams v. Bamberger*, 10 Utah 3, 36 Pac. 202.

A tender by one who has wrongfully repledged the stock to his pledgee, which is refused, releases the lien as to the original pledgor as well as to the second pledgor. *New York Assets Realization Co. v. McKinnon*, 209 Fed. 791.

The tender is good although conditioned on the return of the collateral. *New York Assets Realization Co. v. McKinnon*, 209 Fed. 791.

But a purchaser of the pledgor's interest in the stock at execution sale is not entitled to insist upon an assignment to him of the note secured by the pledge as a condition to his redemption of the stock. *Cushing v. Building Ass'n Society of New or Practical Psychology*, 165 Cal. 731, 134 Pac. 324.

Where a tender is made to the cashier of the pledgee, who has no authority in the matter, he has a right to confer with his superiors, and the latter are entitled to a reasonable time within which to accept or reject it. If the pledgor is requested to wait for an answer, but leaves within a few minutes without further demand or inquiry, and before receiving a reply, he thereby waives the effect of the tender. *Sisson v. Barnum*, 157 N. Y. App. Div. 149, 141 N. Y. Supp. 846, aff'd 220 N. Y. 734, 116 N. E. 1075.

In a suit in equity by the owner of

pledged stock to have the stock restored to him and his title thereto quieted on the ground that the lien of the pledge has been extinguished by a rejected tender of the amount due, payment of the debt may be made a condition of granting the relief sought. *Love v. Park*, 96 Neb. 485, 148 N. W. 140, 95 Neb. 729, 146 N. W. 941.

⁸⁷ A tender of \$10 is not a due offer of payment of a debt of \$20,000 within the meaning of this provision. *Colton v. Oakland Bank of Savings*, 137 Cal. 376, 70 Pac. 225.

⁸⁸ **United States.** *New York Assets Realization Co. v. McKinnon*, 209 Fed. 791.

California. *Kullman v. Greenebaum*, 92 Cal. 403, 27 Am. St. Rep. 150, 28 Pac. 674; *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. Rep. 435, 15 Pac. 773, 14 Pac. 369.

Georgia. *Reid v. Caldwell*, 120 Ga. 718, 48 S. E. 191.

Maryland. *German Sav. Bank of Baltimore City v. Renshaw*, 78 Md. 475, 28 Atl. 281; *Harris v. Franklin Bank*, 77 Md. 423, 26 Atl. 523.

New York. *Lawrence v. Maxwell*, 53 N. Y. 19.

Oregon. *Morgan v. Johns*, 84 Ore. 557, 165 Pac. 369.

Utah. *Hyams v. Bamberger*, 10 Utah 3, 36 Pac. 202.

Refusal to return the stock when the dividends on the stock have amounted to a sum sufficient to pay the debt constitutes a conversion. *Reid v. Caldwell*, 120 Ga. 718, 48 S. E. 191.

A pledgor of stock has no right to the return of any part thereof until the whole amount of the debt for which it was pledged is paid, unless there is some agreement to the contrary; but it is competent, of course, for the parties to agree that part of the stock may be withdrawn as part payments are made.⁸⁹

§ 3937. — Suit in equity to redeem. As a general rule the pledgor cannot maintain a suit in equity to redeem since he ordinarily has an adequate remedy at law.⁹⁰ But a bill in equity to redeem may be maintained where the circumstances are such that the remedy at law is inadequate, or where some special ground of equitable jurisdiction exists, as where an accounting is necessary, or where the pledgor, under the circumstances, is entitled to an injunction against a transfer by the pledgee, or where a discovery is sought, or where there has been a transfer of the stock on the books of the corporation, and the pledgee is insolvent, or the pledgor wishes to recover the possession of the stock itself, and perhaps in other cases.⁹¹ And there

That there are various conflicting claimants for the stock is no excuse for the pledgee's refusal to return it. He may bring an action in the nature of a bill of interpleader against them. *New York Assets Realization Co. v. McKinnon*, 209 Fed. 791.

⁸⁹ *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362; *First Nat. Bank of Indianapolis v. Root*, 107 Ind. 224, 8 N. E. 105.

He cannot redeem a part of the stock. *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362.

Under an agreement that stock pledged to secure the payment of notes is to be held by the pledgee "until said notes shall be fully paid," it was held that no portion of the stock need be surrendered until the indebtedness evidenced by the notes was fully paid. *Goetzinger v. Donahue*, 138 Wis. 103, 119 N. W. 823.

⁹⁰ *Alabama*. *Nelson v. Owen*, 113 Ala. 372, 21 So. 75.

Maryland. *Bryson v. Rayner*, 25 Md. 424, 90 Am. Dec. 69.

New York. *Treadwell v. Clark*, 190

N. Y. 51, 82 N. E. 505, aff'g 114 App. Div. 493, 100 N. Y. Supp. 1; *Id.*, 73 App. Div. 473, 77 N. Y. Supp. 350; *Smith v. Staten Island Land Co.*, 175 App. Div. 588, 162 N. Y. Supp. 681; *Genet v. Howland*, 45 Barb. 560.

North Carolina. *Doak v. Bank of State*, 28 N. C. 309.

Pennsylvania. *Roland v. Lancaster County Nat. Bank*, 135 Pa. St. 598, 19 Atl. 951.

Vermont. *Angus v. Robinson's Adm'r*, 62 Vt. 60, 19 Atl. 993.

⁹¹ *United States*. *Gideon v. Representative Securities Co.*, 232 Fed. 184; *Hower v. Weiss, Malting & Elevator Co.*, 55 Fed. 356.

Alabama. *Nelson v. Owen*, 113 Ala. 372, 21 So. 75.

California. *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889; *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084.

Illinois. *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362.

Maryland. *Clayton v. Smith*, 102 Atl. 925; *Bryson v. Rayner*, 25 Md. 424, 90 Am. Dec. 69.

seems to be some authority to the effect that he may maintain such

Massachusetts. *Fowle v. Ward*, 113 Mass. 548, 18 Am. Rep. 534; *Bartlett v. Johnson*, 9 Allen 530.

Missouri. *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171; *Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943.

New Jersey. *Thielens v. Dialogue* (N. J. Ch.), 19 Atl. 970.

New York. *Treadwell v. Clark*, 190 N. Y. 51, 82 N. E. 505, aff'g 114 App. Div. 493, 100 N. Y. Supp. 1; *Treadwell v. Clark*, 73 App. Div. 473, 77 N. Y. Supp. 350; *Adams v. Ball*, 24 App. Div. 69, 48 N. Y. Supp. 778; *Genet v. Howland*, 45 Barb. 560; *Roberts v. Sykes*, 30 Barb. 173; *Hasbrouck v. Vandervoort*, 4 Sandf. 74. See also *Smith v. Staten Island Land Co.*, 175 App. Div. 588, 162 N. Y. Supp. 681.

Pennsylvania. *Eichbaum v. Sample*, 213 Pa. 216, 62 Atl. 837; *Blood v. Erie Dime Savings & Loan Co.*, 164 Pa. St. 95, 30 Atl. 362; *Conyngham's Appeal*, 57 Pa. St. 474.

South Carolina. See *Haselden v. Hamer*, 97 S. C. 178, 81 S. E. 424.

Vermont. See *Angus v. Robinson's Adm'r*, 62 Vt. 60, 19 Atl. 993.

Virginia. See *Scott v. Brame*, 118 Va. 194, 86 S. E. 850.

Wisconsin. *Whitney v. Whitney Bros. Co.*, 152 Wis. 453, 140 N. W. 35.

The pledgor may sue in equity to compel a retransfer, where it appears that the stock is limited in amount, that it cannot be purchased in the market, that it has no quoted or ascertainable value, and that the pledgor held the pledged shares as an investment having a peculiar value to himself greater than the market price at the time of the transfer. *Eichbaum v. Sample*, 213 Pa. 216, 62 Atl. 837.

Where the pledgee claims title to

the stock under an illegal sale at which he purchased the stock, and claims that the equity of redemption was forever foreclosed thereby, and has sold the stock to an innocent purchaser, it is necessary for the pledgor to have the illegal sale set aside in equity before he can compel the pledgee to account for the proceeds of the second sale. *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171.

A suit for redemption is essentially one for specific performance whereby "the pledgor asks the court to compel the pledgee to carry out his agreement to return the pledged property upon payment of the debt secured by it." *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889.

And see to the same effect *Angus v. Robinson's Adm'r*, 62 Vt. 60, 19 Atl. 993.

Since equity will not decree specific performance of a contract which the defendant has not the ability to perform, a bill to redeem which affirmatively shows on its face has passed from the possession and control of the defendant is demurrable unless it further shows that the latter has in his possession other similar certificates evidencing the same number of shares which he may be compelled to transfer to the pledgor. *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889.

So such a suit will not lie against the administrator of the pledgee where it is alleged that the pledgee disposed of the property during his lifetime. *Angus v. Robinson's Adm'r*, 62 Vt. 60, 19 Atl. 993.

A nonresident purchaser of stock from one to whom the pledgee has wrongfully sold it may be joined as a party to a suit to redeem, though the stock has not been transferred to him

a suit even where he has an adequate remedy at law which he may pursue.⁹²

Generally a tender is necessary to entitle the pledgor to maintain a suit to redeem.⁹³ But the contrary is true, and no tender is necessary, where the pledgee has expressly denied the pledgor's right to redeem,⁹⁴ or has put it out of his power to return the stock,⁹⁵ or where the amount of the account for which the stock was pledged is in dispute,⁹⁶ or the amount due is uncertain and can only be determined by an accounting, which is sought by the pledgor as a part of his relief,⁹⁷ or where the pledge is void.⁹⁸ Even though one to whom the stock has been wrongfully assigned by the pledgee is entitled to be reimbursed for the amount which he paid for it, the pledgee is not obliged to make a tender to him before suing in equity to redeem, especially where the assignee has declined to deliver the stock to him and denies his right to recover it.⁹⁹

on the corporate books. *Gideon v. Representative Securities Co.*, 232 Fed. 184.

The payee of notes secured by stock deposited with a third person in trust for that purpose is not a necessary party to a suit against the trustee to compel him to deliver the stock to the pledgor after the notes have been paid. Possession of the notes by the pledgor is prima facie evidence of their payment, in such a suit. *Leigh v. Laughlin*, 222 Ill. 265, 78 N. E. 563.

The bringing of an action for conversion of the stock, which is dismissed before trial, is not such an election as will prevent the bringing of a subsequent suit in equity to recover the stock itself. *Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943.

Where the pledgor in a suit to redeem obtained a decree for the recovery of the stock or its then value, but was prevented from obtaining either for some time by appeals taken from the decree by the pledgee, and in the meantime the stock depreciated in value, it was held that after final affirmance it would be inequitable to compel him to take the stock instead

of its value at the time of the decree. *Treadwell v. Clark*, 124 N. Y. App. Div. 260, 108 N. Y. Supp. 733, appeal dismissed 192 N. Y. 531, 84 N. E. 1121.

⁹² *Colburn v. Riley*, 11 Colo. App. 184, 52 Pac. 684.

⁹³ *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889.

⁹⁴ *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171.

⁹⁵ *Treadwell v. Clark*, 73 N. Y. App. Div. 473, 77 N. Y. Supp. 350. But see *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889.

⁹⁶ *Treadwell v. Clark*, 73 N. Y. App. Div. 473, 77 N. Y. Supp. 350. But in *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889, it is held that the fact that the amount due is in dispute does not excuse a tender by the pledgor of the amount which he claims is due.

⁹⁷ In *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889, it was held that the complaint showed no such uncertainty as to the amount due as would obviate the necessity of a tender.

⁹⁸ *Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943.

⁹⁹ *Treadwell v. Clark*, 114 N. Y.

If, after having acquired jurisdiction in such a suit, the court finds it impossible to decree a redemption in kind, as where the pledgor has sold the stock to an innocent purchaser and this fact was unknown to the pledgee when the suit was brought, it will retain jurisdiction for the purpose of compelling the pledgor to account for the proceeds of the sale over and above the amount of the debt.¹

§ 3938. — Waiver of right to redeem. An agreement cutting off the right of the pledgor to redeem is inconsistent with the contract of pledge itself, which by its very nature involves such a right,² and it is therefore generally held that a provision in the contract of pledge cutting off the right of redemption is void.³ In any event, such an agreement is always scrutinized by the courts with jealous care, and cannot be enforced where the pledgor has no opportunity to redeem unless the pledgee chooses,⁴ or where the stock is pledged by the corporation to its directors and its enforcement would therefore enable them to obtain a personal advantage through a harsh and unusual contract made by them with it.⁵ "For a valuable consideration, and by a subsequent agreement, the right of redemption may be released,"⁶ and, as we have seen, the parties may agree that the pledgee may take the stock in satisfaction of the debt.⁷

§ 3939. — Statute of limitations; laches. It has been said in some of the cases that, where no time for redemption of property pledged

App. Div. 493, 100 N. Y. Supp. 1, judgment aff'd 190 N. Y. 51, 82 N. E. 505.

¹ Hagan v. Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171.

² Endicott v. Marvel, 83 N. J. Eq. 632, 92 Atl. 373, aff'g 81 N. J. Eq. 378, 87 Atl. 230.

³ "The right of redemption is a part of the contract of pledge and the parties cannot therein make any valid agreement that there shall be no redemption after default." Smith v. Becker, 192 Mo. App. 597, 184 S. W. 943.

A provision for a forfeiture upon nonpayment of the debt is void. Haselden v. Hamer, 97 S. C. 178, 81 S. E. 424.

Even where the contract provides that the stock is to become the

pledgee's in case of default, a sale under judicial process or by notice is necessary in order to cut off the claims of the pledgor. Colonial Trust Co. v. McMillan, 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933.

See also Endicott v. Marvel, 83 N. J. Eq. 632, 92 Atl. 373, aff'g 81 N. J. Eq. 378, 87 Atl. 230.

⁴ As where the stock is pledged by a corporation to five of its seven directors. Endicott v. Marvel, 83 N. J. Eq. 632, 92 Atl. 373, aff'g 81 N. J. Eq. 378, 87 Atl. 230.

⁵ Endicott v. Marvel, 83 N. J. Eq. 632, 92 Atl. 373, aff'g 81 N. J. Eq. 378, 87 Atl. 230.

⁶ Smith v. Becker, 192 Mo. App. 597, 184 S. W. 943.

⁷ See § 3910, supra.

has been fixed by the parties, the pledgor has his lifetime within which to redeem.⁸ The statute of limitations may apply to a suit to redeem, however,⁹ and it is now generally held that the right to sue in equity may be barred by laches.¹⁰

It has been held that where the debt is payable on a certain day, the statute commences to run when it becomes due.¹¹ But there is authority to the effect that limitations will not commence to run until the pledgee repudiates the trust, and the fact of such repudiation is brought to the notice of the pledgor,¹² especially where the pledge is made to secure future advances.¹³

The pledgor's right to maintain a suit to redeem is not barred by delay so long as the debt for which the stock is pledged is not barred;¹⁴ at least unless such delay is unreasonable.¹⁵ Nor can the

⁸ Where a contract of pledge of stock does not limit the time within which redemption may be made, the period of redemption may be deemed to extend through the lifetime of the pledgor and pass to his personal representatives, where redemption is not called for earlier by the pledgee. *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

The right of redemption continues until it has been extinguished for a lawful foreclosure or sale. The pledgee has the power to foreclose at any time, and the failure to act is his. *Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943.

See also *Gilmer v. Morris*, 80 Ala. 78, 60 Am. Rep. 85.

⁹ *Gilmer v. Morris*, 46 Fed. 333, 43 Fed. 456, 35 Fed. 682; *Waterman v. Brown*, 31 Pa. St. 161.

In New York the ten-year statute of limitations applies. *Treadwell v. Clark*, 190 N. Y. 51, 82 N. E. 505, aff'g 114 N. Y. App. Div. 493, 100 N. Y. Supp. 1; *Treadwell v. Clark*, 73 N. Y. App. Div. 473, 77 N. Y. Supp. 350; *Roberts v. Sykes*, 30 Barb. (N. Y.) 173.

¹⁰ *Waterman v. Brown*, 31 Pa. St. 161. See also *Gilmer v. Morris*, 46 Fed. 333, 43 Fed. 456, 35 Fed. 682,

where the suit was held not to be barred.

In *Gilmer v. Morris*, 80 Ala. 78, 60 Am. Rep. 85, stock was pledged in 1871, and the pledgee advanced money on it from time to time, while its value fluctuated from twenty cents on the dollar up, but never more than the amount advanced. In 1881 the pledgee sold the stock for less than the amount advanced, and in 1884 the pledgor sued in equity to redeem, and to hold the pledgee for the value of the stock, which had greatly appreciated since the sale. It was held that the bill should be dismissed on account of the staleness of the demand.

But mere lapse of time is not a bar in the absence of circumstances of equitable estoppel. *Reynolds v. Cridge*, 131 Pa. St. 189, 18 Atl. 1010.

¹¹ *Roberts v. Sykes*, 30 Barb. (N. Y.) 173.

¹² *Gilmer v. Morris*, 80 Ala. 78, 60 Am. Rep. 85.

¹³ *Gilmer v. Morris*, 46 Fed. 333, 43 Fed. 456, 35 Fed. 682.

¹⁴ *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362. And see *Gilmer v. Morris*, 46 Fed. 333.

¹⁵ Where a suit in equity to redeem is brought within the period fixed by the statute of limitations, mere delay will not bar it unless such delay is

pledgor be guilty of laches until after he has had an opportunity to act.¹⁶

§ 3940. — Effect of bankruptcy of pledgee. The pledgor's right to redeem is not affected by the bankruptcy of the pledgee.¹⁷ If the pledgee has repledged the stock with the consent of the pledgor he has a right, notwithstanding his insolvency, to redeem it and turn it over to the pledgor on payment of the amount for which it was pledged, and his act in so doing does not create an unlawful preference in favor of the pledgor within the meaning of the Bankruptcy Act.¹⁸ If the debt for which the stock was pledged has been satisfied, the pledgor is entitled to the possession of the stock as against the pledgee's trustee in bankruptcy, or to its proceeds in case it has been sold.¹⁹ And the same is true if the stock has been repledged by the pledgee, and is returned to the pledgee's trustee in bankruptcy by the second pledgee who has satisfied his claim by the sale of other securities.²⁰

unreasonable. *Treadwell v. Clark*, 190 N. Y. 51, 82 N. E. 505, aff'g 114 N. Y. App. Div. 493, 100 N. Y. Supp. 1; *Treadwell v. Clark*, 73 N. Y. App. Div. 473, 77 N. Y. Supp. 350.

¹⁶ The right of a corporation to redeem stock pledged by it to a majority of its directors is not lost by laches so long as it is in the control of the pledgees. *Endicott v. Marvel*, 83 N. J. Eq. 632, 92 Atl. 373, aff'g 81 N. J. Eq. 378, 87 Atl. 230.

¹⁷ *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, aff'g *In re Jacob Berry & Co.*, 149 Fed. 176; *Richardson v. Shaw*, 209 U. S. 365, 52 L. Ed. 835, 14 Ann. Cas. 981, aff'g 147 Fed. 659.

See also standard works on bankruptcy and pledges.

¹⁸ *Richardson v. Shaw*, 209 U. S. 365, 52 L. Ed. 835, 14 Ann. Cas. 981, aff'g 147 Fed. 659. See also *Gorman v. Littlefield*, 229 U. S. 19, 57 L. Ed. 1047; *Sexton v. Kessler & Co.*, 225 U. S. 90, 56 L. Ed. 995, aff'g 172 Fed. 535, 40 L. R. A. (N. S.) 639.

¹⁹ Where a customer who has deposited stock with a broker as collateral to his account is not indebted to

the latter, he may recover the stock or its proceeds from the broker's trustee in bankruptcy. *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, aff'g *In re Jacob Berry & Co.*, 149 Fed. 176; *Richardson v. Shaw*, 209 U. S. 365, 52 L. Ed. 835, 14 Ann. Cas. 981, aff'g 147 Fed. 659; *In re Stringer*, 230 Fed. 177.

The same is true where stock purchased by a broker for a customer is paid for in full by the latter at the time of the purchase. *Gorman v. Littlefield*, 229 U. S. 19, 57 L. Ed. 1047.

²⁰ *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, aff'g *In re Jacob Berry & Co.*, 149 Fed. 176.

This is true where stock indorsed in blank and deposited with brokers by a customer to secure them against losses is wrongfully repledged by them at a time when the customer owes them nothing, but the second pledgee satisfies his claim out of other stock pledged at the same time, and returns the customer's stock to the trustee. *In re T. A. McIntyre & Co.*, 181 Fed. 955. See also *In re Stringer*, 230 Fed. 177.

§ 3941. — **Identification of pledged stock.** The rule that to entitle a pledgor to redeem he must be able to identify the property pledged by him applies to pledges of stock.²¹ But it must receive a reasonable construction in such cases, in view of the fact that the pledgee is entitled to take out a new certificate in his own name, and is not obliged to keep the pledged shares separate from other like shares which he holds, so that a strict identification of particular shares is thus often rendered impossible. In determining the relative rights of particular customers to stock purchased for them by brokers on margin and held by the brokers as collateral, on the brokers becoming insolvent, customers who are able to identify the precise certificates purchased for them, or to show that certain particular certificates were being carried by the brokers in fulfillment of their order, are entitled to the first right to the certificate so identified.²² If the brokers have on hand a block of stock of a particular kind sufficient to satisfy the demands of all of their customers for that kind of stock, and to cover their own purchases as well, the interests of all concerned are satisfied by a distribution to each pledgor of his proper number of shares, although the particular shares pledged by each cannot be precisely identified.²³ If the number of shares on hand is insufficient to satisfy the demands of all of their customers, including themselves, but is sufficient to satisfy the demands of all of such customers, exclusive of themselves, it will be presumed, in the absence of evidence to the contrary, that such stock was held for their customers.²⁴ But this presumption may be overcome by proof that

In *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, aff'g *In re Jacob Berry & Co.*, 149 Fed. 176, it was held that the pledgor had not waived his right to recover the stock by filing a claim for the value of the stock in the bankruptcy proceedings, in view of his reservations against such waiver in his statement of claim.

²¹ *In re Stringer*, 230 Fed. 177; *In re T. A. McIntyre & Co.*, 181 Fed. 960; *Id.*, 181 Fed. 955; *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

To warrant the recovery of the stock or its proceeds from one to whom the pledgee has repledged it, the pledgor must trace his stock into the hands of such person. *Mould v. Importers' & Traders' Nat. Bank*, 72 N. Y. App.

Div. 30, 76 N. Y. Supp. 148.

²² *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

²³ *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

If at the time of the bankruptcy certificates for a sufficient number of shares of a particular stock are found in the possession of a bankrupt broker to satisfy the claim of a customer, and no other customer claims any right in them, this is a sufficient identification. *Gorman v. Littlefield*, 229 U. S. 19, 57 L. Ed. 1047.

²⁴ *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

certain of the shares were held by the brokers upon purchases for themselves, in which case such shares will go to the trustee in insolvency.²⁵ If, after all efforts at precise identification have been exhausted, there remains a block of unidentified stock insufficient to meet the claims of the remaining pledgors, it will be divided pro rata among them.²⁶

§ 3942. — Subrogation. A surety or indorser on a note secured by a pledge, who pays the same, is entitled to be subrogated to the place of the pledgee as to the collateral to the extent of the payments so made.²⁷ And where the stock is pledged primarily for the payment of such note, his right to subrogation cannot be defeated by the application of the collateral on any other debts to the pledgee, although the pledge gives the pledgee the right to so apply them.²⁸

Where stock is successively pledged as security for two notes, an execution creditor of the pledgor who pays the amount due on the first note is subrogated to the lien of the pledgee to secure its payment, and has a first lien on the stock.²⁹

§ 3943. Remedies of pledgor for conversion or breach of contract. If the pledgee of stock wrongfully sells or otherwise disposes of the same before the debt is due, or if he sells the same after maturity of the debt without necessary demand or notice, or at a private sale, when such a sale is not authorized, he is guilty, as we have seen, of a conversion of the stock, and also of a breach of the contract of bailment, and the pledgor may maintain an action of trover, or he may waive the tort and maintain assumpsit; and the same is true when the pledgee wrongfully refuses to deliver the stock to the pledgor after payment of the debt, or after a valid tender of the

²⁵ *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

²⁶ *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 28 Atl. 104, 26 Atl. 874.

In *In re T. A. McIntyre & Co.*, 221 Fed. 232, the owners of stock, which had been wrongfully pledged by brokers, to whom it had been sent for purposes of transfer, were held to be entitled to share pro rata with other creditors of the brokers in the surplus proceeds of a sale of the stock after

payment of the debt for which the stock was pledged, where they were unable to trace their specific securities into such fund.

See also *In re Stringer*, 230 Fed. 177.

²⁷ *Fourth Nat. Bank of Nashville v. Stahlman*, 132 Tenn. 367, L. R. A. 1916 A 568, 178 S. W. 942.

²⁸ *Fourth Nat. Bank of Nashville v. Stahlman*, 132 Tenn. 367, L. R. A. 1916 A 568, 178 S. W. 942.

²⁹ *Athol Sav. Bank v. Bennett*, 203 Mass. 480, 89 N. E. 632.

full amount due.³⁰ If the pledgee converts the pledge, he thereby, to the extent of its value, in effect discharges the debt.³¹ In order to show conversion it is necessary that there be a repudiation of the trust and use of the stock evidencing intent to deprive the owner thereof permanently.³²

30 United States. *Wilson v. Colorado Min. Co.*, 227 Fed. 721. See also *Skud v. Tillinghast*, 195 Fed. 1.

Alabama. *Sharpe v. National Bank of Birmingham*, 87 Ala. 644, 7 So. 106.

California. *Kullman v. Greenebaum*, 92 Cal. 403, 27 Am. St. Rep. 150, 28 Pac. 674; *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. Rep. 435, 15 Pac. 773, 14 Pac. 369. See *Colton v. Oakland Bank of Savings*, 137 Cal. 376, 70 Pac. 225.

Connecticut. *Stevens v. Hurlbut Bank*, 31 Conn. 146.

Georgia. *Reid v. Caldwell*, 120 Ga. 718, 48 S. E. 191.

Illinois. *National Bank of Illinois v. Baker*, 128 Ill. 533, 4 L. R. A. 586, 21 N. E. 510; *Hughes v. Barrell*, 167 Ill. App. 100; *Schaefer v. Dickinson*, 141 Ill. App. 234.

Maryland. *Merchants' Nat. Bank v. Williams*, 110 Md. 334, 72 Atl. 1114; *Harris v. Franklin Bank*, 77 Md. 423, 26 Atl. 523.

Massachusetts. *Cumnock v. Institution for Savings in Newburyport*, 142 Mass. 342, 56 Am. Rep. 679, 7 N. E. 869; *Fowle v. Ward*, 113 Mass. 548, 18 Am. Rep. 534; *Fisher v. Brown*, 104 Mass. 259, 6 Am. Rep. 235; *Fletcher v. Dickinson*, 7 Allen 23.

Michigan. *Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928; *Hempfling v. Burr*, 59 Mich. 294, 26 N. W. 496.

Missouri. *Schaaf v. Fries*, 90 Mo. App. 111.

New York. *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338; *Smith v. Hall*, 67 N. Y. 48; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307; *In re Mills*, 125 App. Div. 730, 110 N. Y.

Supp. 314, modifying judgment 57 Misc. 315, 107 N. Y. Supp. 1057, judgment aff'd 193 N. Y. 626, 86 N. E. 1128; *Furber v. National Metal Co.*, 118 App. Div. 263, 103 N. Y. Supp. 490, aff'd 193 N. Y. 622, 86 N. E. 1124; *Allen v. Dykers*, 3 Hill 593, aff'd 7 Hill 497, 42 Am. Dec. 87.

Pennsylvania. *Work v. Bennett*, 70 Pa. St. 484; *Neiler v. Kelley*, 69 Pa. St. 403.

"The appropriation to himself or the loss of collateral securities by a pledgee, either intentionally or by culpable negligence, is both a tort and a breach of the contract of pledge, and the pledgor may maintain an independent action either in tort or upon the contract, at his option, against the pledgee for the value of the securities of which he is deprived." *Wilson v. Colorado Min. Co.*, 227 Fed. 721.

Where a pledgee converts the stock of the pledgor, the statute of limitations does not begin as against the remedy for the wrong until the purchaser has notice that the pledgee has misappropriated the stock in repudiation of the trust. *Davis v. Hardwick*, 43 Tex. Civ. App. 71, 94 S. W. 359.

On a sale without notice, the pledgor's cause of action for conversion arises and the statute of limitations commences to run when the sale is made, regardless of whether or not he has notice of the conversion. *Smith v. Staten Island Land Co.*, 175 N. Y. App. Div. 588, 162 N. Y. Supp. 681.

See also §§ 3926, 3936, *supra*. And see generally § 3445 et seq., *supra*.

³¹ *Skud v. Tillinghast*, 195 Fed. 1.

³² *Davis v. Hardwick*, 43 Tex. Civ. App. 71, 94 S. W. 359.

By the weight of authority, payment or tender of the amount due is not necessary to entitle the pledgor of stock to maintain trover or assumpsit against the pledgee for conversion, where the action is based upon a wrongful sale of the stock by the pledgee,³³ although there is authority to the contrary.³⁴ But a tender is necessary to entitle the pledgor to maintain trover or assumpsit, where the action is based upon the pledgee's refusal to deliver the stock to the pledgor, unless the lien created by the pledge has been otherwise discharged.³⁵ Where the pledgee has wrongfully sold the stock, the pledgor is not bound to keep his tender alive by paying the amount due into court.³⁶

An attempted sale, to constitute a conversion, must have been actually made, and the stock must have been parted with. *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 30 Am. St. Rep. 87, 9 So. 299.

The pledgee cannot be charged with conversion where he has never had the stock transferred to himself on the corporate books, and has neither sold it nor refused to deliver it on payment of the note which it was pledged to secure, and there is no proof that he held it in any other or different manner on the day he began suit on the note than on the day it was delivered to him. *Allen v. Hook*, — Mich. —, 164 N. W. 384.

The fact that the pledgee transferred the stock to his agent and servant, who had full knowledge of the facts, and that the stock was transferred to the latter on the corporate books, was held not to amount to a conversion, where the agent indorsed the certificate in blank and redelivered it to his principal, and the latter was at all times in a position to comply with a demand for delivery. *Jones v. Seaman*, 133 N. Y. App. Div. 127, 117 N. Y. Supp. 288, aff'd 200 N. Y. 553, 93 N. E. 1123.

See also § 3446, *supra*.

³³ *United States*. *Rush v. First Nat. Bank of Kansas City*, 71 Fed. 102.

Illinois. *Hughes v. Barrell*, 167 Ill.

App. 100; *Whipple v. Tucker*, 123 Ill. App. 223.

Michigan. *Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928.

New York. *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307; *New York, L. E. & W. R. Co. v. Davies*, 38 Hun 477; *Lewis v. Graham*, 4 Abb. Pr. 106; *Allen v. Dykers*, 3 Hill 593, aff'd 7 Hill 497, 42 Am. Dec. 87.

Pennsylvania. *Work v. Bennett*, 70 Pa. St. 484; *Neiler v. Kelley*, 69 Pa. St. 403.

³⁴ A tender is necessary to enable the pledgee to recover possession of the stock illegally sold under the power, although he may recover any damages sustained by reason of the wrongful sale. *Schaaf v. Fries*, 90 Mo. App. 111.

See also *Cumnock v. Institution for Savings in Newburyport*, 142 Mass. 342, 56 Am. Rep. 679, 7 N. E. 869.

³⁵ *Cumnock v. Institution for Savings in Newburyport*, 142 Mass. 342, 56 Am. Rep. 679, 7 N. E. 869.

A cause of action does not accrue to the pledgor on the pledgee's contract to redeliver the pledged stock on repayment of the money advanced until a tender. *Smith v. Staten Island Land Co.*, 175 N. Y. App. Div. 588, 162 N. Y. Supp. 681.

³⁶ *Furber v. National Metal Co.*, 118 N. Y. App. Div. 263, 103 N. Y. Supp. 490, aff'd 193 N. Y. 622, 86 N. E. 1124.

In an action by a pledgor of stock against the pledgee for conversion, the pledgee may counterclaim for the amount of the debt, if it has not been paid.³⁷ And in an action by the pledgee against the pledgor on the debt, he may set off or recoup his damages resulting from the failure of the pledgee to protect the securities or his conversion of them.³⁸

By the weight of authority, except under special circumstances, the measure of the pledgor's damages for the conversion of stock by the pledgee is the value of stock at the time of the conversion, or, in some jurisdictions, within a reasonable time after the pledgor's knowledge of the conversion, in which he might have replaced the stock by purchasing other shares, less the amount due the pledgee, with interest.³⁹ The pledgor suffers no damage by the conversion

³⁷ Van Schaick v. Ramsey, 90 Hun (N. Y.) 550, 35 N. Y. Supp. 1006.

³⁸ Skud v. Tillinghast, 195 Fed. 1.

³⁹ United States. Wilson v. Colorado Min. Co., 227 Fed. 721.

Georgia. Reid v. Caldwell, 120 Ga. 718, 48 S. E. 191; Bank of Culloden v. Bank of Forsyth, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226.

Illinois. Hughes v. Barrell, 167 Ill. App. 100; Schaefer v. Dickinson, 141 Ill. App. 234; Whipple v. Tucker, 123 Ill. App. 223.

Iowa. Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497.

Maryland. Merchants' Nat. Bank v. Williams, 110 Md. 334, 72 Atl. 1114; Harris v. Franklin Bank, 77 Md. 423, 26 Atl. 523.

Massachusetts. Fowle v. Ward, 113 Mass. 548, 18 Am. Rep. 534.

New York. Smith v. Savin, 141 N. Y. 315, 36 N. E. 338; Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307. See also Tompkins v. Morton Trust Co., 91 App. Div. 274, 86 N. Y. Supp. 520, aff'd 181 N. Y. 578, 74 N. E. 1126.

North Dakota. Second Nat. Bank of Grand Forks v. First Nat. Bank, 8 N. D. 50, 76 N. W. 504.

Pennsylvania. Work v. Bennett, 70 Pa. St. 484.

Washington. Brown v. Union Savings & Loan Ass'n, 28 Wash. 657, 69 Pac. 383.

• Compare Terry v. Birmingham Nat. Bank, 93 Ala. 599, 30 Am. St. Rep. 87, 9 So. 299.

The pledgee is liable for the damages sustained by the pledgor. Whether they will equal the amount of the claim depends upon the facts developed. Content v. Banner, 184 N. Y. 124, 6 Ann. Cas. 106, 76 N. E. 913, rev'g judgment 96 N. Y. App. Div. 625, 88 N. Y. Supp. 1095.

The damages which a pledgor of stock is entitled to recover for conversion thereof by the pledgee are limited to the loss actually sustained by him. Therefore it has been held that, in determining the damages for conversion of stock by a pledgee, who used it to acquire stock in a new corporation reorganized from the old one, not only the money which the pledgor would have been required to pay in addition to the use of his stock, to get into the new corporation, but also interest thereon from the time of the conversion to the time the new stock acquired its highest market price (within a reasonable time for the pledgor to replace it), should be deducted. Griggs v. Day, 158 N. Y. 1,

where the stock is sold for its full value and the proceeds are credited on the debt, which exceeds the value of the stock.⁴⁰

The pledgor may ratify a wrongful sale by the pledgee, and maintain assumpsit to recover the proceeds, less the amount, if any, due the pledgee.⁴¹

Unless there is some special ground of equitable jurisdiction, a pledgor of stock cannot maintain a bill in equity against the pledgee to recover damages for conversion of the stock, or to compel him to replace the same, for, as a rule, there is an adequate remedy at law by an action of trover or assumpsit for damages, or by replevin or detinue to recover the certificate.⁴²

Where the pledgor elects to hold the pledgee as for a conversion, title to the stock vests in the pledgee.⁴³

§ 3944. Mortgage of shares of stock. Shares of stock in a corporation may be mortgaged,⁴⁴ although it is not often done. And they

52 N. E. 692, rev'g 21 N. Y. App. Div. 442, 47 N. Y. Supp. 609.

Where the pledgee of stock, acting in good faith, converts it, it is the duty of the owner to replace it within a reasonable time after knowledge of the conversion, and the measure of his damages is the highest market price for which such stock sells during such reasonable time. *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 692, rev'g 21 N. Y. App. Div. 442, 47 N. Y. Supp. 609.

And it has been held that, where the facts in regard to the conversion are undisputed, what is a reasonable time after notice for the owner to replace the stock is a question of law for the court. *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 692, rev'g 21 N. Y. App. Div. 442, 47 N. Y. Supp. 609. In this case it was held that four years was more than a reasonable time.

A broker, by selling stocks of his customer without notice of the sale, does not thereby, as a matter of law, extinguish all claim against the customer for advances made, but the customer is entitled to be allowed as damages the difference between the price for which the stock was sold, and for which he received credit, and

its market price then or within such reasonable time after a notice of sale as would have enabled him to replace the stock in case the market price exceeded the price realized. *Minor v. Beveridge*, 141 N. Y. 399, 38 Am. St. Rep. 804, 36 N. E. 404, citing cases, and distinguishing *Gillett v. Whiting*, 120 N. Y. 402, 24 N. E. 790.

See also § 3450, *supra*, and the cases there cited.

⁴⁰ *Colton v. Oakland Bank of Savings*, 137 Cal. 376, 70 Pac. 225.

⁴¹ See *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282.

⁴² *Lacombe v. Forstall's Sons*, 123 U. S. 562, 31 L. Ed. 255; *Henry v. Travelers' Ins. Co.*, 45 Fed. 299; *Hineckley v. Pfister*, 83 Wis. 64, 53 N. W. 21. See also *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171.

⁴³ *In re Mills*, 125 N. Y. App. Div. 730, 110 N. Y. Supp. 314, modifying judgment 57 N. Y. Misc. 315, 107 N. Y. Supp. 1057, judgment aff'd 193 N. Y. 626, 86 N. E. 1128; *Tompkins v. Morton Trust Co.*, 91 N. Y. App. Div. 274, 86 N. Y. Supp. 520, aff'd 181 N. Y. 578, 74 N. E. 1126. See also § 3454, *supra*.

⁴⁴ *United States. South Dakota v.*

may be mortgaged, as between the parties, and as against third persons with notice, without any transfer of the certificates.⁴⁵ But a mortgage of shares without a transfer of the certificate or a transfer on the books of the corporation, although recorded, will not be good as against the corporation, if it has no notice thereof, or as against a bona fide purchaser or pledgee of the certificate,⁴⁶ or, according to some courts, as against a creditor of the mortgagor attaching the shares without actual notice.⁴⁷

Although every mortgage is a lien, not every lien on stock is a mortgage.⁴⁸ "The essential element of a mortgage is a transfer or conveyance of the mortgaged property from the mortgagor to the

North Carolina, 192 U. S. 286, 48 L. Ed. 448; *Toler v. East Tennessee, V. & G. Ry. Co.*, 67 Fed. 168. See also *Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 233, 33 L. Ed. 589.

Alabama. *Campbell v. Woodstock Iron Co.*, 83 Ala. 351, 3 So. 369; *Gilmer v. Morris*, 80 Ala. 78, 60 Am. Rep. 85.

Arkansas. *Merchants' & Farmers' Bank v. Citizens' Bank*, 125 Ark. 131, 187 S. W. 650; *Thompson v. Grace*, 91 Ark. 52, 134 Am. St. Rep. 52, 120 S. W. 397.

California. *Tregear v. Etiwanda Water Co.*, 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658.

Connecticut. *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161.

Rhode Island. *Greene v. Dispeau*, 14 R. I. 575.

A transfer of the transferer's interest in a corporation to secure an indebtedness at its maturity, with a provision that the transfer should be void on payment of the sum secured, with interest, was held to be a mortgage on the transferer's interest or stock in the corporation. *Boyett v. Hahn*, 197 Ala. 439, 73 So. 79.

That a deed of trust attempting to convey corporate stock may operate as a chattel mortgage, see *Oligarchy Ditch Co. v. Farm Inv. Co. (Colo.)*, 88 Pac. 443.

As to the mortgage of stock of a

water company where the water right represented thereby is appurtenant to land also covered by the mortgage, see *San Gabriel Valley Bank v. Lake View Town Co.*, 4 Cal. App. 630, 89 Pac. 360.

But a mere subscription to stock which has never been issued or delivered to the subscriber or paid for by him, while it may give him some qualified interest in or right to the stock, constitutes no tangible right capable of being mortgaged. *Cattle-men's Trust Co. of Ft. Worth v. Turner*, — Tex. Civ. App. —, 182 S. W. 438.

In *Spalding v. Paine's Adm'r*, 81 Ky. 415, 5 Ky. L. Rep. 391, it is apparently held that stock cannot be mortgaged.

As to the distinction between a pledge and a mortgage of stock, see § 3904, supra.

⁴⁵ *Jones on Pledges*, § 153; *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. Ed. 448; *Campbell v. Woodstock Iron Co.*, 83 Ala. 351, 3 So. 369; *Tregear v. Etiwanda Water Co.*, 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658.

⁴⁶ See § 3798 et seq., supra.

⁴⁷ See § 3811 et seq., supra. See also *Cates v. Baxter*, 97 Tenn. 443, 37 S. W. 219. But see *Manns v. Brookville Nat. Bank*, 73 Ind. 243.

⁴⁸ *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

mortgagee.”⁴⁹ So a provision of the by-laws giving a corporation a lien upon the shares of a stockholder for the amount of the par value thereof which may be unpaid does not constitute a mortgage.⁵⁰ Whether a transfer of stock absolute in form, but giving the transferrer the option to repurchase it within a specified time, is a mortgage or a conditional sale is a mixed question of law and fact, and is to be determined by a consideration of the peculiar circumstances of each case.⁵¹

The mortgage need not be acknowledged unless the statute so requires.⁵² Even where the statute requires chattel mortgages to be recorded, an unrecorded mortgage is good as between the parties,⁵³ although it is without any effect as against strangers to it.⁵⁴ Where the statute does not require the recording of such mortgages, the record thereof does not constitute constructive notice.⁵⁵

The mortgagee has no right to participate in the governmental affairs of the corporation until he has foreclosed the mortgage and purchased the stock at the foreclosure sale.⁵⁶

The right to redeem in equity after default continues so long as the mortgagee recognizes the mortgage as subsisting; but where a mortgagee in possession ceases to so recognize it, and deals with the property as his own, the mortgagor must bring his suit to redeem within a reasonable time.⁵⁷ In a suit to redeem the burden is on the mortgagee to account for any dividends received by him, and to establish any proper disbursements made on account of the stock.⁵⁸ “A mortgagor cannot, through any device, bargain away his right of redemption at the time of giving the mortgage.”⁵⁹ “While a mortgagor may release his equity of redemption to the mortgagee by a subsequent agreement, yet the courts view such agreements with dis-

⁴⁹ *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

⁵⁰ *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

⁵¹ *Collins v. Denny Clay Co.*, 41 Wash. 136, 82 Pac. 1012.

⁵² *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87.

In Arkansas such a mortgage is required to be acknowledged. *Merchants' & Farmers' Bank v. Citizens' Bank*, 125 Ark. 131, 187 S. W. 650.

⁵³ *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87; *Merchants' & Farmers' Bank v. Citizens' Bank*, 125 Ark. 131, 187 S. W. 650.

⁵⁴ *Merchants' & Farmers' Bank v. Citizens' Bank*, 125 Ark. 131, 187 S. W. 650.

⁵⁵ *Spalding v. Paine's Adm'r*, 81 Ky. 415, 5 Ky. L. Rep. 391; *Schuster v. Jones*, 22 Ky. L. Rep. 568, 58 S. W. 595. See also *State v. Superior Court Pierce Co.*, 14 Wash. 604, 33 L. R. A. 674, 45 Pac. 23.

⁵⁶ *Boyett v. Hahn*, 73 So. 79.

⁵⁷ *Greene v. Dispeau*, 14 R. I. 575.

⁵⁸ *Collins v. Denny Clay Co.*, 41 Wash. 136, 82 Pac. 1012.

⁵⁹ *Collins v. Denny Clay Co.*, 41 Wash. 136, 82 Pac. 1012.

trust and disfavor, and if it appears that the mortgagee has taken advantage of the necessities of the mortgagor, or that the consideration is grossly inadequate, the release will be disregarded and the original relation held to continue."⁶⁰

Where the contract does not provide any method for enforcing the mortgage, a court of equity has original jurisdiction to protect and foreclose the lien created thereby.⁶¹ Where stock is sold on foreclosure of an equitable mortgage under a decree of a court of equity, the court has power to protect the purchaser and to see that he procures a proper transfer on the books of the corporation and a perfect legal title.⁶²

§ 3945. Leases of stock. Shares of stock may be leased by their owner.⁶³

An option to lease stock must be accepted within the time, if any, therein prescribed, in order to become a binding contract.⁶⁴ Such acceptance need not be express, however, but may be implied from the acts and conduct of the party to whom the option runs.⁶⁵

As in other cases, in construing a lease of stock, the intention of the parties must control, and that intention is to be arrived at by considering the instrument as a whole.⁶⁶

If a lease is invalid and unenforceable because not in writing, the owner of the stock may nevertheless recover from the lessee for its use.⁶⁷ The covenants of the lease are valid as long as the use continues, under such circumstances, and reference may be made to them for the terms and time of payment, as a measure of the value of such use.⁶⁸

⁶⁰ *Collins v. Denny Clay Co.*, 41 Wash. 136, 82 Pac. 1012.

⁶¹ *Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 233, 33 L. Ed. 589; *Boyet v. Hahn*, 197 Ala. 439, 73 So. 79.

The mortgagor is a necessary party to a suit to foreclose. *Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 233, 33 L. Ed. 589.

⁶² *Thompson v. Grace*, 91 Ark. 52, 134 Am. St. Rep. 52, 120 S. W. 397.

⁶³ *Zachry v. Nolan*, 66 Fed. 467; *Eisenhauer v. New Orleans Cotton Exchange*, 140 La. 574, 73 So. 685; *State v. Probate Court Washington Co.*, 102 Minn. 268, 113 N. W. 888.

A pledgee of stock, to whom it has been transferred on the corporate

books, may lease it. *Eisenhauer v. New Orleans Cotton Exchange*, 140 La. 574, 73 So. 685.

For a form of a lease of stock, see *State v. Probate Court Washington Co.*, 102 Minn. 268, 113 N. W. 888.

⁶⁴ *Zachry v. Nolan*, 66 Fed. 467.

⁶⁵ *Zachry v. Nolan*, 66 Fed. 467. In this case the question whether there had been such an acceptance was held to be for the jury.

⁶⁶ In *State v. Probate Court Washington Co.*, 102 Minn. 268, 113 N. W. 888, leases were held to vest a life estate in the stock in the lessee with estates in reversion in the lessors.

⁶⁷ *Zachry v. Nolan*, 66 Fed. 467.

⁶⁸ *Zachry v. Nolan*, 66 Fed. 467.

XXVII. GIFTS OF STOCK

§ 3946. General principles. Shares of stock may be made the subject of a gift by their owner to the same extent as other personal property.⁶⁹

The rules for determining the validity and effect of gifts of stock are largely the same as those applicable to gifts of personal property generally.⁷⁰ As in other cases the donor must be mentally competent,⁷¹ and the transaction must be free from fraud⁷² or undue influence.⁷³ And the donee must be competent to take.⁷⁴ There must be an intent to give on the part of the donor,⁷⁵ which must be carried

⁶⁹ **Massachusetts.** *Herbert v. Simon*, 220 Mass. 480, L. R. A. 1915 D 733, 108 N. E. 65.

Michigan. *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

Missouri. *Jones v. Jones*, — Mo. App. —, 201 S. W. 557; *Senn v. Union Premium & Mercantile Co.*, 115 Mo. App. 685, 92 S. W. 507.

Montana. *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775.

New Jersey. *Walker v. Dixon Crucible Co.*, 47 N. J. Eq. 342, 20 Atl. 885.

New York. *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315.

Pennsylvania. *Com. v. Compton*, 137 Pa. St. 138, 20 Atl. 417.

Rhode Island. *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

Virginia. *Sterling v. Wilkinson*, 83 Va. 791, 3 S. E. 533.

And see cases cited in the following notes in this and the succeeding sections.

A husband may make a valid gift of stock to his wife. *Deming v. Williams*, 26 Conn. 226, 68 Am. Dec. 386. In Massachusetts a gift of stock by a husband to his wife is valid as to his creditors if made through a third party and without any actual intention to defraud them. Where the cer-

tificates are surrendered to the corporation by the husband and new ones issued to the wife, there is a sufficient intervention by a third party, to wit, the corporation. *Tucker v. Curtin*, 148 Fed. 929.

⁷⁰ See standard works on gifts.

⁷¹ *Coffey v. Coffey*, 179 Ill. 283, 53 N. E. 590, aff'g 74 Ill. App. 241; *Groff v. Stitzer*, 75 N. J. Eq. 452, 72 Atl. 970.

⁷² A gift of stock in consideration of the donor receiving the dividends and the donee rendering him certain services for life, was held to be fraudulent and void because those provisions were not put in writing. *Groff v. Stitzer*, 75 N. J. Eq. 452, 72 Atl. 970.

⁷³ In *Groff v. Stitzer*, 75 N. J. Eq. 452, 72 Atl. 970, it was held that, under the circumstances, the burden was on the donee to rebut the presumption of undue influence, and that this burden had not been sustained.

⁷⁴ *Snowden v. Crown Cork & Seal Co.*, 114 Md. 650, Ann. Cas. 1912 A 679, 80 Atl. 510.

⁷⁵ **United States.** *Allen-West Commission Co. v. Grumbles*, 129 Fed. 287.

Iowa. *Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119.

Kentucky. *Denunzio's Receiver v. Scholtz*, 117 Ky. 182, 4 Ann. Cas. 529, 77 S. W. 715.

Massachusetts. *Morse v. Meston*, 152 Mass. 5, 24 N. E. 916; *Cummings v. Bramhall*, 120 Mass. 552.

into effect by a transfer of all the donor's right and dominion over the stock.⁷⁶ A mere unexecuted intention to make a gift is not sufficient.⁷⁷ And a promise to make a gift is not a gift, but is void and unenforceable.⁷⁸ There must be an actual or constructive delivery of the stock to the donee.⁷⁹ And the gift must also be accepted by the donee, either formally or by acts manifesting an intention on his part to accept it,⁸⁰ although an acceptance may be presumed from the fact that the gift is beneficial to the donee.⁸¹

New Hampshire. *Liscomb v. Manchester & L. R. R.*, 70 N. H. 312, 48 Atl. 284.

New Jersey. *Bailey v. Orange Memorial Hospital*, — N. J. Eq. —, 102 Atl. 7; *Farrell v. Passaic Water Co.*, 82 N. J. Eq. 97, 88 Atl. 627; *Smith v. Burnet*, 35 N. J. Eq. 314, aff'g 34 N. J. Eq. 219.

New York. *Jackson v. Twenty-Third St. R. Co.*, 88 N. Y. 520; *Richardson v. Emmett*, 61 App. Div. 205, 70 N. Y. Supp. 546, rev'd on other grounds 170 N. Y. 412, 63 N. E. 440; *In re Babcock's Estate*, 85 Misc. 256, 147 N. Y. Supp. 168, aff'd 169 App. Div. 903, 153 N. Y. Supp. 1105, 216 N. Y. 717, 111 N. E. 1084; *Crouse v. Judson*, 41 Misc. 338, 84 N. Y. Supp. 755.

Pennsylvania. *Reese v. Philadelphia Trust, Safe Deposit & Insurance Co.*, 218 Pa. 150, 120 Am. St. Rep. 880, 67 Atl. 124.

There must be an intention on the part of the donor "to absolutely and irrevocably divest himself of the title, dominion, and control of the subject of the gift in praesenti at the very time he undertakes to make the gift." *Allen-West Commission Co. v. Grumbles*, 129 Fed. 287.

In *Morse v. Meston*, 152 Mass. 5, 24 N. E. 916, the evidence was held to be insufficient to show that a decedent intended to give stock, found in a box with other securities in the possession of the wife of his executor, to her, or that he put the certificates in

the box with the intention of delivering it to her as her property.

⁷⁶ See § 3949, *infra*.

⁷⁷ *Dewey v. Barnhouse*, 75 Kan. 214, 88 Pac. 877; *Barnhouse v. Dewey*, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081; *Denunzio's Receiver v. Scholtz*, 117 Ky. 182, 4 Ann. Cas. 529, 77 S. W. 715; *Getchell v. Biddeford Nat. Bank*, 94 Me. 452, 80 Am. St. Rep. 408, 47 Atl. 895.

"There is no gift until the intention of giving is fully consummated by the donor transferring all right and dominion over the thing given to the donee." *Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119.

⁷⁸ *Thompson v. Hudgins*, 116 Ala. 93, 22 So. 632; *Noble v. Garden*, 146 Cal. 225, 2 Ann. Cas. 1001, 79 Pac. 883; *Heartt v. Sherman*, 229 Ill. 581, 82 N. E. 417; *Apache State Bank v. Daniels*, 32 Okla. 121, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914 A 520, 121 Pac. 237.

⁷⁹ See § 3947, *infra*.

⁸⁰ *Wheeler v. Mineral Farm Consol. Min. Co.*, 31 Colo. 110, 71 Pac. 1101; *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 102 N. E. 282, 100 N. E. 1049; *Denunzio's Receiver v. Scholtz*, 117 Ky. 182, 4 Ann. Cas. 529, 77 S. W. 715; *In re Babcock's Estate*, 85 N. Y. Misc. 256, 147 N. Y. Supp. 168, aff'd 169 N. Y. App. Div. 903, 153 N. Y. Supp. 1105, 216 N. Y. 717, 111 N. E. 1084; *Crouse v. Judson*, 41 N. Y. Misc. 338, 84 N. Y. Supp. 755.

⁸¹ *Denunzio's Receiver v. Scholtz*,

§ 3947. **Necessity for and sufficiency of delivery.** The general rule that to constitute a valid gift, either inter vivos or causa mortis, there must be a delivery of the thing given, is applicable to gifts of shares of stock.⁸² Delivery may be either actual or constructive

117 Ky. 182, 4 Ann. Cas. 529, 77 S. W. 715; Jones v. Jones, — Mo. App. —, 201 S. W. 557; Sparks v. Hurley, 208 Pa. 166, 101 Am. St. Rep. 926, 57 Atl. 364; Smith v. Bank of Washington, 5 Serg. & R. (Pa.) 318.

⁸² **United States.** Fowler v. Gowling, 152 Fed. 801.

Alabama. Cannon v. Birmingham Trust & Savings Co., 194 Ala. 469, 69 So. 934; Thompson v. Hudgins, 116 Ala. 93, 22 So. 632.

California. Noble v. Learned, 153 Cal. 245, 94 Pac. 1047, 7 Cal. Unrep. Cas. 297, 87 Pac. 402; Noble v. Garden, 146 Cal. 225, 2 Ann. Cas. 1001, 79 Pac. 883.

Indiana. Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 102 N. E. 282, 100 N. E. 1049; Teague v. Abbot, 51 Ind. App. 604, 100 N. E. 27.

Kansas. Barnhouse v. Dewey, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081; Dewey v. Barnhouse, 75 Kan. 214, 88 Pac. 877.

Kentucky. Denunzio's Receiver v. Scholtz, 117 Ky. 182, 4 Ann. Cas. 529, 77 S. W. 715.

Maine. Getchell v. Biddeford Nat. Bank, 94 Me. 452, 80 Am. St. Rep. 408, 47 Atl. 895.

Massachusetts. Cummings v. Bramhall, 120 Mass. 552.

Missouri. Jones v. Jones, — Mo. App. —, 201 S. W. 557; Gray v. Douthikin, 188 Mo. App. 667, 176 S. W. 514.

Montana. Leyson v. Davis, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775.

New Hampshire. Bond v. Bean, 72 N. H. 444, 101 Am. St. Rep. 686, 57 Atl. 340; Bean v. Bean, 71 N. H. 538, 53 Atl. 907; Liscomb v. Manchester & L. R. R., 70 N. H. 312, 48 Atl. 284.

New Jersey. Bailey v. Orange Memorial Hospital, — N. J. Eq. —, 102 Atl. 7; Farrell v. Passaic Water Co., 82 N. J. Eq. 97, 88 Atl. 627; Matthews v. Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054; Smith v. Burnet, 35 N. J. Eq. 314, aff'g 34 N. J. Eq. 219.

New York. In re Cornell's Estate, 170 N. Y. 423, 63 N. E. 445; In re Morgan, 104 N. Y. 74, 9 N. E. 861; Jackson v. Twenty-Third St. R. Co., 88 N. Y. 520; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; In re Mills' Estate, 172 App. Div. 530, 158 N. Y. Supp. 1100, aff'd 219 N. Y. 642, 114 N. E. 1072; In re Babcock's Estate, 85 Misc. 256, 147 N. Y. Supp. 168, aff'd 169 App. Div. 903, 153 N. Y. Supp. 1105, 216 N. Y. 717, 111 N. E. 1084; Crouse v. Judson, 41 Misc. 338, 84 N. Y. Supp. 755; Kernochan v. Russell, 36 Misc. 817, 74 N. Y. Supp. 841, aff'g 34 Misc. 824, 71 N. Y. Supp. 1139.

North Carolina. Zollicoffer v. Zollicoffer, 168 N. C. 326, 84 S. E. 349.

Oklahoma. Apache State Bank v. Daniels, 32 Okla. 121, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914 A 520, 121 Pac. 237.

Pennsylvania. Reese v. Philadelphia Trust, Safe Deposit & Insurance Co., 218 Pa. 150, 120 Am. St. Rep. 880, 67 Atl. 124; In re Roberts' Appeal, 85 Pa. St. 84.

The question of delivery is essentially the same whether the gift is inter vivos or causa mortis. Teague v. Abbot, 51 Ind. App. 604, 100 N. E. 27.

"Mere words unaccompanied by delivery could only be a promise, and there being no consideration the promise could not be enforced, and therefore the gift would not be complete.

in form,⁸³ and may be by assignment of the certificate and manual delivery thereof to the donee,⁸⁴ or by an assignment, surrender and

In order that the gift be valid, it must be completely executed, because if there remains anything to be done the donor may refuse to do it." *Apache State Bank v. Daniels*, 32 Okla. 121, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914 A 520, 121 Pac. 237.

Any delivery which transfers either the legal or the equitable title is sufficient. *Gilkinson v. Third Ave. R. Co.*, 47 N. Y. App. Div. 472, 63 N. Y. Supp. 792.

"A delivery which vests in the donee the equitable title is sufficient without a complete transfer of the legal title." *First Nat. Bank v. Holland*, 99 Va. 495, 55 L. R. A. 155, 86 Am. St. Rep. 898, 39 S. E. 126. And see to the same effect *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

⁸³ *Alabama*. *Thompson v. Hudgins*, 116 Ala. 93, 22 So. 632.

California. *Noble v. Garden*, 146 Cal. 225, 2 Ann. Cas. 1001, 79 Pac. 883.

Indiana. *Teague v. Abbot*, 51 Ind. App. 604, 100 N. E. 27.

New York. In *re Mills' Estate*, 172 App. Div. 530, 158 N. Y. Supp. 1100, aff'd 219 N. Y. 642, 114 N. E. 1072; In *re Babcock's Estate*, 85 Misc. 256, 147 N. Y. Supp. 168, aff'd 169 App. Div. 903, 153 N. Y. Supp. 1105, 216 N. Y. 717, 111 N. E. 1084; *Crouse v. Judson*, 41 Misc. 338, 84 N. Y. Supp. 755; *Kernochan v. Russell*, 36 Misc. 817, 74 N. Y. Supp. 841, aff'd 34 Misc. 824, 71 N. Y. Supp. 1139.

Pennsylvania. *Reese v. Philadelphia Trust, Safe Deposit & Insurance Co.*, 218 Pa. 150, 120 Am. St. Rep. 880, 67 Atl. 124.

There may be a constructive delivery "by delivery of the means of obtaining possession." *Teague v. Abbot*, 51 Ind. App. 604, 100 N. E. 27.

Manual delivery was held to be un-

necessary where the donor had taught the donee the combination of the safe in which the stock was kept. *Teague v. Abbot*, 51 Ind. App. 604, 100 N. E. 27.

Where stock was issued to an employee of a corporation, who had previously received an interest in the profits in lieu of salary, and the employee gave his notes therefor, and thereafter the proprietor of the business declared his intention to give him the stock, tore up the notes, and delivered the certificate to him, it was held that there was a sufficient delivery. *Denunzio's Receiver v. Scholtz*, 117 Ky. 182, 4 Ann. Cas. 529, 77 S. W. 715.

⁸⁴ *California*. *Calkins v. Equitable Building & Loan Ass'n*, 126 Cal. 531, 59 Pac. 30.

Illinois. *Coffey v. Coffey*, 179 Ill. 283, 53 N. E. 590, aff'd 74 Ill. App. 241.

Iowa. *Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119.

Massachusetts. *Bone v. Holmes*, 195 Mass. 495, 81 N. E. 290.

Missouri. *Gray v. Doubikin*, 188 Mo. App. 667, 176 S. W. 514.

New Jersey. *Walker v. Dixon Crucible Co.*, 47 N. J. Eq. 342, 20 Atl. 885.

New York. *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315; In *re Bullard's Estate*, 76 App. Div. 207, 78 N. Y. Supp. 491.

Pennsylvania. *Reese v. Philadelphia Trust, Safe Deposit & Insurance Co.*, 218 Pa. 150, 120 Am. St. Rep. 880, 67 Atl. 124.

Where an indorsement transferring stock was made on the certificates, reserving dividends during the life of the donor, and the certificates were placed in an envelope and delivered to the donee, with instructions not to open the same until the donor's death, there being a present intention

cancellation of the old certificate and the issuance and delivery of a new one to the donee.⁸⁵ Delivery of the certificate with a written assignment, but without indorsement, is sufficient.⁸⁶ And, by the weight of authority, a valid gift, either inter vivos or causa mortis, may be made by delivery of the certificate, accompanied by words of absolute and present gift, without any written assignment or indorsement.⁸⁷ An indorsement or assignment has been held to be

to make a gift of the stock, it was held that there was an executed gift of the stock in the lifetime of the donor, within Cal. Civ. Code, § 324, making stock personal property, and transferable, as between the parties, by indorsement and delivery of the certificates. *Calkins v. Equitable Building & Loan Ass'n*, 126 Cal. 531, 59 Pac. 30.

⁸⁵ *Snowden v. Crown Cork & Seal Co.*, 114 Md. 650, Ann. Cas. 1912 A 679, 80 Atl. 510.

Where a husband, for the purpose of carrying out the wishes of his deceased wife, renounced his right to administer on her estate, requested that letters be granted to his son, joined in the latter's bond, and consented to the surrender of stock certificates standing in the wife's name and to which he was entitled as distributee, and the issuance of new certificates in the names of his children, it was held that this was a gift by him of the stock to them. *Bayley v. Bayley*, 141 N. Y. App. Div. 243, 126 N. Y. Supp. 102.

⁸⁶ *Stone v. Hackett*, 12 Gray (Mass.) 227; *Curtis v. Crossley*, 59 N. J. Eq. 358, 45 Atl. 905; *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

⁸⁷ *United States*. In re 35% Automobile Supply Co., 247 Fed. 377. See also *Allen-West Commission Co. v. Grumbles*, 129 Fed. 287.

Colorado. *Grimes v. Barndollar*, 58 Colo. 421, 148 Pac. 256.

Connecticut. *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663.

Iowa. *Smith v. Meeker*, 153 Iowa 655, 133 N. W. 1058.

Maine. *Brown v. Crafts*, 98 Me. 40, 56 Atl. 213.

Massachusetts. *Herbert v. Simson*, 220 Mass. 480. See also *Boston Safe Deposit & Trust Co. v. Adams*, 224 Mass. 442, L. R. A. 1916 F 488, 113 N. E. 277.

Montana. *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775, writ of error dismissed 170 U. S. 36, 42 L. Ed. 939.

New Hampshire. *Bond v. Bean*, 72 N. H. 444, 101 Am. St. Rep. 686, 57 Atl. 340.

New York. *Ridden v. Thrall*, 125 N. Y. 572, 11 L. R. A. 684, 21 Am. St. Rep. 758, 26 N. E. 627; In re *Mills' Estate*, 172 App. Div. 530, 158 N. Y. Supp. 1100, aff'd 219 N. Y. 642, 114 N. E. 1072; *Gilkinson v. Third Ave. R. Co.*, 47 App. Div. 472, 63 N. Y. Supp. 792; *Kernochoan v. Russell*, 36 Misc. 817, 74 N. Y. Supp. 841, aff'g 34 Misc. 824, 71 N. Y. Supp. 1139; *Walsh v. Sexton*, 55 Barb. 251.

Pennsylvania. *Com. v. Crompton*, 137 Pa. St. 138, 20 Atl. 417; *O'Donnell v. Gaffney*, 22 Pa. Super. Ct. 316.

Rhode Island. *Hopkins v. Manchester*, 16 R. I. 663, 7 L. R. A. 387, 19 Atl. 243. See *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

Vermont. See *Watson v. Watson*, 69 Vt. 243, 39 Atl. 201.

Virginia. *First Nat. Bank v. Holland*, 99 Va. 495, 55 L. R. A. 155, 86 Am. St. Rep. 898, 39 S. E. 126; *Thomas' Adm'r v. Lewis*, 89 Va. 1,

necessary in some states, however, in the case of a gift *inter vivos*.⁸⁸ And the absence of an assignment or indorsement is evidence bearing upon the donor's intention, to be considered by the jury with the other evidence in the case.⁸⁹

Manual delivery of the certificates is generally held to be essential if they are present and their delivery is practicable,⁹⁰ since dominion over the stock is most effectually secured by possession of the certificates.⁹¹ And it has been held that a mere written assignment of the stock without delivery is insufficient under such circumstances,⁹²

18 L. R. A. 170, 37 Am. St. Rep. 848, 15 S. E. 389.

This is true of a gift *causa mortis* of national bank stock. *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775, writ of error dismissed 170 U. S. 36, 42 L. Ed. 939.

The delivery of the certificate, "without formal indorsement or assignment, is sufficient to effectuate the gift where it is the intent and purpose of the donor to transfer the ownership at once." *Herbert v. Simson*, 220 Mass. 480, L. R. A. 1915 D 733, 108 N. E. 65.

The donee, under such circumstances, does not acquire the legal title to the shares, or their ownership in the sense that no further act is required to perfect his right. But, as between himself and the donor, he acquires the equitable title to the shares and some legal as well as equitable rights, and a court of equity has jurisdiction to compel a formal assignment by the donor, or his executor in case of his death, and a transfer on the books of the corporation. Such a gift is complete and not inchoate. *Herbert v. Simson*, 220 Mass. 480, L. R. A. 1915 D 733, 108 N. E. 65.

The delivery of the stock with an intent to make a completed gift, and its acceptance by the donee, vests in him the equitable title to the property. *Bond v. Bean*, 72 N. H. 444, 101 Am. St. Rep. 686, 57 Atl. 340.

And see generally § 3786, *supra*.

⁸⁸ *Sinnott v. Hibernia Nat. Bank*, 105 La. 705, 30 So. 233; *Baltimore Retort & Fire Brick Co. v. Mali*, 65 Md. 93, 57 Am. Rep. 304, 3 Atl. 286; *Pennington v. Gittings*, 2 Gill & J. (Md.) 209; *Heyer v. Sullivan*, — N. J. Eq. —, 102 Atl. 248; *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054.

⁸⁹ *Herbert v. Simson*, 220 Mass. 480, L. R. A. 1915 D 733, 108 N. E. 65; *Bond v. Bean*, 72 N. H. 444, 101 Am. St. Rep. 686, 57 Atl. 340.

⁹⁰ *Allen-West Commission Co. v. Grumbles*, 129 Fed. 287; *Gray v. Doubikin*, 188 Mo. App. 667, 176 S. W. 514; *Richardson v. Emmett*, 170 N. Y. 412, 63 N. E. 440, rev'g on other grounds 61 N. Y. App. Div. 205, 70 N. Y. Supp. 546; *Jackson v. Twenty-Third St. R. Co.*, 88 N. Y. 520.

But see *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313, where apparently the certificates were retained by the donor and only an assignment of them was delivered.

⁹¹ *Allen-West Commission Co. v. Grumbles*, 129 Fed. 287.

⁹² Where it is within the power of an alleged donor to deliver the certificates, but instead thereof the donor reads the certificates and delivers a mere written assignment of the stock, a valid gift of the stock will not be deemed to have been made. *Allen-West Commission Co. v. Grumbles*, 129 Fed. 287.

although there is authority to the contrary.⁹³ It has also been held that actual delivery of the certificate is unnecessary where it is already in the possession of the donee,⁹⁴ or where it is at a distance, so that actual delivery is impossible.⁹⁵ Delivery of the keys of a safe deposit box containing the certificates has also been held to be sufficient.⁹⁶ But, on the other hand, delivery of a key to a box containing the certificates has been held to be insufficient, where the box is readily accessible and the certificates might be easily removed.⁹⁷ The effect in this respect of a transfer of the stock to the donee on the corporate books will be considered in a subsequent section.⁹⁸

Delivery need not be made directly to the donee,⁹⁹ but a delivery to a third person as agent or trustee for the use of the donee is sufficient.¹ And there may be a valid gift by a declaration on the

⁹³ *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313.

In *Colton v. Williams*, 65 Ill. App. 466, it was held that delivery of the certificate was not essential, and in this case there was not even a written assignment.

In *Curtis v. Crossley*, 59 N. J. Eq. 358, 45 Atl. 905, it is said that a gift would probably be complete by delivery of a deed assigning the stock without the delivery of the certificates.

In *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535, it is said that it has been held that a delivery of an assignment without delivery of the certificates and without registration constitutes a valid gift.

And see *Tarbox v. Grant*, 56 N. J. Eq. 199, 39 Atl. 378, as to gifts of choses in action generally.

⁹⁴ In *re Mills' Estate*, 172 N. Y. App. Div. 530, 158 N. Y. Supp. 1100, aff'd 219 N. Y. 642, 114 N. E. 1072.

⁹⁵ In *re Mills' Estate*, 172 N. Y. App. Div. 530, 158 N. Y. Supp. 1100, aff'd 219 N. Y. 642, 114 N. E. 1072.

⁹⁶ *Gilkinson v. Third Ave. R. Co.*, 47 N. Y. App. Div. 472, 63 N. Y. Supp. 792; *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535; *Thomas' Adm'r v. Lewis*, 89 Va. 1, 18 L. R. A. 170, 37 Am. St. Rep. 848, 15 S. E. 389.

⁹⁷ *Apache State Bank v. Daniels*, 32 Okla. 121, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914 A 520, 121 Pac. 237.

⁹⁸ See § 3948, *infra*.

⁹⁹ *Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119; *Grymes v. Hone*, 49 N. Y. 17; In *re Mills' Estate*, 172 N. Y. App. Div. 530, 158 N. Y. Supp. 1100, aff'd 219 N. Y. 642, 114 N. E. 1072.

See also cases cited in the following notes.

¹ *Iowa*. *Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119; *Larimer v. Beardsley*, 130 Iowa 706, 107 N. W. 935.

Massachusetts. *Stone v. Hackett*, 12 Gray 227.

New York. *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; In *re Mills' Estate*, 172 App. Div. 530, 158 N. Y. Supp. 1100, aff'd 219 N. Y. 642, 114 N. E. 1072.

Pennsylvania. *Smith v. Bank of Washington*, 5 Serg. & R. 318.

Rhode Island. *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

“Delivery to a third person as agent or trustee for the use of the donee, and under such circumstances as indicate that the donor relinquishes all control over the property and intends to vest title in the donee, is quite as effectual as manual delivery directly

part of the donor that he holds the stock in trust for the donee.² But the fact that stock is taken by one person in the name of another does not necessarily constitute a delivery to the latter.³

Possession of certificates indorsed in blank which are registered in the name of another will not give rise to a presumption of a gift of the stock by the latter to the possessor.⁴ But where there is competent evidence tending to show an intention to give and delivery of the certificates, possession thereof by the donee is prima facie evidence of property and is conclusive unless impeached or explained.⁵

§ 3948. Necessity for and effect of transfer on corporate books.

According to the weight of authority a transfer of the stock to the donee on the corporate books is not essential to a valid gift as between the parties, and hence as between them the fact that it remains in the name of the donor on the books does not defeat the gift or affect the title of the donee.⁶ But there is some authority

to him." *Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119.

² *United States*. *Fowler v. Gowing*, 152 Fed. 801.

Kansas. *Barnhouse v. Dewey*, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081; *Dewey v. Barnhouse*, 75 Kan. 214, 88 Pac. 877.

Maine. *Getchell v. Biddeford Nat. Bank*, 94 Me. 452, 80 Am. St. Rep. 408, 47 Atl. 895.

Missouri. *Mize v. Bates County Nat. Bank*, 60 Mo. App. 358.

Pennsylvania. *Dickerson's Appeal*, 115 Pa. St. 198, 2 Am. St. Rep. 547, 8 Atl. 64.

³ *Barnhouse v. Dewey*, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081; *Dewey v. Barnhouse*, 75 Kan. 214, 88 Pac. 877.

⁴ *In re Perry*, 129 N. Y. App. Div. 587, 114 N. Y. Supp. 246.

⁵ *Barnhouse v. Dewey*, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081; *Liscomb v. Manchester & L. R. R.*, 70 N. H. 312, 48 Atl. 284.

⁶ *United States*. *Allen-West Commission Co. v. Grumbles*, 129 Fed. 287.

California. *Calkins v. Equitable Building & Loan Ass'n*, 126 Cal. 531, 59 Pac. 30.

Connecticut. *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663.

Iowa. *Smith v. Meeker*, 153 Iowa 655, 133 N. W. 1058; *Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119; *Larimer v. Beardsley*, 130 Iowa 706, 107 N. W. 935.

Kansas. *Barnhouse v. Dewey*, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081.

Massachusetts. *Herbert v. Simson*, 220 Mass. 480, L. R. A. 1915 D 733, 108 N. E. 65; *Bone v. Holmes*, 195 Mass. 495, 81 N. E. 290; *Stone v. Hackett*, 12 Gray 227.

Montana. *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775, writ of error dismissed 170 U. S. 36, 42 L. Ed. 939.

New Jersey. *Farrell v. Passaic Water Co.*, 82 N. J. Eq. 97, 88 Atl. 627.

New York. *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313. See also *In re Bullard's Estate*, 76 App. Div. 207, 78 N. Y. Supp. 491.

to the effect that a transfer on the books is essential to a delivery.⁷

It is generally held that a transfer of stock from the donor to the donee on the corporate books, standing alone, is not sufficient to constitute a valid gift,⁸ although prima facie such a transfer followed by dominion over the stock by the transferee would vest the title in him.⁹ But there is authority to the effect that such a transfer

North Carolina. *Zollicoffer v. Zollicoffer*, 168 N. C. 326, 84 S. E. 349.

Pennsylvania. *Reese v. Philadelphia Trust, Safe Deposit & Insurance Co.*, 218 Pa. 150, 120 Am. St. Rep. 880, 67 Atl. 124.

Rhode Island. *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

Virginia. *First Nat. Bank v. Holland*, 99 Va. 495, 55 L. R. A. 155, 86 Am. St. Rep. 898, 39 S. E. 126.

As to the necessity for a transfer on the books as between the parties generally, see § 3794, *supra*.

As to the effect of unregistered transfers as against creditors of the transferrer, see § 3811, *supra*.

As to the effect of unregistered transfers as against the corporation, see § 3798, *supra*.

⁷ *Baltimore Retort & Fire Brick Co. v. Mali*, 65 Md. 93, 57 Am. Rep. 304, 3 Atl. 286; *Pennington v. Gittings*, 2 Gill & J. (Md.) 208.

⁸ *Jones v. Jones*, — Mo. App. —, 201 S. W. 557; *Jackson v. Twenty-Third St. R. Co.*, 88 N. Y. 520; *Richardson v. Emmett*, 61 N. Y. App. Div. 205, 70 N. Y. Supp. 546, *rev'd* on other grounds. 170 N. Y. 412, 63 N. E. 440. See also *In re Crawford*, 113 N. Y. 560, 5 L. R. A. 71, 21 N. E. 692.

Where a person to whom stock had been issued by a railroad company, in payment for a right of way over his premises, induced it to transfer the same to his children on the books and to issue new certificates to them, it was held that, regardless of whether there was a valid gift of the stock to

the children as between the father and them, he could not deny their ownership as against the corporation, and hence could not rescind the transaction by which he obtained the stock from it since he could not place it in statu quo. *Francis v. New York & B. E. R. Co.*, 108 N. Y. 93, 15 N. E. 192.

The fact that a husband purchases stock and has the certificates made out in his wife's name does not constitute a gift where he never delivers them to her or declares a trust in respect to them in her favor. The relationship is a circumstance to be considered, but is not controlling. *Getchell v. Biddeford Nat. Bank*, 94 Me. 452, 80 Am. St. Rep. 408, 47 Atl. 895.

⁹ *Richardson v. Emmett*, 61 N. Y. App. Div. 205, 70 N. Y. Supp. 546, *rev'd* on other grounds 170 N. Y. 412, 63 N. E. 440; *In re Babcock's Estate*, 85 N. Y. Misc. 256, 147 N. Y. Supp. 168, *aff'd* 169 N. Y. App. Div. 903, 153 N. Y. Supp. 1105, 216 N. Y. 717, 111 N. E. 1084. See also *Wheeler v. Mineral Farm Consol. Min. Co.*, 31 Colo. 110, 71 Pac. 1101.

Where the owner of stock offers to donate it to the company, and executes the gift by transferring the stock, or clearly and unmistakably manifesting an intention to effectuate it, he thereby parts with his property, and an action by the corporation will lie to protect or enforce its rights thereto. *Wheeler v. Mineral Farm Consol. Min. Co.*, 31 Colo. 110, 71 Pac. 1101.

constitutes a sufficient delivery even though the donor retains possession of the certificates.¹⁰

§ 3949. Transfer of title, dominion and control. To constitute a valid gift inter vivos, there must be an absolute and irrevocable transfer of the present title, dominion and control of the stock from the donor to the donee.¹¹ The delivery in such case must be absolute

¹⁰ *In re Roberts' Appeal*, 85 Pa. St. 84. See also *Sparks v. Hurley*, 208 Pa. 166, 101 Am. St. Rep. 926, 57 Atl. 364.

Placing stock in the name of the donee was held to be a completed gift in *Goodwir v. Hampton Transportation Co.*, 133 Mich. 229, 94 N. W. 729.

A transfer of stock on the books from a husband to his wife is sufficient, in equity, to constitute a gift to her. And the same is true where the husband purchases stock and has the same transferred directly to his wife by the vendor. *Deming v. Williams*, 26 Conn. 226, 68 Am. Dec. 386.

¹¹ **United States.** *Allen-West Commission Co. v. Grumbles*, 129 Fed. 287.

Connecticut. *Deming v. Williams*, 26 Conn. 226, 68 Am. Dec. 386.

Indiana. *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 102 N. E. 282, 100 N. E. 1049.

Iowa. *Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119.

Maine. *Brown v. Crafts*, 98 Me. 40, 56 Atl. 213.

Maryland. *Bauernschmidt v. Bauernschmidt*, 97 Md. 35, 54 Atl. 637.

Massachusetts. *Cummings v. Bramhall*, 120 Mass. 552; *Stone v. Hackett*, 12 Gray 227.

New Hampshire. *Walker v. Walker*, 66 N. H. 390, 27 L. R. A. 799, 49 Am. St. Rep. 616, 31 Atl. 14.

New Jersey. *Bailey v. Orange Memorial Hospital*, — N. J. Eq. —, 102 Atl. 7; *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054.

New York. *In re Morgan*, 104 N. Y. 74, 9 N. E. 861; *Jackson v.*

Twenty-Third St. R. Co., 88 N. Y. 520; *Richardson v. Emmett*, 61 App. Div. 205, 70 N. Y. Supp. 546, rev'd on other grounds 170 N. Y. 412, 63 N. E. 440; *Gilkinson v. Third Ave. R. Co.*, 47 App. Div. 472, 63 N. Y. Supp. 792; *In re Babcock's Estate*, 85 Misc. 256, 147 N. Y. Supp. 168, aff'd 169 App. Div. 903, 153 N. Y. Supp. 1105, 216 N. Y. 717, 111 N. E. 1084; *Crouse v. Judson*, 41 Misc. 338, 84 N. Y. Supp. 755.

Pennsylvania. *Reese v. Philadelphia Trust, Safe Deposit & Insurance Co.*, 218 Pa. 150, 120 Am. St. Rep. 880, 67 Atl. 124.

Rhode Island. *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

Virginia. *First Nat. Bank v. Holland*, 99 Va. 495, 55 L. R. A. 155, 86 Am. St. Rep. 898, 39 S. E. 126; *Sterling v. Wilkinson*, 83 Va. 791, 3 S. E. 533.

The delivery "must be such as to vest the donee with control and dominion over the property and to absolutely divest the donor of his dominion and control." *Jackson v. Twenty-Third St. R. Co.*, 88 N. Y. 520, quoted with approval in *Richardson v. Emmett*, 61 N. Y. App. Div. 205, 70 N. Y. Supp. 546, rev'd on other grounds 170 N. Y. 412, 63 N. E. 440.

"There can be no perfected gift where there has been no complete surrender of dominion over the thing given. * * * There can be no gift which the law will recognize where there is reserved to the donor,

and unconditional.¹² The title vests in praesenti, and the gift goes into absolute and immediate effect.¹³ But "if the gift is absolute,

either expressly or as a result of the circumstances and conditions attending the transaction, a power of revocation or a dominion over the subject of the gift. There must be no locus poenitentiae, and there is always a locus poenitentiae when the supposed donor may at any time undo what he has done." *Bauernschmidt v. Bauernschmidt*, 97 Md. 35, 54 Atl. 637, quoted in part with approval in *Harvey v. Stowe*, 219 Fed. 17, aff'd 241 U. S. 199, 60 L. Ed. 953.

"The gift of a right of action for conversion of" the stock, "or of the possibility of compelling a delivery or transfer of it by a suit in equity, is not sufficient, when the donor retains the unrestrained power to place the title, possession, and control of the stock beyond the reach of the donee at any time, and thereby to defeat such a suit in equity." *Allen-West Commission Co. v. Grumbles*, 129 Fed. 287.

There is no valid gift where it is always within the power of the donor to cancel the assignment of the stock, and make such other disposition of it as he sees fit. *Bailey v. Orange Memorial Hospital*, — N. J. Eq. —, 102 Atl. 7.

In order to constitute a gift by a husband to his wife, the transfer to her must be irrevocably to her for her separate use. *Deming v. Williams*, 26 Conn. 226, 68 Am. Dec. 386.

Where an owner of stock divided a portion thereof, gratuitously, among members of his family, and later took back, handled and voted the stock as business exigencies rendered convenient, a completed gift was not made. *Bauernschmidt v. Bauernschmidt*, 97 Md. 35, 54 Atl. 637.

Where a safe deposit box was rented by a husband in his own and his

wife's name, each having a right of use thereof, it being agreed that the holding was as "joint tenants, the survivor * * * to have access thereto in case of the death of either," and securities owned by the husband were placed in the box by the husband, who gave one key to his wife, retaining the other, it was held that there was not a complete gift of the securities to the wife. *Bauernschmidt v. Bauernschmidt*, 97 Md. 35, 54 Atl. 637.

In *First Nat. Bank v. Holland*, 99 Va. 495, 55 L. R. A. 155, 86 Am. St. Rep. 898, 39 S. E. 126, the language used by the donor in a will and a deed of trust in respect to stock which he had previously given to his wife was held to be a recognition of the gift as previously made and to be confirmatory, rather than derogatory, of her prior title.

¹² *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 102 N. E. 282, 100 N. E. 1049; *Teague v. Abbot*, 51 Ind. App. 604, 100 N. E. 27; *Sterling v. Wilkinson*, 83 Va. 791, 3 S. E. 533.

¹³ **United States.** *Allen-West Commission Co. v. Grumbles*, 129 Fed. 287.

Indiana. *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 102 N. E. 282, 100 N. E. 1049; *Teague v. Abbot*, 51 Ind. App. 604, 100 N. E. 27.

New Hampshire. *Bean v. Bean*, 71 N. H. 538, 53 Atl. 907; *Walker v. Walker*, 66 N. H. 390, 27 L. R. A. 799, 49 Am. St. Rep. 616, 31 Atl. 14.

New Jersey. *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054.

Pennsylvania. *Reese v. Philadelphia Trust, Safe Deposit & Insurance Co.*, 218 Pa. 150, 120 Am. St. Rep. 880, 67 Atl. 124.

Rhode Island. *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

the mere postponement of the enjoyment until the death of the donor is not material, and will not defeat it";¹⁴ nor will the fact that the donor reserves the dividends,¹⁵ or the fact that the dividends are paid to him.¹⁶ "The test seems to be whether any interest in the property itself has been retained as distinguished from the mere use or enjoyment."¹⁷ Nor, after a gift is made complete by delivery, is it necessary that the donee shall retain possession of the stock, but it may be redelivered to the donor, as the agent of the donee, for safe-keeping or other purposes.¹⁸ And hence the fact that the donor

Virginia. *Sterling v. Wilkinson*, 83 Va. 791, 3 S. E. 533.

The property must be delivered absolutely and unconditionally, and the gift must take effect at once and completely. *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 102 N. E. 282, 100 N. E. 1049.

"A gift inter vivos must be complete in praesenti; it has no reference to the future." *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054.

¹⁴*Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119.

¹⁵**California.** *Calkins v. Equitable Building & Loan Ass'n*, 126 Cal. 531, 59 Pac. 30.

Iowa. *Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119.

Maryland. *Snowden v. Crown Cork & Seal Co.*, 114 Md. 650, Ann. Cas. 1912 A 679, 80 Atl. 510.

Massachusetts. *Bone v. Holmes*, 195 Mass. 495, 81 N. E. 290.

New York. See *In re Cornell's Estate*, 170 N. Y. 423, 63 N. E. 445.

¹⁶*Stone v. Hackett*, 12 Gray (Mass.) 227; *First Nat. Bank v. Holland*, 99 Va. 495, 55 L. R. A. 155, 86 Am. St. Rep. 898, 39 S. E. 126.

Especially is this true where the donor reserves a life interest in the stock. *Larimer v. Beardsley*, 130 Iowa 706, 107 N. W. 935; *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

¹⁷*Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119.

¹⁸**United States.** *Harvey v. Stowe*,

219 Fed. 17, aff'd 241 U. S. 199, 60 L. Ed. 953.

Iowa. *Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119; *Larimer v. Beardsley*, 130 Iowa 706, 107 N. W. 935.

Missouri. *Jones v. Jones*, — Mo. App. —, 201 S. W. 557.

New Jersey. *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054.

New York. *Richardson v. Emmett*, 61 App. Div. 205, 70 N. Y. Supp. 546, rev'd on other grounds 170 N. Y. 412, 63 N. E. 440; *Crouse v. Judson*, 41 Misc. 338, 84 N. Y. Supp. 755.

Rhode Island. *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

"Where there has been a completed gift, the mere fact that naked possession has been acquired by the donor for the temporary purpose of enjoying the use only," as for the collection of the dividends, "without intent to reinvest him with title, will not disturb it." *Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119.

So it may be redelivered to the donor temporarily to enable him to vote it, etc., without affecting the donee's title. *Harvey v. Stowe*, 219 Fed. 17, aff'd 241 U. S. 199, 60 L. Ed. 953.

Delivery of an assignment in trust to the trustee is not defeated by a return of the instrument to the donor. *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912 C 1221, 78 Atl. 535.

had possession of and exercised dominion over the stock after that time is subject to explanation.¹⁹

Gifts *causa mortis*, are conditional on the death of the donor, and are subject to be defeated in case he survives,²⁰ and this is true regardless of whether such a condition is expressed when the gift is made.²¹ But with this exception the gift must be absolute, the same as in the case of gifts *inter vivos*,²² and, as we have seen, a delivery of the stock to the donee is equally essential.²³

§ 3950. Revocation. A gift *inter vivos* of stock, when once made, cannot be revoked or recalled by the donor without the consent of the donee,²⁴ nor can the subsequent acts of the donor, to which the donee is not a party and to which he does not consent, affect his title.²⁵ A

¹⁹ *Jones v. Jones*, — Mo. App. —, 201 S. W. 557; *Richardson v. Emmett*, 61 N. Y. App. Div. 205, 70 N. Y. Supp. 546, rev'd on other grounds 170 N. Y. 412, 63 N. E. 440. See also *In re Brandreth's Estate*, 58 N. Y. App. Div. 575, 69 N. Y. Supp. 142, rev'd 169 N. Y. 437, 58 L. R. A. 148, 62 N. E. 563.

²⁰ *Arkansas*. *Hatcher v. Buford*, 60 Ark. 169, 27 L. R. A. 507, 29 S. W. 641.

Indiana. *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 102 N. E. 282, 100 N. E. 1049; *Teague v. Abbot*, 51 Ind. App. 604, 100 N. E. 27.

Montana. *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775, writ of error dismissed 170 U. S. 36, 42 L. Ed. 939.

New Hampshire. *Bean v. Bean*, 71 N. H. 538, 53 Atl. 907.

New Jersey. *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054.

²¹ *Hatcher v. Buford*, 60 Ark. 169, 27 L. R. A. 507, 29 S. W. 641; *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775, writ of error dismissed 170 U. S. 36, 42 L. Ed. 939.

The condition is always implied when the gift is one *causa mortis*. *Bean v. Bean*, 71 N. H. 538, 53 Atl. 907.

²² *Leyson v. Davis*, 17 Mont. 220,

31 L. R. A. 429, 42 Pac. 775, writ of error dismissed 170 U. S. 36, 42 L. Ed. 939.

The gift is subject only to the condition that it will be defeated by the survival of the donor. *Teague v. Abbot*, 51 Ind. App. 604, 100 N. E. 27.

²³ See § 3947, *supra*.

²⁴ *Illinois*. *Coffey v. Coffey*, 179 Ill. 283, 53 N. E. 590, aff'd 74 Ill. App. 241.

Indiana. *Teague v. Abbot*, 51 Ind. App. 604, 100 N. E. 27.

New Jersey. *Walker v. Joseph Dixon Crucible Co.*, 47 N. J. Eq. 342, 20 Atl. 885.

New York. *In re Bullard's Estate*, 76 App. Div. 207, 78 N. Y. Supp. 491.

Pennsylvania. *In re Delamater's Estate*, 1 Whart. 362.

²⁵ *Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119; *First Nat. Bank v. Holland*, 99 Va. 495, 55 L. R. A. 155, 86 Am. St. Rep. 898, 39 S. E. 126.

The title of the donee cannot be affected by the fact that the donor subsequently carries the stock on his private books as though it were his own. *Harvey v. Stowe*, 219 Fed. 17, aff'd 241 U. S. 199, 60 L. Ed. 953.

The donor cannot thereafter sell the stock to another. *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315.

gift causa mortis, on the other hand, may be revoked at any time before his death,²⁶ and it is generally held that his recovery will ipso facto work a revocation.²⁷

XXVIII. MEMBERSHIP IN CORPORATIONS

§ 3951. Power to admit members or to exclude from membership.

In the absence of restrictions in its charter, a corporation has the implied or incidental power to admit new members.²⁸ And when the charter does not regulate or restrict the admission of new members, the whole matter is within the control of the corporation.²⁹ In the absence of charter or statutory restrictions, a corporation may determine who shall be admitted to membership, and how they shall be admitted. It may exclude any person whom it deems unfit for membership. Indeed, in the absence of restrictions, it may act arbitrarily, and exclude any persons it may see fit, and the courts have no power to interfere.³⁰ So when it offers stock for sale, it has the right to

²⁶ **Arkansas.** *Hatcher v. Buford*, 60 Ark. 169, 27 L. R. A. 507, 29 S. W. 641.

Indiana. *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 102 N. E. 282, 100 N. E. 1049.

Montana. *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775, writ of error dismissed 170 U. S. 36, 42 L. Ed. 939.

New York. *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Collins v. Collins*, 11 Misc. 28, 31 N. Y. Supp. 1017.

Oklahoma. *Apache State Bank v. Daniels*, 32 Okla. 121, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914 A 520, 121 Pac. 237.

²⁷ *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 102 N. E. 282, 100 N. E. 1049; *Teague v. Abbot*, 51 Ind. App. 604, 100 N. E. 27; *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775, writ of error dismissed 170 U. S. 36, 42 L. Ed. 939; *Apache State Bank v. Daniels*, 32 Okla. 121, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914 A 520, 121 Pac. 237.

²⁸ A statute incorporating certain persons and their associates as a his-

torical society, and providing that they and their successors shall be capable of enjoying all privileges and franchises incident to a corporation, gives the corporation, as one of its incidental powers, the right to admit new members. *State v. Sibley*, 25 Minn. 387.

²⁹ *State v. Sibley*, 25 Minn. 387; *Ellerbe v. Faust*, 119 Mo. 653, 25 L. R. A. 149, 25 S. W. 390; *Diligent Fire Co. v. Com.*, 75 Pa. St. 291.

Minors may be admitted as members of mutual benefit societies and other nonstock corporations, in the absence of provision to the contrary. *Chicago Mut. Life Indemnity Ass'n v. Hunt*, 127 Ill. 257, 2 L. R. A. 549, 20 N. E. 55.

Conditions as to age may be waived. *McCoy v. Roman Catholic Mut. Ins. Co.*, 152 Mass. 272, 25 N. E. 289; *Morrison v. Wisconsin Odd Fellow's Mut. Life Ins. Co.*, 59 Wis. 162, 18 N. W. 13.

³⁰ **Illinois.** *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 143 Ill. 210, 18 L. R. A. 190, 36 Am. St. Rep. 385, 32 N. E. 274.

select the purchasers, and may sell to one man and refuse to sell to another.³¹

A corporation, however, has no power to exclude persons from membership in violation of its charter or enabling act, or to enact by-laws as to the admission or qualification of members which conflict with its charter or the general law, or its articles of association, or which are contrary to public policy.³²

Minnesota. *State v. Sibley*, 25 Minn. 387. See *Blien v. Rand*, 77 Minn. 110, 46 L. R. A. 618, 79 N. W. 606.

Missouri. *Ellerbe v. Faust*, 119 Mo. 653, 25 L. R. A. 149, 25 S. W. 390.

New Jersey. *Varick v. Medical Society of New Jersey*, 38 N. J. L. 377.

New York. *McKane v. Adams*, 123 N. Y. 609, 20 Am. St. Rep. 785, 25 N. E. 1057; *People v. Holstein Friesian Ass'n*, 41 Hun 439, 16 Abb. N. Cas. 307.

Pennsylvania. See *Hughes v. Farmers' Hay & Straw Market Ass'n*, 20 Pa. St. 327.

Wisconsin. *Holyoke v. Millmann*, 151 Wis. 551, 43 L. R. A. (N. S.) 790, 139 N. W. 392.

It is ordinarily for the corporation to determine the qualification and election of its members, and the mode of procedure is within its discretion. *Varick v. Medical Society of New Jersey*, 38 N. J. L. 377.

A statute incorporating certain persons named, and all others "hereafter duly associated, as provided by the by-laws," to promote the best interests of owners of a certain breed of cattle, "and thereby the public generally," does not require the corporation to admit to membership any owner of such cattle who shall apply, or to register his cattle in its registry book. *People v. Holstein Friesian Ass'n*, 41 Hun (N. Y.) 439, 16 Abb. N. Cas. (N. Y.) 307.

In *Blien v. Rand*, 77 Minn. 110, 46 L. R. A. 618, 79 N. W. 606, it was

held that the right to membership in a corporation might, by a provision in its articles of incorporation, be restricted to persons of a certain nationality, where the provision was not inconsistent with any statute.

"Stock in a corporation is not merely property. It also creates a personal relation analogous otherwise than technically to a partnership. * * * There seems to be no greater objection to retaining the right of choosing one's associates in a corporation than in a partnership." *Barrett v. King*, 181 Mass. 476, 63 N. E. 934.

An incorporated board of trade, as a voluntary organization, is not under obligation to admit any particular person to membership. *People v. Board of Trade of Chicago*, 224 Ill. 370, 79 N. E. 611.

As to the validity of by-laws requiring stockholders to offer their stock to the corporation or its members before selling the same to others, see § 513, *supra*.

As to the validity of contracts to this effect, see § 3762, *supra*.

³¹ *Holyoke v. Millmann*, 151 Wis. 551, 43 L. R. A. (N. S.) 790, 139 N. W. 392.

³² When the charter of a corporation limits the membership to active members, a by-law authorizing the admission of merely contributing members is void. *Diligent Fire Co. v. Com.*, 75 Pa. St. 291.

A corporation organized under a law authorizing the formation of corporations for the promotion of literary

§ 3952. Acquisition of membership—Necessity for contract. In order that a person may be made or become a member of a private corporation, of whatever character, there must be a valid and completed contract between him and the corporation.³³ No man can be

and scientific pursuits cannot pass valid by-laws limiting the qualification for membership to persons who are Irish, or of Irish parentage, and who are Roman Catholics, and providing for the appointment of a Roman Catholic bishop as spiritual director. *People v. Young Men's Father Matthew Total Abstinence Benev. Society*, 41 Mich. 67, 1 N. W. 931.

Under the Minnesota statutes incorporating the Union Depot Company of St. Paul for the benefit of railroads entering that city, to be open to all such roads then or thereafter constructed, authorizing such companies to subscribe for stock in said corporation, and prohibiting any unjust discrimination against any company using or desiring to use the depot, and also providing for the division of shares, but fixing no price, it was held that, where five companies had become stockholders by purchasing shares at par, a company subsequently entering the city was entitled to become a stockholder by purchasing shares at par. *St. Paul Union Depot Co. v. Minnesota & N. W. R. Co.*, 47 Minn. 154, 13 L. R. A. 415, 49 N. W. 646.

It was also held that, where all the authorized stock was taken by railroad companies who were stockholders, they might be compelled to surrender so much as was necessary to entitle the incoming company to equal rights. *St. Paul Union Depot Co. v. Minnesota & N. W. R. Co.*, 47 Minn. 154, 13 L. R. A. 415, 49 N. W. 646.

If a statute gives persons the right to subscribe for stock in a corporation, and the corporation or its officers wrongfully refuse to receive their

subscriptions, they may maintain an action against the corporation for damages. *Lallande v. Louisiana State Ins. Co.*, 9 La. 326; *Walden v. Union Bank*, 6 La. 248; *Union Bank v. McDonough*, 5 La. 63.

It is otherwise if the board of directors acted under an honest mistake. *Walden v. Union Bank*, 6 La. 248.

33 United States. *Foote v. Anderson*, 123 Fed. 659.

California. *Shattuck & Desmond Warehouse Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348; *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248.

Connecticut. *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

Indiana. *Butler University v. Scoonover*, 114 Ind. 381, 5 Am. St. Rep. 627, 16 N. E. 642.

New Jersey. *Ecuadorian Ass'n v. Ecuador Co.*, 71 N. J. Eq. 757, 65 Atl. 1051, aff'g 70 N. J. Eq. 277, 61 Atl. 481.

New York. *Glenn v. Garth*, 133 N. Y. 18, 31 N. E. 344, 30 N. E. 649.

Wisconsin. *Holyoke v. Millmann*, 151 Wis. 551, 43 L. R. A. (N. S.) 790, 139 N. W. 392.

"It is clear that a corporation by its own act cannot make one its shareholder, nor can one make himself a shareholder without the consent of the corporation. The corporation may evidence its assent to the creation of the relation by placing on its books the name of one as a shareholder, and that act may evidence, as against the company, the contract, and a person, by knowledge of and acquiescence in such act, may be held a stockholder; but it is equally clear that, this relation being one based on mutual con-

made a member of a private corporation without his consent, express or implied.³⁴ Thus, as was shown in another chapter, a special act

sent, neither party by its or his own separate act can create it. It requires assent of both to bind. If, now, the act of the corporation in placing one's name in its list of stockholders is accepted by the court as evidence that the person named is a shareholder, and if a jury is permitted to find a verdict based alone on proof of such act, it is clear that the so-called contract thus enforced is made for the defendant, not by his own act or consent, but by a rule of evidence. That such should be the case is contrary to our sense of right. The essence of a contract is consent to be bound. Contracts are enforced because they represent the undertakings of the contracting parties. Representing the agreements of the parties thereto, their sanctity is such that the Federal Constitution forbids their impairment by the state. Assuredly the law which affords them this high regard, and prevents their impairment because they represent the assent of the contractors, should not by a rule of evidence force into a contract one who has given no consent or done no act or omitted to do nothing from which consent could be implied. If, however, the act of the corporation alone in entering one's name as a stockholder is evidence of a contract, it is clear that the law by its rule of presumption, and not the party by his act or will, has created the alleged contract. We cannot sanction any course which thus dispenses with the element of consent, express or implied, as the basis and ground work of a contract." *Foote v. Anderson*, 123 Fed. 659.

"It must appear that the minds of the parties met, that the defendants agreed to be and become stockholders in the corporation with the privileges

and responsibilities of that relation, and that the corporation accepted them as such." *Glenn v. Garth*, 133 N. Y. 18, 31 N. E. 344, 30 N. E. 649.

In *Mann v. German-American Inv. Co.*, 70 Neb. 454, 97 N. W. 600, the holder of a contract purporting to be for the purchase and sale of a diamond, issued by a so-called tontine company, was held not to have thereby become a stockholder in the company.

See also § 521, *supra*.

34 United States. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531; *Foote v. Anderson*, 123 Fed. 659; *Hecht, Liebmann & Co. v. Phenix Woolen Co.*, 121 Fed. 188; *Williams v. American Nat. Bank of Arkansas City, Kansas*, 85 Fed. 376; *Brown v. Finn*, 34 Fed. 124.

California. *Shattuck & Desmond Warehouse Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348; *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248.

Indiana. *State v. Dawson*, 16 Ind. 40.

Massachusetts. *Ellis v. Marshall*, 2 Mass. 269, 3 Am. Dec. 49.

Minnesota. *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721.

New York. *Glenn v. Garth*, 133 N. Y. 18, 31 N. E. 344, 30 N. E. 649; *Richards v. Robin*, 178 App. Div. 535, 165 N. Y. Supp. 780; *Richards v. Ackerman*, 175 App. Div. 746, 162 N. Y. Supp. 657.

Virginia. *Yeaton v. Bank of Old Dominion*, 21 Gratt. 593.

"The relation of stockholder to a corporation is one of contract, either express or implied. It only exists when a party has either expressly consented to become a stockholder, or his conduct is such that in law his consent will be implied." *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248.

"Such a contract may be express or implied, but it exists only when

purporting to incorporate certain persons, naming them, can only have the effect of incorporating such of the persons named as consent or join in accepting the act.³⁵ Nor can the mere act of a corporation in placing a person's name on its list of stockholders, or the mere transfer of stock to him on the corporate books, or the issuance of a certificate in his name, make him a stockholder, where it is done without his knowledge or consent.³⁶

On the other hand, a person cannot acquire membership in a private corporation without the consent of the corporation, express or implied, given either by the stockholders or members collectively, as constituting or representing the corporation, or by its directors or other authorized officers or agents.³⁷ As we have seen in a prior chapter, a mere subscription for shares in a corporation cannot constitute the subscriber a member of the corporation until it is either expressly or impliedly accepted by the corporation, unless the corporation has offered its shares, so that the subscription is an acceptance of its offer.³⁸

A corporation may be estopped to deny that a person is a stockholder, as for example, where it has issued a share of stock and has recognized the party to whom the issue was made as a stockholder, and has granted to him the usual rights and privileges of membership.³⁹

both parties have expressly consented to its creation, or have so acted that the law implies consent. It is clear that a corporation by its own act cannot make one its shareholder." Foote v. Anderson, 123 Fed. 659.

A person who neither signed a subscription list himself nor authorized any one to sign his name thereto cannot be held liable as a stockholder although his name appears thereon. Silvain v. Benson, 83 Wash. 271, 145 Pac. 175.

A person cannot be made a stockholder through the error or connivance of another and without his knowledge. Bartlett v. Stephens, 137 Minn. 213, 163 N. W. 288.

An incorporated board of trade is a voluntary association, and no person is obliged to join it. People v. Board of Trade, 224 Ill. 370, 79 N. E. 611.

See also § 521, supra.

³⁵ See § 239 et seq., supra.

³⁶ See § 4182, infra.

³⁷ **United States.** Foote v. Anderson, 123 Fed. 659.

Illinois. American Live Stock Commission Co. v. Chicago Live Stock Exchange, 143 Ill. 210, 18 L. R. A. 190, 36 Am. St. Rep. 385, 32 N. E. 274.

Maine. Starrett v. Rockland Fire & Marine Ins. Co., 65 Me. 374.

New Jersey. See Columbia Council No. 77, Jr. O. U. A. M. of Matawan v. Belmar Building & Loan Ass'n (N. J. Eq.), 54 Atl. 142.

Wisconsin. Holyoke v. Millmann, 151 Wis. 551, 43 L. R. A. (N. S.) 790, 139 N. W. 392.

³⁸ See § 521 et seq., supra.

³⁹ See § 720, supra.

Where stock is issued before a legal incorporation is effected, and the corporation, after incorporation, recognizes the parties to whom it was issued as stockholders, it will not be heard

On the other hand, one who is sought to be held liable as a stockholder may be estopped to deny that he is one.⁴⁰

§ 3953. — Joint stock corporations. Most of the modern business corporations are stock corporations,—that is, corporations having a capital stock divided into shares. Persons who own these shares are the members of the corporation. Shares in such a corporation may be acquired in various ways, but in all cases there is a contract relation between the corporation and the shareholder or stockholder.

As we have seen, shares of stock may be acquired by virtue of a subscription therefor made before or after the corporation is formed,⁴¹ or by purchase from the corporation after it is formed.⁴²

Shares of stock, with the resulting membership in the corporation, may also be acquired by transfer from the original or a subsequent holder. One of the incidents of a joint stock corporation is that the shares therein, represented generally by certificates of stock, are transferable by the holders, without the consent of the other stockholders, or of the corporation, except in so far as such consent is implied as a matter of law from the nature of the corporation. When a corporation issues shares of its capital stock, it impliedly consents, and all the other stockholders impliedly consent, in the absence of express stipulation to the contrary, that the shares may at any time be transferred by the holder, and no further consent is necessary.⁴³ The transferee of the shares, by reason of his ownership thereof, becomes a member of the corporation, and assumes contract relations with it as such, in the place of the transferrer.⁴⁴ As we have seen, shares of stock may thus be transferred by act of the parties as by a sale⁴⁵ or gift,⁴⁶ or by operation of law, as in the case of the holder's death, when they vest in his executor or administrator,^{46a} or, in some states, on a sale under attachment or execution.⁴⁷

§ 3954. — Corporations not having a capital stock—General principles. There are many corporations, called "nonstock corporations," which have no capital stock divided into shares. Membership

to deny that they are such. *Thorpe v. Pennock Mercantile Co.*, 99 Minn. 22, 9 Ann. Cas. 229, 108 N. W. 940.

⁴⁰ See § 716 et seq., *supra*.

That a person who voluntarily permits his name to stand on the corporate books as a stockholder is estopped as against creditors to deny that he is one, see § 4182, *infra*.

⁴¹ See Chap. 17, *supra*.

⁴² See subd. xxv, this chapter, *supra*.

⁴³ See § 3758 et seq., *supra*.

⁴⁴ See § 3768 et seq., *supra*.

⁴⁵ See subd. xxv, this chapter, *supra*.

⁴⁶ See subd. xxvii, this chapter, *supra*.

^{46a} See § 3429.

⁴⁷ See § 3436 et seq., *supra*.

in such a corporation is acquired by a contract with the corporation, the mode of entering into which will vary according to the charter and by-laws of the particular corporation. Of this character are most of the stock and produce exchanges, and like bodies, incorporated social, literary, scientific or political clubs or societies, mutual insurance and benefit companies, and the like. Membership in such corporations is usually evidenced by a certificate or policy of some kind issued by the corporation, and showing that the person named therein, or the holder, is entitled to the rights of membership. Certificates of membership in such corporations may be transferable, but they are not necessarily so. Whether they are or not, depends upon the charter and constitution or by-laws of the corporation, and the terms of the contract between it and its members.⁴⁸

Signing of the constitution and by-laws of a nonstock corporation (as of an incorporated Odd Fellows' lodge), by the terms of which the signers agree to support the same, and pay all legal dues, etc., and are admitted to membership, constitutes the making of a valid contract of membership between the signer and the corporation, supported upon each side by a sufficient consideration.⁴⁹ A contract of membership in mutual benefit and insurance companies, and like corporations, is usually effected by an application for membership in a particular form and its acceptance, and the issuance to the applicant of a policy or certificate of membership.⁵⁰ But this is not

⁴⁸ See *Dade Coal Co. v. Penitentiary* Co. No. 2, 119 Ga. 824, 47 S. E. 338; *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 143 Ill. 210, 36 Am. St. Rep. 385, 32 N. E. 274.

Within the meaning of the Federal Bankruptcy Act, a seat or membership in a stock exchange may be deemed property, and upon the bankruptcy of the owner thereof pass to the trustee. *Page v. Edmunds*, 187 U. S. 596, 47 L. Ed. 318; *In re Gaylord*, 111 Fed. 717. See also *Zell v. Baltimore Stock Exchange*, 102 Md. 489, 4 L. R. A. (N. S.) 435, 62 Atl. 808.

And see standard works on bankruptcy.

⁴⁹ *Palmetto Lodge No. 5, I. O. O. F. v. Hubbell*, 2 Strohh. (S. C.) 457, 49 Am. Dec. 604.

⁵⁰ See *Burlington Voluntary Relief Department v. White*, 41 Neb. 547, 43 Am. St. Rep. 701, 59 N. W. 747; *Belle-ville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333; *Fuller v. Madison Mut. Ins. Co.*, 36 Wis. 599.

Membership in a mutual insurance company commences with the taking out of a policy and lasts only during the term of the policy. This is true in the absence of any provision in the charter to the contrary, and is especially true where the charter specifically so provides. *Huber v. Martin*, 127 Wis. 412, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400, 105 N. W. 1031, 1135.

In *Sugg v. Farmers' Mut. Ins. Ass'n (Tenn.)*, 63 S. W. 226, it was held that the word "stockholders," as used in a statute relating to insurance companies, meant in the case of

always necessary. Neither a formal application, nor the issuance of a policy or certificate, nor a formal acceptance of the application, where there is one, by the directors of the corporation, is necessary, in the absence of an express provision therefor, if a completed contract of membership has in fact been otherwise made, and this may be shown by receipt and retention of fees, premiums, etc., or other conduct.⁵¹ In every case, however, whether the contract be shown by formal writings or by conduct, the minds of the parties must have met, and there must be a completed contract of membership.⁵² The corporation is not liable in damages for breach of contract for rescinding its action in electing a person to membership before a certificate of membership has been issued to him.⁵³ Nor is it liable for the false statements of one of its directors leading to such rescission, where they were made in the line of his duty as a director.⁵⁴

The charters or constitutions of mutual benefit associations and other corporations of like character usually prescribe certain qualifications for membership, and, when such is the case, only persons coming within such provisions may be admitted.⁵⁵ So membership

assessment companies, those who had agreed to become members of the association and to pay assessments.

See also standard works on fraternal benefit associations and insurance.

⁵¹ *Burlington Voluntary Relief Department v. White*, 41 Neb. 547, 43 Am. St. Rep. 701, 59 N. W. 747; *Eilenberger v. Protective Mut. Fire Ins. Co.*, 89 Pa. St. 464; *Cumberland Valley Mut. Protection Co. v. Schell*, 29 Pa. St. 31; *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. (Pa.) 348; *Van Slyke v. Trempealeau County Farmers' Mut. Fire Ins. Co.*, 48 Wis. 683, 5 N. W. 236.

⁵² *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 143 Ill. 210, 18 L. R. A. 190, 36 Am. St. Rep. 385, 32 N. E. 274; *Com. v. Massachusetts Mut. Fire Ins. Co.*, 112 Mass. 116; *Baltimore & O. Employes' Relief Ass'n v. Post*, 122 Pa. St. 579, 2 L. R. A. 44, 9 Am. St. Rep. 147, 15 Atl. 885; *Matkin v. Supreme Lodge Knights of Honor*, 82 Tex. 301, 27 Am. St. Rep. 886, 18 S. W. 306; *Supreme Lodge of Protection,*

Knights and Ladies of Honor v. Grace, 60 Tex. 569.

Deduction by a railroad company of dues to an employees' relief association from the wages of an employee does not amount to an acceptance of the employee's application to the association for membership, or make him a member, although the constitution and by-laws of the association authorize the railroad company to collect dues from members, it not appearing that the association has notified the company that the employee has been admitted to membership. *Baltimore & O. Employes' Relief Ass'n v. Post*, 122 Pa. St. 579, 2 L. R. A. 44, 9 Am. St. Rep. 147, 15 Atl. 885.

⁵³ *Dunn v. Knights of Gideon Mut. Aid Society*, 151 N. C. 133, 65 S. E. 761.

⁵⁴ *Dunn v. Knights of Gideon Mut. Aid Society*, 151 N. C. 133, 65 S. E. 761.

⁵⁵ *Societa Unione Fratellanza Italiana v. Leyden*, 225 Mass. 540, L. R. A. 1917 C 256, 114 N. E. 738.

is often limited to persons of a certain age,⁵⁶ or of a certain religious denomination,⁵⁷ and persons engaged in certain occupations are often made ineligible to membership.⁵⁸ Residence in the state under whose laws the corporation is formed is not essential to membership in the absence of such a requirement in the statute or articles of incorporation.⁵⁹

§ 3955. — Compliance with provisions of charter, constitution or by-laws. In order that membership may be acquired in a non-stock corporation, the provisions of its charter, constitution and valid by-laws must be complied with, except in so far as they may be and are waived.⁶⁰ When the valid by-laws of a corporation fix a particular mode of acquiring membership therein, membership, in the absence of a waiver, cannot be acquired in any other mode. Nor has a court of equity any power to compel the corporation to issue a certificate of membership to an applicant who has not complied with its by-laws.⁶¹ So compliance with provisions of the constitution and

⁵⁶ *Chicago Mut. Life Indemnity Ass'n v. Hunt*, 127 Ill. 257, 2 L. R. A. 549, 20 N. E. 55.

Where the initiation of members over a stated age is prohibited by the constitution of an insurance society, the acts of its officers or agents in admitting members over the specified age are null and void, and create no liability in favor of the beneficiaries of a member so wrongfully admitted, at least unless such person was induced to join through fraud or misrepresentation of the officers or agents of the association. *Pirring v. Supreme Council Catholic Mut. Ben. Ass'n*, 104 N. Y. App. Div. 571, 93 N. Y. Supp. 575.

In California by statute membership in co-operative business associations is limited to persons over 18 years of age. Notwithstanding this provision, an allegation that a person was under the age of 18 at the time when a certificate was issued to him was held to be insufficient to warrant an injunction against recognizing the validity of such certificate, since such person may have reached the age of 18 before the action was brought,

since it did not appear that he ever claimed any right under the certificate. *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530.

Conditions as to age may be waived. *McCoy v. Roman Catholic Mut. Ins. Co.*, 152 Mass. 272, 25 N. E. 289; *Morrison v. Wisconsin Odd Fellows Mut. Life Ins. Co.*, 59 Wis. 162, 18 N. W. 13.

⁵⁷ *Bonfitto v. San Donato Mut. Ben. Ass'n*, 62 Pa. Super. Ct. 248.

⁵⁸ Saloon keepers may be excluded by a by-law of a mutual benefit association. *Ellerbe v. Faust*, 119 Mo. 653, 25 L. R. A. 149, 25 S. W. 390; *Kreeck v. Supreme Lodge, F. U. A.*, 95 Neb. 428, 145 N. W. 859.

⁵⁹ *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530.

⁶⁰ *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 143 Ill. 210, 18 L. R. A. 190, 36 Am. St. Rep. 385, 32 N. E. 274; *Belleville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333; *Matkin v. Supreme Lodge Knights of Honor*, 82 Tex. 301, 27 Am. St. Rep. 886, 18 S. W. 306.

⁶¹ *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 143 Ill. 210, 18 L. R. A. 190, 36 Am.

laws of the association requiring initiation is essential to membership.⁶² But provisions in the by-laws as to formal steps to be taken to acquire membership may be waived by the corporation, or it may be estopped to assert that they have not been taken.⁶³

St. Rep. 385, 32 N. E. 274. See also McKane v. Adams, 123 N. Y. 609, 20 Am. St. Rep. 785, 25 N. E. 1057.

This point arose in an Illinois case, in which membership in the Chicago Live Stock Exchange was claimed by a transferee of a certificate of membership therein. It appeared that the certificate had been transferred to the complainant by one who was a member, but that the complainant had not applied for membership. The by-laws of the corporation provided for admission to membership upon the written application of the applicant indorsed by two members, approved by seven votes of the board of directors, and upon payment of an initiation fee, or presentation of an unimpaired and unforfeited certificate of membership, duly transferred, and upon signing an agreement to abide by the rules, regulations, by-laws, and amendments thereto, of the corporation. It was held that the ownership of such a certificate did not constitute the complainant a member of the corporation, or entitle it to any rights as such, and that the only way in which it could avail itself thereof was by applying for membership in accordance with the by-laws, and tendering the certificate in lieu of the prescribed initiation fee, in case it should be admitted, or, in case its application should be rejected, then by selling the certificate to some other person desiring to become a member. *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 143 Ill. 210, 36 Am. St. Rep. 385, 32 N. E. 274.

⁶² *Arkansas. Supreme Lodge Knights & Ladies of Honor v. Johnson*, 81 Ark. 512, 99 S. W. 834.

Minnesota. Loudon v. Modern

Brotherhood of America, 107 Minn. 12, 119 N. W. 425.

Missouri. Shartle v. Modern Brotherhood of America, 139 Mo. App. 433, 122 S. W. 1139; *Loyd v. Modern Woodmen of America*, 113 Mo. App. 19.

Nebraska. Driscoll v. Modern Brotherhood of America, 77 Neb. 282, 109 N. W. 158.

Texas. Matkin v. Supreme Lodge Knights of Honor, 82 Tex. 301, 27 Am. St. Rep. 886, 18 S. W. 306.

A by-law of a secret order or association which insures the lives of its members, making initiation necessary to membership and the enjoyment of the benefits attaching thereto, is reasonable and valid. And it has been held, therefore, that where the constitution and by-laws of such an association make initiation indispensable to membership, and it is only upon the death of a member that his beneficiary is entitled to receive his insurance, the fact that a person's application for membership has been accepted, and his "proposition fee" paid, does not make him a member, or entitle his beneficiary to any insurance in the event of his death before he had been initiated as a member. *Matkin v. Supreme Lodge Knights of Honor*, 82 Tex. 301, 27 Am. St. Rep. 886, 18 S. W. 306.

⁶³ Where the relief department of a railroad company, in the nature of a mutual insurance company, organized for the benefit and protection of railroad employees in the case of sickness or death, placed an employee's name upon the roll of its membership at his solicitation, and deducted from his wages his assessments or dues, on the basis of membership, with knowledge

§ 3956. — **Effect of fraud.** False and fraudulent misrepresentations as to material facts by an applicant for membership in a corporation, if not waived by the corporation with knowledge of the facts, will entitle it to rescind the contract of membership and exclude him, upon discovery of the fraud.⁶⁴ But, as a general rule, misstatements of fact do not amount to fraud, and are no ground

of the fact that no formal application for membership had been made, and no physical examination had, as was required by its by-laws, it was held estopped from denying his membership in an action by his widow to recover a death benefit. *Burlington Voluntary Relief Department v. White*, 41 Neb. 547, 43 Am. St. Rep. 701, 59 N. W. 747.

Officers of a local lodge have no authority to waive provisions of the by-laws of the order requiring initiation. *Loyd v. Modern Woodmen of America*, 113 Mo. App. 19, 87 S. W. 530.

Even if a subordinate lodge of a benefit association has power to waive a provision of the constitution and laws of the supreme lodge making initiation essential to membership, the election of an uninitiated applicant for membership to a lodge office does not have that effect, where he was never admitted, and never attended any meetings or performed any of the duties of such office. *Supreme Lodge Knights & Ladies of Honor v. Johnson*, 81 Ark. 512, 99 S. W. 834.

In *Shartle v. Modern Brotherhood of America*, 139 Mo. App. 433, 122 S. W. 1139, a requirement of initiation was held not to have been waived.

In *Driscoll v. Modern Brotherhood of America*, 77 Neb. 282, 109 N. W. 158, the acceptance of dues and assessments by the secretary of a subordinate lodge, without the knowledge or consent of the association, was held not a waiver by the association of the requirement of initiation and not to estop it from denying that an unin-

itiated person making such payments was a member.

Acceptance of assessments does not constitute a waiver where the officers receiving them were ignorant of their right to repudiate. *Loudon v. Modern Brotherhood of America*, 107 Minn. 12, 119 N. W. 425.

⁶⁴ **Maine.** *Swett v. Citizens' Mut. Relief Society*, 78 Me. 541, 7 Atl. 394.

Massachusetts. *Cobb v. Covenant Mut. Ben. Ass'n*, 153 Mass. 176, 10 L. R. A. 666, 25 Am. St. Rep. 619, 26 N. E. 230.

Michigan. *Briesenmeister v. Supreme Lodge Knights of Pythias of World*, 81 Mich. 525, 45 N. W. 977.

Minnesota. *National Council Knights & Ladies of Security v. Turov*, 135 Minn. 455, 161 N. W. 225; *Rigler v. National Council Knights & Ladies of Security*, 128 Minn. 51, 150 N. W. 178; *Kulberg v. National Council Knights & Ladies of Security*, 124 Minn. 437, 145 N. W. 1020; *Marcus v. National Council Knights & Ladies of Security*, 123 Minn. 145, 143 N. W. 265.

Nebraska. *Kreck v. Supreme Lodge, F. U. A.*, 95 Neb. 428, 145 N. W. 859.

New York. *Pirrung v. Supreme Council Catholic Mut. Ben. Ass'n*, 104 App. Div. 571, 93 N. Y. Supp. 575.

Pennsylvania. *Bonfitto v. San Donato Mut. Ben. Ass'n*, 62 Pa. Super. Ct. 248.

Texas. *Supreme Ruling Fraternal Mystic Circle v. Hansen*, — Tex. Civ. App. —, 161 S. W. 54.

See standard works on fraternal benefit associations.

for rescission, in the absence of a warranty, if they were made in good faith, and in the honest belief that they were true.⁶⁵

§ 3957. Loss of membership—Transfer of shares or membership.

The usual mode in which a person ceases to be a member of a corporation is by a transfer of his shares or membership. As we have seen in previous sections, it is generally an incident of joint stock corporations that the shares of stock shall be transferable by the holder at any time, subject to the express provisions and regulations prescribed by the charter or articles of association and authorized by-laws of the corporation.⁶⁶ And when a valid transfer is made, the transferrer ceases to be a member of the corporation, and the transferee takes his place.⁶⁷ Shares of stock in a joint stock corporation, however, may be made nontransferable by an express provision in the charter, or by a provision in the by-laws of the corporation, assented to by all the stockholders, provided there is nothing in the charter to prevent.⁶⁸

Whether membership in a nonstock corporation is transferable depends upon the charter and by-laws of the corporation. If it is transferable, a valid transfer has the same effect as a transfer of shares in a stock corporation,—the transferrer is no longer a member, and the transferee takes his place.⁶⁹ If it is transferable only on compliance with certain conditions, a transfer does not become effective until they have been complied with.⁷⁰

§ 3958. — Surrender of shares or withdrawal from membership.

Shareholders of a stock corporation may dispose of their stock, and

⁶⁵ *Illinois Masons' Benev. Society v. Winthrop*, 85 Ill. 537; *Supreme Lodge Knights of Pythias of World v. Edwards*, 15 Ind. App. 524, 41 N. E. 850; *Seiverts v. National Benev. Ass'n of Minneapolis*, 95 Iowa 710, 64 N. W. 671; *Clapp v. Massachusetts Ben. Ass'n*, 146 Mass. 519, 16 N. E. 433.

Compare, in cases of warranty, *Smith v. Baltimore & O. R. Co.*, 81 Md. 412, 32 Atl. 181; *Cobb v. Covenant Mut. Ben. Ass'n*, 153 Mass. 176, 10 L. R. A. 666, 25 Am. St. Rep. 619, 26 N. E. 230.

See standard works on fraternal benefit associations.

⁶⁶ See § 3758 et seq., supra.

⁶⁷ See § 3768 et seq., supra.

⁶⁸ See §§ 3759, 3760, supra.

⁶⁹ See *American Livestock Commission Co. v. Chicago Livestock Exchange*, 143 Ill. 210, 18 L. R. A. 190, 36 Am. St. Rep. 385, 32 N. E. 274.

⁷⁰ Where the rules of a board of trade permit a transfer of membership on approval of the transferee by the board of directors after the posting of notice, a transfer is not completed until the conditions have been complied with, and until that time the transferrer is still a member and may be disciplined as such. *Bostedo v. Board of Trade of Chicago*, 227 Ill. 90, 81 N. E. 42, aff'g 130 Ill. App. 560; *Wood v. Chamber of Commerce of Milwaukee*, 119 Wis. 367, 96 N. W. 835.

so cease to be members of the corporation.⁷¹ And, under some statutes, the corporation may itself purchase their stock.⁷² But, strictly speaking, a stockholder cannot resign from the corporation.⁷³ And he cannot surrender his stock to the corporation and withdraw its value without the consent of the corporation until the winding up stage of the corporation has been reached.⁷⁴ The by-laws may permit a member to withdraw from membership upon compliance with certain conditions, although still retaining his stock,⁷⁵ and where such is the case a valid withdrawal terminates his liability as a member.⁷⁶ Of course a by-law permitting stockholders to surrender their stock and withdraw from membership is void if in conflict with the constitution or statutes of the state.⁷⁷

Members of incorporated co-operative associations⁷⁸ and of build-

⁷¹ See § 3768, *supra*.

⁷² See § 1134 *et seq.*, *supra*.

⁷³ *Picalora v. Gulf Co-operative Co.*, 68 N. Y. Misc. 331, 123 N. Y. Supp. 980.

⁷⁴ *Hammond v. A. Vetsburg Co.*, 56 Fla. 369, 48 So. 419; *Mayfield v. Alton Railway, Gas & Electric Co.*, 100 Ill. App. 614, judgment *aff'd* 198 Ill. 528, 65 N. E. 100.

⁷⁵ In *Long Island Bottlers' Union v. S. Liebmann's Sons Brewing Co.*, 83 N. Y. App. Div. 146, 82 N. Y. Supp. 561, *aff'd* 180 N. Y. 524, 72 N. E. 1145, the by-laws permitted members of an association to resign their membership on 30 days' notice, although still retaining their stock. It was held in this case that the notice of an intention to resign was equivalent to a resignation at the end of the 30 days, and that no further resignation was required.

⁷⁶ *Long Island Bottlers' Union v. S. Liebmann's Sons Brewing Co.*, 83 N. Y. App. Div. 146, 82 N. Y. Supp. 561, *aff'd* 180 N. Y. 524, 72 N. E. 1145.

⁷⁷ A by-law permitting any stockholder to surrender his stock and withdraw from the corporation on giving notice, and providing that under such circumstances he shall receive back what he has paid upon the stock violates a statute prohibiting the with-

drawal or payment to stockholders of any part of the capital stock except upon its dissolution. *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375.

In *Driscoll v. Lewiston Equitable Co-operative Society*, 59 Me. 474, it was held that a by-law allowing members of a co-operative society to withdraw the amounts which they had paid in when the corporation was insolvent would be violative of a statute prohibiting the division of the corporate property so as to reduce the stock below its par value until all the corporate debts are paid, and then only for the purpose of closing its concerns.

In *Picalora v. Gulf Co-operative Co.*, 68 N. Y. Misc. 331, 123 N. Y. Supp. 980, a by-law providing for payment to members of a co-operative company, who resigned, the amount paid for their stock, was held to be unauthorized by the stock corporation law and hence invalid.

See generally § 489, *supra*.

⁷⁸ Under the Massachusetts statutes, such a provision in the by-laws is valid, and constitutes an agreement between the stockholder and the corporation, under which the former has a right to demand back the money he has paid to the corporation, and to maintain an action for it in case the

ing and loan associations⁷⁹ are frequently given the right to withdraw from the association and to receive back what they have paid in on surrender of their stock. And it has been held that a member of a building and loan association may sever his relations with it where it has departed from its plan of organization, and abandoned some of its essential features, to his prejudice.⁸⁰ But a co-operative association is under no obligation to purchase the shares of members who withdraw where there is no provision in its charter

corporation refuses to pay. *Lindsay v. Arlington Co-operative Ass'n*, 186 Mass. 371, 71 N. E. 797, and cases there cited; *Atwood v. Dumas*, 149 Mass. 167, 3 L. R. A. 416, 21 N. E. 236; *Delano v. Wild*, 6 Allen (Mass.) 1, 83 Am. Dec. 605; *Baxter v. McIntire*, 13 Gray (Mass.) 168; *Merrill v. McIntire*, 13 Gray (Mass.) 157; *Fuller v. Salem & D. Loan & Fund Ass'n*, 10 Gray (Mass.) 94.

A by-law permitting withdrawals only when the assets of the corporation exceed its liabilities, does not authorize a withdrawal when the corporation is insolvent. *Driscoll v. Lewiston Equitable Co-operative Society*, 59 Me. 474.

In *Lindsay v. Arlington Co-operative Ass'n*, 186 Mass. 371, 71 N. E. 797, the by-law in question was held to be a positive agreement by the association to pay a member an amount equal to the par value of the shares which he desired to withdraw, and not merely to give it an option to take such shares.

In *Hartford v. Co-operative Mut. Homestead Co.*, 128 Mass. 494, it was held that under the by-laws of a co-operative building association, a member desiring to withdraw was required to give notice of that fact to the corporation, which then had one year in which to repay to him the amount paid in, and that he could not maintain an action to recover that amount until after a year from the receipt of the notice by the corporation.

In *Lewiston Co-operative Society v.*

Thorpe, 91 Me. 64, 39 Atl. 283, where the by-laws permitted members to withdraw their shares provided no detriment would result to the remaining shareholders, it was held that a member had no right to withdraw his shares after the directors had voted to allow no more withdrawals for the present, it appearing that their action was authorized by the by-laws and warranted by the condition of the corporation.

In *Howe Grain & Mercantile Co. v. Jones*, 21 Tex. Civ. App. 198, 51 S. W. 24, a by-law providing that on the death of a stockholder his stock should be paid to his legal representatives, was held to create a valid binding contract, for breach of which an action would lie.

⁷⁹ In *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375, a land company was held not to come within the provisions of Civ. Code, § 639, relating to withdrawals from building and loan associations.

See standard works on building and loan associations.

⁸⁰ Where a building and loan association had suspended payment of dues for an unreasonable length of time so that its general plan of satisfying loans to members had been departed from materially, it was held that the contractual relations might be dissolved by a member prejudiced by such departure. *Burkheimer v. National Mut. Building & Loan Ass'n*, 59 W. Va. 209, 4 L. R. A. (N. S.) 1047, 53 S. E. 372.

or by laws requiring it to do so, even though it has been accustomed to purchase the stock of retiring members.⁸¹

Statutes in some states provide that where a corporation disposes of all of its assets as an entirety,⁸² or changes the nature of its business,⁸³ nonconsenting stockholders may surrender their stock to the corporation and receive its value. And provision is frequently made for an arbitration to determine the value of the stock under such circumstances in case the corporation and the stockholder are unable to agree upon it.⁸⁴ It has been held that mandamus will not lie to compel the corporation to comply with such a provision, but that a suit in equity is the proper remedy.⁸⁵

The National Banking Act permits the withdrawal of nonconsenting stockholders of a national bank on renewal of its charter, on giving notice to the directors of their desire to do so. The withdrawing stockholder is entitled to receive the appraised value of his stock from the bank on surrendering his shares, and the bank is then required to sell such stock at public auction.⁸⁶ Under this provision a nonconsenting stockholder has a right to elect whether he will continue to be a stockholder or will withdraw, and if he fails to exercise his option and elect to withdraw within the time prescribed, he continues to be a shareholder.⁸⁷ But stockholders who have done all that the statute requires of them in order to end their relation to the bank, cease to be shareholders, and are no longer entitled to share in its profits or liable to bear its burdens, although by reason of the

⁸¹ *Herring v. Ruskin Co-op. Ass'n* (Tenn.), 52 S. W. 327.

⁸² *Teele v. Rockport Granite Co.*, 224 Mass. 20, 112 N. E. 497; *Hoffard v. Williams Shoe Co.*, 95 Ohio St. 376, 117 N. E. 17.

⁸³ *Teele v. Rockport Granite Co.*, 224 Mass. 20, 112 N. E. 497.

⁸⁴ *Teele v. Rockport Granite Co.*, 224 Mass. 20, 112 N. E. 497; *Hoffard v. Williams Shoe Co.*, 95 Ohio St. 376, 117 N. E. 17.

The corporation may set up legal defects appearing on the face of the award as a defense to an action thereon. *Hoffard v. Williams Shoe Co.*, 95 Ohio St. 376, 117 N. E. 17.

⁸⁵ *Teele v. Rockport Granite Co.*, 224 Mass. 20, 112 N. E. 497.

⁸⁶ *Aspey v. Kimball*, 221 U. S. 514, 55 L. Ed. 834, aff'g 164 Fed. 830, and

Aspey v. Whittemore, 199 Mass. 65, 85 N. E. 91; *Smith v. Phillips Nat. Bank*, 114 Me. 297, 96 Atl. 217; *First Nat. Bank of Clarion v. Brenneman's Ex'rs*, 114 Pa. St. 315, 7 Atl. 910.

The committee of appraisal provided for in the act exercise no judicial functions. They render no judgment as upon a litigated cause and their proceedings are not of record. The act does not even provide that the appraisal shall be in writing. They may correct clerical errors in their appraisal within the 30 days during which the stockholder is entitled to appeal. *First Nat. Bank of Clarion v. Brenneman's Ex'rs*, 114 Pa. St. 315, 7 Atl. 910.

⁸⁷ *Smith v. Phillips Nat. Bank*, 114 Me. 297, 96 Atl. 217.

fault or neglect of the bank, the transfer of their stock has not been completed and their names remain on the corporate books as stockholders,⁸⁸ and although they still retain possession of their certificates.⁸⁹ The withdrawal takes effect as of the date of the expiration of the original charter of the bank, and not as of the date of the notice of withdrawal, and hence the withdrawing stockholder can claim no rights or benefits accruing to stockholders after that date, and is not entitled to a dividend declared between that date and the date of the notice.⁹⁰ A stockholder may withdraw or waive his withdrawal before it has been acted upon by the bank, and he does so, if after giving notice of withdrawal, he accepts a dividend declared between the date of such notice and the date of the expiration of the original charter.⁹¹ The right of subscribers to the stock of a corporation to revoke or withdraw their subscriptions,⁹² and the right of a stockholder to recover the value of his shares on consolidation of the corporation with another corporation,⁹³ are considered in other chapters.

In the absence of any provision on the subject in the charter or by-laws, the filing of a resignation by a member of a nonstock corporation terminates his membership, and no acceptance of such resignation is necessary.⁹⁴ But provisions in the by-laws of an incorporated medical society requiring resignations to be accepted before they become effective,⁹⁵ and prohibiting the acceptance of the resignation of a member who is under charges,⁹⁶ have been held to be valid.

In the absence of a provision in the charter to the contrary, mem-

⁸⁸ *Aspey v. Kimball*, 221 U. S. 514, 55 L. Ed. 834, aff'g 164 Fed. 830, and *Aspey v. Whittemore*, 199 Mass. 65, 85 N. E. 91.

⁸⁹ The withdrawing stockholders are not obliged to surrender their certificates except upon payment for their shares. *Aspey v. Kimball*, 221 U. S. 514, 55 L. Ed. 834, aff'g 164 Fed. 830, and *Aspey v. Whittemore*, 199 Mass. 65, 85 N. E. 91.

⁹⁰ *Smith v. Phillips Nat. Bank*, 114 Me. 297, 96 Atl. 217.

⁹¹ *Smith v. Phillips Nat. Bank*, 114 Me. 297, 96 Atl. 217.

⁹² See Chap. 17, §§ 563-566, *supra*.

⁹³ See chapter on Consolidation and Merger, *infra*.

⁹⁴ See *Ewald v. Medical Society of New York*, 144 N. Y. App. Div. 82, 128 N. Y. Supp. 886, rev'g judgment 70 N. Y. Misc. 615, 130 N. Y. Supp. 1024.

⁹⁵ *Ewald v. Medical Society of New York*, 144 N. Y. App. Div. 82, 128 N. Y. Supp. 886, rev'g judgment 70 N. Y. Misc. 615, 130 N. Y. Supp. 1024.

⁹⁶ Such a rule was held to prevent the acceptance of the resignation of a member against whom charges had been preferred although he had not yet been served with a copy of them. *Ewald v. Medical Society of New York*, 144 N. Y. App. Div. 82, 128 N. Y. Supp. 886, rev'g judgment 70 N. Y. Misc. 615, 130 N. Y. Supp. 1024.

bership in a mutual insurance company terminates on the expiration of the member's policy.⁹⁷

§ 3959. — Forfeiture of shares or membership. Whether or not a joint stock corporation, or other corporation for pecuniary profit, has the power to forfeit or sell the shares of a stockholder because of nonpayment of calls or assessments thereon, depends upon whether such power has been expressly conferred upon it by the legislature or by agreement of the stockholders. Unless the power has been so conferred, it does not exist.⁹⁸ If, however, the power is conferred, and is properly exercised, the effect is to deprive the delinquent stockholder of his membership in the corporation, and he cannot afterwards claim any rights or be subjected to any liabilities as such.⁹⁹ As we shall presently see, a member of a nonstock corporation may forfeit his right to remain a member, and be expelled or disfranchised, if he is guilty of conduct authorizing expulsion.¹ In such a case, however, he must, as a rule, be expelled. A member of a corporation does not lose his membership, ipso facto, because of an act or default which is made a cause of forfeiture or expulsion, unless it is expressly so provided, but there must be proper action by the corporation expelling him.² The charter or by-laws may provide

⁹⁷ This is particularly true where the statute provides that policyholders shall be deemed members of the company "for and during the terms specified in their respective policies, and no longer." *Huber v. Martin*, 127 Wis. 412, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400, 105 N. W. 1031, 1135.

⁹⁸ As to forfeiture for nonpayment of calls, see § 662 et seq., *supra*.

As to forfeiture for nonpayment of assessments on full paid stock, see subd. xxxv, *infra*.

⁹⁹ See § 665, *supra*.

¹ See § 3960 et seq., *infra*.

² *Denver Chamber of Commerce & Board of Trade v. Green*, 8 Colo. App. 420, 47 Pac. 140; *Burchard v. Western Commercial Travelers Ass'n*, 139 Mo. App. 606, 123 S. W. 973. See also *State v. Vincennes University*, 5 Ind. 77.

Where the constitution of a medical

society provided that, if annual dues should not be paid at a certain time, the defaulter should forfeit his membership, and should be duly notified thereof by the secretary, that notice of the requirement should be served each year, and that, on reading the roll of members, any such defaulter should be immediately stricken from the rolls, it was held that nonpayment of dues at the time fixed was not ipso facto a forfeiture of membership. *Medical & Surgical Soc. of Montgomery Co. v. Weatherly*, 75 Ala. 248.

Where the by-laws of an incorporated club provide that the resignation of an indebted member be not accepted, that a member wishing to withdraw give specified written notice of his intention in respect thereto, and that indebted members be notified of their indebtedness and dropped off the roll of membership by the board of governors upon failure to pay such

for an ipso facto forfeiture of membership or suspension³ of a mem-

indebtedness within 30 days after notification, it was held that the relationship to the club of an indebted member did not terminate ipso facto, but required action to that end on the part of the duly authorized board. *Westchester Golf Club v. Pinkney*, 43 N. Y. Misc. 338, 87 N. Y. Supp. 153, where the court held, also, that where the club had the option to drop or retain the name of a member, that by notification to a member that his name would be dropped unless he paid his indebtedness by a specified time, it would be presumed that the corporation had exercised its option to drop such name, so that the member was justified in assuming that his name had been so dropped without taking steps to see that such was the fact, and that where a member had in good faith assumed that his name had been dropped under such circumstances, he could not be held for dues alleged to have accrued against him thereafter.

Where a by-law of a religious society provided that any member should be dropped from the list if he should cease to worship regularly with the society, or fail to contribute to the support of its worship for one year, it was held that a member did not cease to be a member merely because of such omissions, and could not be expelled for such causes except by a vote of the society after a hearing. *Gray v. Christian Society*, 137 Mass. 329, 50 Am. Rep. 310.

Failure of members to comply with a by-law of a local chapter of an incorporated benevolent society does not work a dissolution of membership in the absence of provision of the by-laws providing for loss of membership in such case, but they are to be regarded as members upon subsequently

complying. *Union Benev. Soc. No. 2 of Athens v. Martin*, 23 Ky. L. Rep. 2276, 67 S. W. 38.

A by-law providing that, if a member fails to pay dues for a year, he shall be deemed to have relinquished his membership, and may be excluded from the rooms of the association, and his certificate of membership shall be sold at auction, and any surplus of the proceeds be paid over to him, does not ipso facto terminate the membership of one whose dues are a year in arrears, nor is the remedy given for nonpayment of dues exclusive. The corporation, so long as he remains a member, may sue on his agreement, and collect them. *Denver Chamber of Commerce & Board of Trade v. Green*, 8 Colo. App. 420, 47 Pac. 140.

"All regulations of a quasi penal character which affect a forfeiture must be strictly construed. It is never assumed that a forfeiture will follow unless the result is compelled by the language, evident purport, and necessary construction of the terms relied on." *Denver Chamber of Commerce & Board of Trade v. Green*, 8 Colo. App. 420, 47 Pac. 140.

³ **Arkansas.** *Supreme Lodge Knights & Ladies of Honor v. Johnson*, 81 Ark. 512, 99 S. W. 834.

District of Columbia. *Drum v. Benton*, 13 App. Cas. 245.

Illinois. *Dillon v. National Council Knights & Ladies of Security*, 244 Ill. 202, 91 N. E. 417; *People v. Board of Trade of Chicago*, 224 Ill. 370, 79 N. E. 611; *Champion v. Hannahan*, 138 Ill. App. 387; *Supreme Tribe of Ben Hur v. Miller*, 122 Ill. App. 489.

Indiana. *Supreme Lodge Knights of Honor v. Hahn*, 43 Ind. App. 75, 84 N. E. 837.

Maine. *Gifford v. Workmen's Ben*

ber, however, and, when such is the case, notice to him is not necessary unless specially provided for.⁴

§ 3960. — Disfranchisement or expulsion of members—Power to expel or disfranchise. The power to declare a forfeiture and dis-

Ass'n, 105 Me. 17, 17 Ann. Cas. 1173, 72 Atl. 680.

Maryland. Dague v. Grand Lodge, Brotherhood of Railroad Trainmen, 111 Md. 95, 73 Atl. 735.

Michigan. Edgerly v. Ladies of Modern Maccabees, 185 Mich. 148, 151 N. W. 692.

Mississippi. Independent Order of Sons & Daughters of Jacob of America v. Moncrief, 96 Miss. 419, 50 So. 558.

Missouri. Knode v. Modern Woodmen of America, 171 Mo. App. 377, 157 S. W. 818; Burchard v. Western Commercial Travelers Ass'n, 139 Mo. App. 606, 123 S. W. 973; Bange v. Supreme Council Legion of Honor of Missouri, 128 Mo. App. 461, 105 S. W. 1092.

Nebraska. Kreeck v. Supreme Lodge, F. U. A., 95 Neb. 428, 145 N. W. 859.

New York. Riess v. Supreme Conclave Improved Order of Heptasophs, 177 App. Div. 845, 164 N. Y. Supp. 878; People v. Philip Bernstein Sick & Benefit Society, 161 App. Div. 823, 146 N. Y. Supp. 886.

Pennsylvania. Beeman v. Supreme Lodge, Shield of Honor, 215 Pa. 627, 64 Atl. 792.

Virginia. Knights of Columbus v. Burroughs' Beneficiary, 107 Va. 671, 17 L. R. A. (N. S.) 246, 60 S. E. 40.

A by-law of a board of trade providing that the failure of a member to pay the annual assessment during the whole of any fiscal year shall ipso facto work a forfeiture and cancellation of his membership is not unreasonable or contrary to public policy, but is valid. People v. Board of Trade, 224 Ill. 370, 79 N. E. 611. In

this case the rule under which the membership was forfeited was held to require the payment of annual dues by suspended members.

Nonpayment of assessments will be held to work an ipso facto suspension only in those cases where the language of the by-laws permits of no other construction. Burchard v. Western Commercial Travelers Ass'n, 139 Mo. App. 606, 123 S. W. 973.

The association must have complied with all the conditions on which the contract makes the forfeiture depend. Bange v. Supreme Council Legion of Honor of Missouri, 128 Mo. App. 461, 105 S. W. 1092.

A member of a beneficial association does not lose his membership by failing to pay assessments accruing after the association has notified him that it will not accept any more money from him on the ground that he is no longer a member. Langnecker v. Trustees of Grand Lodge, A. O. U. W. of Wisconsin, 111 Wis. 279, 55 L. R. A. 185, 87 Am. St. Rep. 860, 87 N. W. 293.

In the case of fraternal benefit associations the question of forfeiture generally arises in actions on certificates or policies of insurance, in which the forfeiture is set up as a defense. Reference should therefore be had to standard works on fraternal benefit associations and insurance.

⁴ People v. Board of Trade of Chicago, 224 Ill. 370, 79 N. E. 611; Knights of Columbus v. Burroughs' Beneficiary, 107 Va. 671, 17 L. R. A. (N. S.) 246, 60 S. E. 40.

Only such notice need be given as is prescribed by the by-laws. Drum v. Benton, 13 App. Cas. (D. C.) 245.

franchise or expel members may be expressly conferred upon a joint stock corporation or other corporation for pecuniary profit by its charter or the general law in force at the time of its creation, or perhaps by a by-law assented to by all the stockholders or members.⁵ But the power does not exist in such corporations unless it is so conferred.⁶ It cannot be conferred by a by-law passed by a mere majority of the stockholders or members.⁷ A different rule, however, applies to nonstock corporations not organized for pecuniary profit, such as boards of trade, stock and produce exchanges, mutual benefit societies or associations, social, literary, and political clubs or societies, and the like. Subject to any restrictions which may be contained in its charter, such a corporation has the implied or incidental power to disfranchise or expel a member, provided there is sufficient cause therefor, as will be explained in the following sections. This power has been recognized and exercised from a very early period in the history of corporations.⁸

⁵ As to the power to forfeit and sell shares for nonpayment of calls, see § 662, *supra*.

As to the power to forfeit full paid shares for nonpayment of assessments, see subd. xxxv, *infra*.

⁶ **Michigan.** *People v. Minong Min. Co.*, 33 Mich. 2; *Westcott v. Minnesota Min. Co.*, 23 Mich. 145.

Missouri. *Purdy v. Bankers' Life Ass'n*, 101 Mo. App. 91, 74 S. W. 486.

New Jersey. *In re St. Lawrence Steamboat Co.*, 44 N. J. L. 529.

New York. *In re Long Island R. Co.*, 19 Wend. 37, 32 Am. Dec. 429.

Oregon. *Budd v. Multnomah St. Ry. Co.*, 15 Ore. 413, 3 Am. St. Rep. 169, 15 Pac. 659.

Tennessee. *Cartwright v. Dickin-son*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

Wisconsin. *Edgerton Tobacco Mfg. Co. v. Croft*, 69 Wis. 256, 34 N. W. 143.

And see § 662, *supra*, and § 3962, *infra*.

⁷ See §§ 512, 662, *supra*.

⁸ **California.** *Peyre v. Mutual Relief Soc. of French Zouaves*, 90 Cal. 240, 27 Pac. 191; *Otto v. Journeymen Tail-*

lors' Protective & Benevolent Union, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217.

Maryland. *Weber v. Zimmerman*, 22 Md. 156.

Massachusetts. *Burrows v. Massachusetts Medical Society*, 12 Cush. 402; *Taylor v. Edson*, 4 Cush. 522.

Michigan. *Meurer v. Detroit Musicians' Benevolent & Protective Ass'n*, 95 Mich. 451, 54 N. W. 954.

Missouri. *Albers v. Merchants' Exch. of St. Louis*, 39 Mo. App. 583.

New York. *People v. New York Board of Fire Underwriters*, 7 Hun 248, 54 How. Pr. 240; *People v. New York Commercial Ass'n*, 18 Abb. Pr. 271.

Ohio. *State v. Society for Support of Sick*, 6 Ohio Dec. 899.

Pennsylvania. *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Com. v. Philanthropic Society*, 5 Binn. 486; *Com. v. St. Patrick Benev. Society*, 2 Binn. 441, 4 Am. Dec. 453.

South Carolina. *Smith v. Smith*, 3 Desauss. 557.

Wisconsin. *State v. Chamber of Commerce of Milwaukee*, 47 Wis. 670, 20 Wis. 63; *Dickenson v. Chamber of*

§ 3961. — — **Grounds for disfranchisement or expulsion in general.** A corporation has no power to disfranchise or expel a member arbitrarily, but there must be such cause therefor as to bring the case within the settled rules of law on the subject.⁹ There has been some conflict in the decisions as to what constitutes sufficient cause for expulsion. In the absence of express statutory or charter provision on the subject, the decided weight of authority is to the effect that the power is inherent, and may be exercised in three cases, and in three cases only, namely: (1) When an offense is committed which, although it has no immediate relation to a member's duty as such, is of so infamous a nature as to render him unfit for the society of honest men, and which is indictable at common law; (2) when the offense is a violation of his duty as a member of the corporation; and (3) when the offense is of a mixed nature, being both against his duty as a member of the corporation, and also indictable at common law.¹⁰ If the conduct of a member comes within any of these cases,

Commerce of Milwaukee, 29 Wis. 45, 9 Am. Rep. 544.

England. *Rex v. Richardson*, 1 Burr. 517; *Lord Bruce's Case*, 2 Str. 819.

See also many other cases cited in notes in the following sections.

⁹*Fuller v. Trustees of Academic School*, 6 Conn. 532; *State v. Georgia Medical Society*, 38 Ga. 608, 95 Am. Dec. 408; *Com. v. St. Patrick Benev. Soc.* 2 Binn. (Pa.) 441, 4 Am. Dec. 453; *State v. Chamber of Commerce of Milwaukee*, 20 Wis. 63; and many other cases cited in the notes following.

"A member cannot be deprived of his membership arbitrarily or without proper cause." *Pepin v. Societe St. Jean Baptiste*, 24 R. I. 550, 60 L. R. A. 626, 54 Atl. 47.

Members of a committee appointed members of a committee to conduct the defense of suits brought against the society cannot be expelled merely because the suits were decided against the society, there being no showing that they did not perform their duties as members of such committee with diligence and good faith. *Radice v.*

Italian-American Christopher Columbus Society, 67 N. J. L. 196, 50 Atl. 691.

The governing body of an incorporated church will not be permitted to arbitrarily expel a member, where property rights are involved. *Holcombe v. Leavitt*, 124 N. Y. Supp. 980. See *Stahl v. Roumanian Young Men's Ass'n*, 77 N. J. L. 380, 71 Atl. 1114.

¹⁰*Allen v. Chicago Undertakers' Ass'n*, 232 Ill. 458, 83 N. E. 952; *People v. Board of Trade of Chicago*, 45 Ill. 112; *People v. Medical Society of Erie County*, 32 N. Y. 187; *People v. New York Commercial Ass'n*, 18 Abb. Pr. (N. Y.) 271; *Macaviczai v. Workingman's Club*, 246 Pa. 136, 92 Atl. 41; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Com. v. St. Patrick Benev. Society*, 2 Binn. (Pa.) 441, 4 Am. Dec. 453; *Leech v. Harris*, 2 Brewst. (Pa.) 571; *Com. v. Guardians of Poor of Philadelphia*, 6 Serg. & R. (Pa.) 469; *Carlin v. Ancient Order of Hibernians*, 54 Pa. Super. Ct. 512.

"It appears to be well settled," said the Supreme Court of Wisconsin, "that when the charter of a corporation is silent upon the subject of ex-

it is ground for expulsion, although it may not be expressly made so by the by-laws or rules of the corporation, and although they may specify some causes for expulsion.¹¹

§ 3962. — — By-laws and regulations of corporation. Corporations are frequently in express terms given the power to adopt by-laws and regulations for their government, or specifically for the expulsion of members. And the power exists, subject to limitations, even in the absence of an express provision therefor.¹² Corporations, therefore, other than joint stock corporations, and other corporations for pecuniary profit, may always adopt reasonable by-laws, unless restricted by their charter or articles of association, declaring what shall constitute membership, and what shall operate as a forfeiture thereof, applicable to existing as well as future members, provided the by-laws are not contrary to law.¹³

pulsion, or grants the power in general terms, there are but three legal causes of disfranchisement: (1) Offenses of an infamous character indictable at common law. (2) Offenses against the corporator's duty to the corporation, as a member of it. (3) Offenses compounded of the two." *State v. Chamber of Commerce of Milwaukee*, 20 Wis. 63. Quoted with approval in *Dickenson v. Chamber of Commerce of Milwaukee*, 29 Wis. 45, 9 Am. Rep. 544.

"On mature reflection it appears to me," said Chief Justice Tilghman in a Pennsylvania case, "that without an express power in the charter, no man can be disfranchised, unless he has been guilty of some offense, which either affects the interests or good government of the corporation, or is indictable by the law of the land." *Com. v. St. Patrick Benev. Society*, 2 Binn. (Pa.) 441, 4 Am. Dec. 453.

A fraternal benefit association has an inherent right to expel a member who is convicted of perjury. *Cunningham v. Supreme Council, Royal Arcanum*, 165 N. Y. App. Div. 52, 151 N. Y. Supp. 83.

A beneficial association "necessarily possesses the inherent power to

expel any of its members from membership for offenses which affect the life and integrity of the organization by becoming insubordinate to the supreme authority and resisting the enforcement of the supreme law, if the exercise of that power is not expressly prohibited by the statute or its charter." *Crow v. Capital City Council*, 26 Pa. Super. Ct. 411.

¹¹ *People v. New York Board of Fire Underwriters*, 7 Hun (N. Y.) 248, and cases cited in the preceding note.

"The power to expel for these causes is manifestly essential to the healthful existence of the corporate body and does not depend upon a specific grant." *People v. Board of Trade of Chicago*, 45 Ill. 112, quoted with approval in *Allen v. Chicago Undertakers' Ass'n*, 232 Ill. 458, 83 N. E. 952.

¹² See § 484, *supra*.

¹³ *Taylor v. Edson*, 4 Cush. (Mass.) 522; *Com. v. Union League of Philadelphia*, 135 Pa. St. 301, 8 L. R. A. 195, 20 Am. St. Rep. 870, 19 Atl. 1030.

A corporation may adopt by-laws providing for the expulsion of members even though its charter does not expressly give it power to do so, where

When the power to expel members is not expressly conferred upon a corporation by its charter, so that it has such power only as is inherent and exists at common law, the power cannot be exercised except when the member has been legally convicted of an infamous offense, or when he has committed some act tending to the destruction or injury of the corporation. And a by-law which vests in a majority of the members the power of expulsion for minor offenses is void.¹⁴ But where a corporation, such as a social club, for example, is expressly given the power to expel members, and to determine the causes which shall justify expulsion, and the manner of effecting the same, thus expressly vesting in a majority of the members the power to determine the causes for expulsion, a majority of the members may pass a by-law making minor offenses ground for expulsion, if they amount to disorderly conduct, or are injurious or hostile to the interests or objects of the association.¹⁵

The fact that the charter of a corporation expressly gives it the power to expel members for certain causes does not impliedly exclude the power to expel for other causes which would be sufficient in the absence of an express provision, unless there is something to show that it was so intended.¹⁶ The power of a corporation to pass by-laws prescribing grounds for the expulsion of members, even when such power is expressly conferred, is not unlimited. The by-laws must be reasonable, and not contrary to law or public policy.¹⁷ Of

it is given general power to make by-laws not inconsistent with the constitution and laws of the state. *Allen v. Chicago Undertakers' Ass'n*, 232 Ill. 458, 83 N. E. 952.

A nonstock corporation may expel members for violation of its by-laws, when authorized to punish infractions of its by-laws. *Jackson v. South Omaha Live Stock Exchange*, 49 Neb. 687, 68 N. W. 1051.

See also § 511, *supra*, and cases there cited.

¹⁴ *Com. v. Union League of Philadelphia*, 135 Pa. St. 301, 8 L. R. A. 195, 20 Am. St. Rep. 870, 19 Atl. 1030; *Evans v. Philadelphia Club*, 50 Pa. St. 107. And see § 3960, *supra*.

¹⁵ *Com. v. Union League of Philadelphia*, 135 Pa. St. 301, 8 L. R. A. 195, 20 Am. St. Rep. 870, 19 Atl. 1030.

¹⁶ *Com. v. St. Patrick Benev. So-*

ciety, 2 Binn. (Pa.) 441, 4 Am. Dec. 453. And see *Evans v. Club*, 3 Luz. Leg. Obs. (Pa.) 205.

¹⁷ **California.** *Otto v. Journeymen Tailors' Protective & Benevolent Union*, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217.

Georgia. *State v. Georgia Medical Society*, 38 Ga. 608, 95 Am. Dec. 408.

Michigan. *Allnutt v. Subsidiary High Court*, 62 Mich. 110, 28 N. W. 802.

New York. *Brown v. Supreme Court I. O. F.*, 176 N. Y. 132, 68 N. E. 145; *People v. New York Benev. Soc. of Operative Masons*, 3 Hun 361; *Stein v. Marks*, 44 Misc. 140, 89 N. Y. Supp. 921; *People v. Medical Society of Erie County*, 24 Barb. 570.

Pennsylvania. *Com. v. St. Patrick Benev. Society*, 2 Binn. 441, 4 Am. Dec. 453.

By-laws providing for expulsion of

course by-laws providing for the expulsion of members of a corporation are void if they conflict with the charter of the corporation, or the general law under which it was formed.¹⁸ And the supreme body of a fraternal benefit association has no jurisdiction to try and expel a member for disobedience of one of its orders which it had no authority to make.¹⁹ A charter or statutory provision giving a corporation authority to make rules, by-laws and ordinances, and do everything needful for the good government and support of its affairs, gives the corporation no power to provide for the expulsion of members for causes which are insufficient under the settled principles of law on the subject.²⁰ A grant in general terms in the charter, of the power to suspend or expel members, gives no power to expel a member for causes not affecting the government of the corporation or the accomplishment of its objects, and not amounting to an indictable offense.²¹

By-laws providing for expulsion are penal in character, and will be strictly construed.²² Nothing can be taken by intentment or implication to effectuate an expulsion thereunder,²³ but the cause of expulsion must fall strictly within the terms of the law.²⁴

A person cannot be expelled for deviation from the by-laws or rules of the corporation prior to becoming a member.²⁵

members must be consistent with the charter, and must state the causes of expulsion with such a reasonable degree of certainty that a member may know the transgressions which will subject him to the penalty. *People v. New York Produce Exchange*, 149 N. Y. 401, 44 N. E. 84.

And see generally §§ 490, 495, *supra*.

¹⁸ *Allen v. Chicago Undertakers' Ass'n*, 232 Ill. 458, 83 N. E. 952; *Grand Lodge (Colored) Knights of Pythias v. Jones*, 100 Miss. 467, 56 So. 458; *New York Protective Ass'n v. McGrath*, 23 N. Y. 209.

And see generally § 489, *supra*.

Under a statute providing that corporations might prescribe suitable penalties for the violation of their by-laws, not exceeding in any case twenty dollars for any one offense, it was held that a member could not be expelled for mere infraction of a by-law. *People v. Fire Department of Detroit*, 31 Mich. 458.

¹⁹ *Semken v. State Council of Junior Order of United American Mechanics of State of New York*, 176 N. Y. App. Div. 567, 163 N. Y. Supp. 193.

²⁰ *Com. v. St. Patrick Benev. Society*, 2 Binn. (Pa.) 441, 4 Am. Dec. 453.

²¹ *State v. Chamber of Commerce of Milwaukee*, 20 Wis. 63.

²² *Albers v. Merchants' Exch. of St. Louis*, 140 Mo. App. 446, 120 S. W. 139.

²³ *Albers v. Merchants' Exch. of St. Louis*, 140 Mo. App. 446, 120 S. W. 139.

²⁴ *Albers v. Merchants' Exch. of St. Louis*, 140 Mo. App. 446, 120 S. W. 139; *Reed v. National Order of Daughters of Isabella*, 95 N. Y. Misc. 695, 160 N. Y. Supp. 907, *aff'd* 177 N. Y. App. Div. 949, 164 N. Y. Supp. 1110.

²⁵ *People v. Medical Society of Erie County*, 32 N. Y. 187.

§ 3963. — — **Particular grounds.** Many cases have come before the courts for determination of the sufficiency of particular acts to justify expulsion, and it may be well to refer to them specifically. It has been held in some jurisdictions that a member of a corporation may be expelled because of original disqualification for membership,²⁶ especially where he makes false representations as to his eligibility.²⁷ But there is authority to the contrary.²⁸

It has been held that an incorporated chamber of commerce, board of trade, or the like, may disfranchise, expel, or suspend a member, in pursuance of a by-law, for refusal or failure to promptly perform a contract,²⁹ even though the contract may be unenforceable because

²⁶ *Beesley v. Chicago Journeymen Plumbers' Protective & Benevolent Ass'n*, 44 Ill. App. 278; *Kulberg v. National Council of Knights & Ladies of Security*, 124 Minn. 437, 145 N. W. 120; *Reg. v. Saddlers' Co.*, 10 H. L. Cas. 404. And see *Diligent Fire Co. v. Com.*, 75 Pa. St. 291.

One who acquires membership through fraud is not entitled to the aid of a court of equity to restore him to membership after he has been expelled. *Bonfitto v. San Donato Mut. Ben. Ass'n*, 62 Pa. Super. Ct. 248.

²⁷ Where he makes false representations as to his age, when he was over the age limit when he joined. *National Council Knights & Ladies of Security v. Turov*, 135 Minn. 455, 161 N. W. 225; *Rigler v. National Council Knights & Ladies of Security*, 128 Minn. 51, 150 N. W. 178; *Kulberg v. National Council Knights & Ladies of Security*, 124 Minn. 437, 145 N. W. 1020; *Marcus v. National Council Knights & Ladies of Security*, 123 Minn. 145, 143 N. W. 265.

See also § 3956, *supra*.

²⁸ In *Fawcett v. Charles*, 13 Wend. (N. Y.) 473, it was held that a defect in a member's original qualifications for membership, and the fact that he procured his admission by false representations, could only be inquired into by quo warranto, and were not

ground for his expulsion by resolution of the corporation.

See also *Pirics v. First Russian Slavonic Greek Catholic Benev. Society*, 83 N. J. Eq. 29, 89 Atl. 1036.

²⁹ *People v. Board of Trade of Chicago*, 45 Ill. 112; *Albers v. Merchants' Exchange of St. Louis*, 140 Mo. App. 446, 120 S. W. 139; *Haebler v. New York Produce Exchange*, 149 N. Y. 414, 44 N. E. 87, rev'g judgment 15 Misc. 42, 36 N. Y. Supp. 427; *People v. New York Produce Exchange*, 149 N. Y. 401, 44 N. E. 84; *Dickenson v. Chamber of Commerce of Milwaukee*, 29 Wis. 45, 9 Am. Rep. 544. See also *Lewis v. Wilson*, 121 N. Y. 284, 24 N. E. 474.

A produce exchange, incorporated for the purpose, among others, of inculcating "just and equitable principles of trade," and empowered to "make all proper and lawful by-laws," and to expel members in such manner as may be provided by its by-laws, may make a by-law providing for expulsion of any member for "fraudulent breach of contract, or of any proceedings inconsistent with just and equitable principles of trade." *People v. New York Produce Exchange*, 149 N. Y. 401, 44 N. E. 84.

Under a by-law of a produce exchange providing for expulsion of members for "willful violation of the charter or by-laws, or for fraudulent

it is not in writing, as required by the statute of frauds;³⁰ for violating a by-law prohibiting members from gathering in any public place in the vicinity of the exchange room, and forming a market, for the purpose of making any trade or contract for the future delivery of grain or provisions, before the time fixed for opening the exchange room for general trading, or after the time fixed for closing the same;³¹ for allowing rebates to customers contrary to the rules and regulations of the association;³² for making or reporting any false or fictitious purchases or sales, or acting in any way in bad faith, dishonestly, or dishonorably;³³ or for obtaining goods under false pretenses;³⁴ or for misappropriating money belonging to customers;³⁵ or for dealing in futures;³⁶ or for dealing in or having any business connection with bucket shops.³⁷ Rules of this character, which are general in their terms, are commonly held to cover the conduct of

breach of contract, or for any proceedings inconsistent with just and equitable principles of trade, or for other misconduct," a mere breach or nonperformance of a contract, unaccompanied by any moral delinquency, is no cause for expulsion; but the by-law extends to conduct in respect to a contract, either in its inception or execution, or the failure to perform it, which is inconsistent with just and fair dealing, although it may fall short of actionable fraud, and although it is not of that specific and definite character of which the law, in an action between the parties, will take notice. *People v. New York Produce Exchange*, 149 N. Y. 401, 44 N. E. 84.

The fact that the contract is enforceable at law does not make it any the less a cause for expulsion under such a by-law. *People v. New York Produce Exchange*, 149 N. Y. 401, 44 N. E. 84.

As to the power of the New York Stock Exchange to expel members, see *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 17 N. E. 225.

³⁰ *Dickenson v. Chamber of Commerce of Milwaukee*, 29 Wis. 45, 9 Am. Rep. 544.

³¹ *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760.

³² *Jackson v. South Omaha Live Stock Exchange*, 49 Neb. 687, 68 N. W. 1051.

³³ *Pitcher v. Board of Trade of Chicago*, 121 Ill. 412, 13 N. E. 187. See also *Wood v. Chamber of Commerce of Milwaukee*, 119 Wis. 367, 96 N. W. 835.

³⁴ *People v. New York Commercial Ass'n*, 18 Abb. Pr. (N. Y.) 271. It was so held in this case, although the offense was not committed within the local jurisdiction of the corporation, nor against a member thereof, the corporation having been formed inter alia, "to inculcate just and equitable principles in trade," and the offense being in direct contravention of such object.

³⁵ *People v. East Buffalo Live Stock Ass'n*, 88 N. Y. App. Div. 619, 84 N. Y. Supp. 795, aff'd 179 N. Y. 598, 72 N. E. 1148.

³⁶ "Dealing in differences on the fluctuations in the market price of a commodity without a bona fide purchase or sale for an actual delivery." See *Wood v. Chamber of Commerce of Milwaukee*, 119 Wis. 367, 96 N. W. 835.

³⁷ *Bostedo v. Board of Trade*, 130 Ill. App. 560, judgment aff'd 227 Ill. 90, 81 N. E. 42.

members of the corporation with nonmembers, especially where the declared object of the corporation is to promote just and equitable principles in trade.³⁸ By-laws permitting such corporations to expel members who refuse to submit business disputes with other members to arbitration have been held to be valid.³⁹ But, on the other hand, it has been held that a member cannot be expelled for refusal or failure to submit a matter in dispute to arbitration after having commenced suit upon it;⁴⁰ or for refusal to pay an award rendered in an arbitration, where the member protested against the arbitration on the ground that the association had no jurisdiction.⁴¹ It has

³⁸ *Bostedo v. Board of Trade of Chicago*, 130 Ill. App. 560, judgment aff'd 227 Ill. 90, 81 N. E. 42; *Haebler v. New York Produce Exchange*, 149 N. Y. 414, 44 N. E. 87, rev'g 15 N. Y. Misc. 42, 36 N. Y. Supp. 427; *Wood v. Chamber of Commerce of Milwaukee*, 119 Wis. 367, 96 N. W. 835.

³⁹ *Evans v. Chamber of Commerce of Minneapolis*, 86 Minn. 448, 91 N. W. 8; *Haebler v. New York Produce Exchange*, 149 N. Y. 414, 44 N. E. 87, rev'g 15 N. Y. Misc. 42, 36 N. Y. Supp. 427. See also *Farmer v. Board of Trade of Kansas City*, 78 Mo. App. 557.

This was held to be true where the statute under which the corporation was formed authorized it to appoint a board of arbitration, and its articles of incorporation stated that one of its purposes was "to facilitate the speedy adjustment of business disputes." *Evans v. Chamber of Commerce of Minneapolis*, 86 Minn. 448, 91 N. W. 8.

A by-law providing for a trial before a board of managers is not unreasonable, coercive or contrary to public policy because it gives the board power to discipline a member only when he refuses to arbitrate or conciliate his differences with another member, where he is not required to submit them to arbitration, but may do so or not, as he chooses. *Haebler v. New York Produce Exchange*, 149 N. Y. 414, 44 N. E. 87, rev'g judg-

ment 15 N. Y. Misc. 42, 36 N. Y. Supp. 427.

Where by-laws give the board of directors power to discipline a member only when he refuses to arbitrate as he has agreed to do in consideration of the rights and privileges of membership, and do not attempt to deprive him of an opportunity to litigate his differences in the ordinary way, they are not unreasonable, coercive, violative of constitutional rights, or contrary to public policy. *Evans v. Chamber of Commerce of Minneapolis*, 86 Minn. 448, 91 N. W. 8.

"The error which prevails in a few cases, in which an opposite doctrine has been announced, lies in the fact that the broad distinction was not observed which exists between an attempt to enforce in the courts an absolute agreement to waive, disregard, and ignore the ordinary methods of settling disputes, and an effort to compel compliance with an agreement made between individuals, as a condition of becoming and remaining members of a voluntary association for business purposes, that they will settle their business differences in a prescribed way." *Evans v. Chamber of Commerce of Minneapolis*, 86 Minn. 448, 91 N. W. 8.

⁴⁰ *State v. Chamber of Commerce of Milwaukee*, 20 Wis. 63.

⁴¹ *Savannah Cotton Exchange v. State*, 54 Ga. 668.

been held that a member of such a corporation cannot be expelled for selling a seat to which the managers have declared the member's title invalid.⁴²

It has been held that a physician who is a member of a medical society may be expelled for selling out his practice, and then resuming practice in the same locality to the purchaser's injury;⁴³ or for holding himself out as prepared and willing to practice either as an allopath or homeopath, as might be desired by the patient, etc.;⁴⁴ or for gross immorality in a professional transaction;⁴⁵ or for forging hospital records for the purpose of concealing acts of charlatanry on his part;⁴⁶ but not for receiving for his services a less fee than that prescribed by the by-laws of the society;⁴⁷ or for advertising a particular remedy;⁴⁸ or because his political views and acts as a politician are distasteful to the other members;⁴⁹ or for becoming surety on the official bond of a negro elected to office, "in opposition to the wishes of the entire respectable community," and becoming surety on the bonds of negroes charged with inciting a riot, etc.⁵⁰

It has been held that a member of a trades union may be expelled for working, in violation of the by-laws of the union, for a person who does not pay wages weekly, or who employs nonunion men;⁵¹ or for working upon nonunion material, or otherwise violating the rules and agreements of the union;⁵² but not for refusal to join in a labor strike.⁵³

⁴² *People v. New York Cotton Exchange*, 8 Hun (N. Y.) 216.

⁴³ *Barrows v. Massachusetts Medical Society*, 12 Cush. (Mass.) 402.

⁴⁴ *Ex parte Paine*, 1 Hill (N. Y.) 665.

⁴⁵ *Barrows v. Massachusetts Medical Society*, 12 Cush. (Mass.) 402.

⁴⁶ *Ewald v. Medical Society of New York*, 144 N. Y. App. Div. 82, 128 N. Y. Supp. 886, rev'g judgment 70 N. Y. Misc. 615, 130 N. Y. Supp. 1024.

⁴⁷ *People v. Medical Society of Erie Co.*, 24 Barb. (N. Y.) 570.

⁴⁸ *People v. Medical Society of Erie Co.*, 32 N. Y. 187.

⁴⁹ *State v. Georgia Medical Society*, 38 Ga. 608, 95 Am. Dec. 408.

⁵⁰ *State v. Georgia Medical Society*, 38 Ga. 608, 95 Am. Dec. 408.

⁵¹ *Burns v. Bricklayers' Union No. 1 of Brooklyn*, 27 Abb. N. Cas. (N.

Y.) 20. But see *Otto v. Journeymen Tailors' Protective & Benevolent Union*, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217, and *People v. New York Benev. Soc. of Operative Masons*, 3 Hun (N. Y.) 361.

⁵² See *Bossert v. United Brotherhood of Carpenters & Joiners of America*, 77 N. Y. Misc. 592, 137 N. Y. Supp. 321.

⁵³ In *People v. New York Benev. Soc. of Operative Masons*, 3 Hun (N. Y.) 361, it was held that a member of a beneficial association could not be expelled under a by-law for working at a trade, and refusing to join a strike, as such a by-law was contrary to public policy. See also *Otto v. Journeymen Tailors' Protective & Benevolent Union*, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217. But see *Burns v. Bricklayers' Union No. 1 of*

It has been held that a member of a board of fire underwriters, organized to maintain uniformity in insurance rates among its members, may be expelled for charging lower rates than those fixed by the association.⁵⁴

A member of a mutual benefit association or other corporation may be expelled for failure to pay legal dues, assessments or fines, as required by his contract of membership, if there is an express provision therefor,⁵⁵ but not for failure of the officers receiving pay-

Brooklyn, 27 Abb. N. Cas. (N. Y.) 20.

⁵⁴ *People v. New York Board of Fire Underwriters*, 7 Hun (N. Y.) 248, aff'g 54 How. Pr. 240.

⁵⁵ *United States. Scheu v. Grand Lodge, Ohio Division, Independent Foresters*, 17 Fed. 214.

Alabama. Medical & Surgical Soc. of Montgomery Co. v. Weatherly, 75 Ala. 248.

District of Columbia. Drum v. Benton, 13 App. Cas. 245.

Georgia. Supreme Conclave Knights of Damon v. Warwick, 110 Ga. 388, 35 S. E. 645; *Hussey v. Gallagher*, 61 Ga. 86.

Illinois. Champion v. Hanahan, 138 Ill. App. 387.

Indiana. Supreme Lodge Knights of Honor v. Hahn, 43 Ind. App. 75, 84 N. E. 837.

Iowa. Finnerty v. Supreme Council Catholic Knights of America, 115 Iowa 398, 88 N. W. 834.

Kentucky. Roberts v. Brotherhood of Locomotive Firemen & Enginemen, 156 Ky. 189, 160 S. W. 924.

Louisiana. State v. Stevedores & Longshoremen's Benev. Ass'n, 43 La. Ann. 1098, 10 So. 169.

Massachusetts. Proctor v. United Order of Golden Star, 203 Mass. 587, 25 L. R. A. (N. S.) 370, 89 N. E. 1042; *Horgan v. Metropolitan Mut. Aid Ass'n*, 202 Mass. 524, 88 N. E. 890; *Karcher v. Supreme Lodge, Knights of Honor*, 137 Mass. 371.

Michigan. Edgerly v. Ladies of Modern Maccabees, 185 Mich. 148, 151 N. W. 692.

Minnesota. Dougherty v. Supreme Court of Independent Order of Foresters, 125 Minn. 142, 145 N. W. 813.

Missouri. Knode v. Modern Woodmen of America, 171 Mo. App. 377, 157 S. W. 818; *Meisenbach v. Supreme Tent, Knights of Maccabees of World*, 140 Mo. App. 76, 119 S. W. 514; *Burchard v. Western Commercial Travelers Ass'n*, 139 Mo. App. 606, 123 S. W. 973.

Nebraska. King v. Physicians' Casualty Ass'n, 97 Neb. 637, 150 N. W. 1010; *Henton v. Sovereign Camp Woodmen of World*, 87 Neb. 552, 138 Am. St. Rep. 500, 127 N. W. 869.

New Jersey. Sibley v. Board of Management of Carteret Club of Elizabeth, 40 N. J. L. 295.

New York. Whiteside v. Noyac Cottage Ass'n, 142 N. Y. 585, 37 N. E. 624; *Wheeler v. Connecticut Mut. Life Ins. Co.*, 82 N. Y. 543, 37 Am. Rep. 594; *Riess v. Supreme Conclave Improved Order of Heptasophs*, 177 App. Div. 845, 164 N. Y. Supp. 878; *People v. Philip Bernstein Sick & Benefit Society*, 161 App. Div. 823, 146 N. Y. Supp. 886; *Taufer v. Brotherhood of Painters, Decorators & Paperhangers of America*, 137 App. Div. 838, 122 N. Y. Supp. 527.

Pennsylvania. Young v. Grand Lodge of Sons of Progress, 173 Pa. St. 302, 33 Atl. 1038.

Virginia. Knights of Columbus v. Burroughs' Beneficiary, 107 Va. 671, 17 L. R. A. (N. S.) 246, 60 S. E. 40.

To justify suspension the assessment must be made by a legally constituted

ment to remit the money to the proper authorities.⁵⁶ A member of a mutual benefit association may also be expelled if he fraudulently alters his certificate or a physician's bill, etc., so as to increase the benefits secured thereby;⁵⁷ or if he fraudulently pretends to be sick or disabled in order to obtain benefits, or draws relief after recov-

body under the charter and by-laws of the association and in strict conformity therewith. *Burchard v. Western Commercial Travelers Ass'n*, 139 Mo. App. 606, 123 S. W. 973; *King v. Physicians' Casualty Ass'n*, 97 Neb. 637, 150 N. W. 1010.

A member cannot lawfully be expelled for failure to pay dues at an increased rate, where the by-law providing for the increase is unreasonable and void. *Hibernia Fire Engine Co. v. Com.*, 93 Pa. St. 264.

An offer by a third person to pay the assessment of a delinquent member will not bind the society, where it is made after the time fixed for payment and to one having no authority to bind it. *Supreme Conclave Knights of Damon v. Warwick*, 110 Ga. 388, 35 S. E. 645.

Where a member is under no legal obligation to pay for picnic tickets and the corporation has no authority to assess him for them, he cannot legally be expelled for failure to pay for them. *People v. Philip Bernstein Sick & Benefit Society*, 161 N. Y. App. Div. 823, 146 N. Y. Supp. 886.

A mutual benefit society has an inherent right to expel members for nonpayment of dues and assessments. *Knights of Columbus v. Burroughs' Beneficiary*, 107 Va. 671, 17 L. R. A. (N. S.) 246, 60 S. E. 40.

There must be an express provision therefor to authorize expulsion for nonpayment of a fine. *Erd v. Bavarian National Aid & Relief Ass'n City of Detroit*, 67 Mich. 233, 34 N. W. 555.

There can be no expulsion for nonpayment of a fine which is different from that authorized by the by-laws.

Meurer v. Detroit Musicians' Benevolent & Protective Ass'n, 95 Mich. 451, 54 N. W. 954.

A by-law authorizing directors of a corporation to fine or suspend a member for disorderly conduct does not authorize suspension of a member for the nonpayment of a fine imposed for violating a rule of the corporation, where he in good faith contests the validity of the fine. *Albers v. Merchants' Exch. of St. Louis*, 39 Mo. App. 583.

Failure to pay dues pending an illegal suspension is no ground for expulsion. *People v. New York Benev. Soc. of Operative Masons*, 3 Hun (N. Y.) 361.

In the case of fraternal benefit associations the question generally is as to the effect of the nonpayment of dues or assessments on the liability of the association on the member's certificate or policy of insurance. This question is not within the scope of this work. Reference should therefore be had to standard works on fraternal benefit associations and insurance.

⁵⁶ A by-law of a mutual benefit association which provides that, although members pay their dues as such by-laws provide, they shall lose membership and insurance rights if the dues received by the officers are not remitted by them, is unreasonable, and cannot result in the loss of membership of one otherwise entitled to remain in full standing. *Brown v. Supreme Court I. O. F.*, 176 N. Y. 132, 68 N. E. 145.

⁵⁷ *Com. v. Philanthropic Society*, 5 Binn. (Pa.) 486.

ery;⁵⁸ or otherwise draws or attempts to draw benefits by means of false representations;⁵⁹ and it has been assumed that a member of such an association may be expelled for enlisting as a soldier in active service, contrary to the provisions of a by-law.⁶⁰ A fraternal association may provide in its constitution that members shall be expelled for unbecoming conduct, or conduct tending to injure the society.⁶¹ But such a provision will not authorize the expulsion of a member of a brotherhood of locomotive engineers simply because he has given testimony against a railroad.⁶² A by-law authorizing the expulsion of a member who shall be guilty of any immoral practice or improper conduct, violative of his duties and unbecoming his profession as a member of the order, justifies the expulsion of a member who has been convicted of perjury.⁶³ Such an association has inherent power to expel members for participating in an illegal meeting at which the password is divulged.⁶⁴ And especially has it such power where the constitution and by-laws authorize expulsion for any offense which tends to bring discredit upon or injure the order, or for exposing the password.⁶⁵ A trustee may be expelled for fraudulently charging the corporation with money which he has

⁵⁸ *Society for Visitation of Sick & Burial of Dead v. Com.*, 52 Pa. St. 125, 91 Am. Dec. 139.

⁵⁹ *Pepin v. Societe St. Jean Baptiste*, 24 R. I. 550, 60 L. R. A. 626, 54 Atl. 47.

A member cannot lawfully be expelled for obtaining money from the association for sick benefits to which he was not entitled by obtaining a judgment against it for the same, since while such judgment remains in force it is conclusive upon the association that he is entitled to the benefit. *Spier v. Douglas Mut. Benefit & Aid Society*, 144 Ill. App. 195.

⁶⁰ *Franklin Beneficial Ass'n v. Com.*, 10 Pa. St. 357.

But is not such a by-law contrary to public policy? See *In re Charter of Rev. David Mulholland Benev. Soc. of Manayunk*, 10 Phila. (Pa.) 19.

⁶¹ *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S. W. 831.

In this case it was said that it probably would not be an unreasonable construction of such a by-law to hold that it authorized the expulsion of a member of a brotherhood of locomotive engineers for writing a letter advising the widow of an engineer who had been killed in a railroad accident to sue the company, provided the members acted in good faith and in the exercise of their honest judgment in expelling him.

⁶² As so construed, the provision would be unreasonable, unlawful and void. *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S. W. 834.

⁶³ *Cunningham v. Supreme Council*, *Royal Arcanum*, 165 N. Y. App. Div. 52, 151 N. Y. Supp. 83.

⁶⁴ *Carlin v. Ancient Order of Hibernians*, 54 Pa. Super. Ct. 512.

⁶⁵ *Carlin v. Ancient Order of Hibernians*, 54 Pa. Super. Ct. 512.

not paid.⁶⁶ A member cannot lawfully be expelled for the acts of a subordinate lodge for which he personally is not responsible.⁶⁷

By-laws of an undertakers' association authorizing the suspension of members for soliciting business have been sustained.⁶⁸

It has been held that a member of a social club may be expelled for being guilty of rude and ungentlemanly conduct in the clubhouse, by charging a fellow member, without provocation, with acting like a blackguard, where the charter of the club expressly allows a majority of the members to determine the causes which shall justify expulsion, and they have passed a by-law providing for expulsion "for a willful infraction of the rules of the house, or of any by-law of the league, or for acts or conduct which they may deem disorderly, or injurious to the interests or hostile to the objects" of the club.⁶⁹

On the other hand, it has been held that a member of a corporation (a social club) cannot be expelled for minor offenses, even in pursuance of a by-law, where the corporation is not expressly given the power to determine causes for expulsion, and that he cannot be expelled, therefore, under such circumstances, for striking another member, or using insulting language to him;⁷⁰ that a member of a mutual benefit association or social club or society cannot be expelled under a by-law merely for vilifying or defaming or privately quarreling with another member,⁷¹ at least where the association is not

⁶⁶ *Com. v. Guardians of Poor of City of Philadelphia*, 6 Serg. & R. (Pa.) 469.

⁶⁷ *Reed v. National Order of Daughters of Isabella*, 95 N. Y. Misc. 695, 160 N. Y. Supp. 907, aff'd 177 N. Y. App. Div. 949, 164 N. Y. Supp. 1110.

⁶⁸ *Allen v. Chicago Undertakers' Ass'n*, 232 Ill. 458, 83 N. E. 952.

⁶⁹ *Com. v. Union League of Philadelphia*, 135 Pa. St. 301, 8 L. R. A. 195, 20 Am. St. Rep. 870, 19 Atl. 1030.

⁷⁰ *Evans v. Philadelphia Club*, 50 Pa. St. 107. Compare *Com. v. Union League of Philadelphia*, 135 Pa. St. 301, 8 L. R. A. 195, 20 Am. St. Rep. 870, 19 Atl. 1030.

⁷¹ *People v. Alpha Lodge No. 1 Knights of Sobriety, Fidelity & Integrity*, 13 N. Y. Misc. 677, 35 N. Y. Supp. 214, 8 N. Y. App. Div. 591, 40 N. Y. Supp. 1147; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Com. v. St.*

Patrick Benev. Society, 2 Binn. (Pa.) 441, 4 Am. Dec. 453. "The offense of vilifying a member or a private quarrel," said Chief Justice Tilghman in the case last cited, "is totally unconnected with the affairs of the society, and therefore its punishment cannot be necessary for the good government of the corporation."

A member of a corporation cannot be expelled for defaming another member, unless the defamation was without any reasonable cause. *Allnutt v. Subsidiary High Court of United States Ancient Order of Foresters*, 62 Mich. 110, 28 N. W. 802.

A provision in the constitution of a benefit society providing for the suspension or expulsion of a member who makes to the chief ranger or to the public any false or malicious accusation against another member, is not void as having nothing to do with

expressly vested with the power to determine what causes shall justify expulsion;⁷² or for defaming and injuring the society in taverns;⁷³ or for refusal to take a sacrament in accordance with the forms and practice of a particular church or sect;⁷⁴ or for testifying to the truth as a witness in an action against the corporation,⁷⁵ or against another corporation.⁷⁶ It has also been held that a member of an incorporated religious society cannot be expelled for immorality, in the absence of provision therefor in its charter.⁷⁷

A by-law providing for expulsion for using improper language at meetings has been upheld.⁷⁸ But it has been held that a provision permitting expulsion of members who impugn the honor of the society or talk against it, does not justify the expulsion of a member for disorderly conduct at a meeting.⁷⁹ And where a corporation adopted, for the government of the debates of its members, Cushing's Manual, which prohibits censure of a member for speaking offensive words, if no notice was taken of them when they were spoken, and they were not written down until after the intervention of business after he had finished his speech, it was held that a member was unlawfully expelled for using offensive words which were not noticed or objected to until a subsequent meeting.⁸⁰ And it has also been

the transaction of the business of the society, since the accusation may be one which affects the interests or good government of the society, and may have reference to its affairs. *People v. Women's Catholic Order of Foresters*, 162 Ill. 78, 44 N. E. 401, aff'g 59 Ill. App. 390.

A by-law providing for the expulsion of any member "who shall publicly attack or scandalize the national council" was upheld in *Crow v. Capital City Council*, 26 Pa. Super. Ct. 411.

⁷² *Com. v. Union League of Philadelphia*, 135 Pa. St. 301, 8 L. R. A. 195, 20 Am. St. Rep. 870, 19 Atl. 1030.

⁷³ *Com. v. German Society for Mut. Support & Assistance*, 15 Pa. St. 251.

⁷⁴ *People v. St. Francis Ben. Society*, 24 How. Pr. (N. Y.) 216.

⁷⁵ *United Bros. v. Williams*, 126 Ga. 19, 115 Am. St. Rep. 64, 54 S. E. 907.

⁷⁶ A member of a railroad brotherhood cannot be expelled lawfully for

testifying against the railroad company, and a by-law authorizing expulsion on that ground is void. *St. Louis Southwestern R. Co. of Texas v. Thompson*, 102 Tex. 89, 19 Ann. Cas. 1250, 113 S. W. 144; *Id.*, — Tex. Civ. App. —, 192 S. W. 1095.

⁷⁷ *People v. German United Evangelical St. Stephen's Church*, 53 N. Y. 103.

⁷⁸ *Neff v. Pennsylvania Daughters of Liberty*, 62 Pa. Super. Ct. 251.

⁷⁹ Such a provision refers to acts and conversations with or in the presence of persons outside of the society, and does not justify the expulsion of a member for disorderly conduct in pressing a motion at a meeting of the society and in refusing to cease talking when ordered to do so. *Radice v. Italian-American Christopher Columbus Society*, 67 N. J. L. 196, 50 Atl. 691.

⁸⁰ *People v. American Inst. City of New York*, 44 How. Pr. (N. Y.) 468.

held that a member of an educational corporation cannot be expelled for disrespectful and contemptuous language towards his associates, and neglect of duty in not acting on committee.⁸¹ It has also been held that a by-law of a hook and ladder company providing for expulsion of a member who shall be guilty of an act whereby the reputation of the company may be injured, witnessed by any member of the company, applies only to acts of moral turpitude.⁸²

§ 3964. — — Good faith. Expulsion of a member must be in good faith, and because of the act or conduct relied upon as the cause of expulsion. If a member is expelled nominally for an offense which would warrant his expulsion, but in reality for an offense which, by the rules or by-laws of the corporation, is punishable by a fine only, or which is not a valid ground for expulsion, he will be reinstated by the courts.⁸³ Even though the rules of the organization permit a summary expulsion without notice or trial, there is an implied obligation or contract on the part of the organization that the members will be fairly treated and that good faith will be maintained between them. And the expulsion of a member, where brought about for the mere purpose of promoting the private interests of certain parties and to enable them to obtain control of the property of the corporation is fraudulent and void.⁸⁴ It is not necessary that malice in the sense of hatred or ill-will towards the expelled member be shown.

⁸¹ *Fuller v. Trustees of Academic School in Plainfield*, 6 Conn. 532.

⁸² Such a by-law was held not to authorize expulsion of a member for withholding from the company money which he claims he has no right to turn over to it, or for other transactions of a purely financial character between himself and a third person concerning the division of a commission for a loan to the company. *De Hart v. Good Will Hook & Ladder Co.* No. 1, 61 N. J. L. 507, 40 Atl. 570.

⁸³ *Otto v. Journeymen Tailors' Protective & Benevolent Union*, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217; *Wallace v. Grand Lodge United Brothers of Friendship*, 32 Ky. L. Rep. 1013, 107 S. W. 724; *St. Louis Southwestern R. Co. of Texas v. Thompson*, 102 Tex. 89, 19 Ann. Cas. 1250, 113 S. W. 144;

Id., — Tex. Civ. App. —, 192 S. W. 1095; *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S. W. 834.

Where the ostensible charge against a member is merely for the purpose of affording a pretext or color for expelling him for another act which would not justify his expulsion, and his expulsion is based solely upon the latter act, it cannot be said that the members act in good faith and from proper motives in expelling him. *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S. W. 834.

⁸⁴ *Hendryx v. People's United Church of Spokane*, 42 Wash. 336, 4 L. R. A. (N. S.) 1154, 7 Ann. Cas. 764, 84 Pac. 1123.

Malice in such cases is sufficiently shown if it is proven that in expelling him the other members acted knowingly and wilfully in violation of his rights and to his injury.⁸⁵

§ 3965. — — Waiver of cause of expulsion. A corporation may waive the right to expel a member for violation of a by-law, or other acts in violation of his duty to the corporation, and if it consents to or acquiesces in an act, it cannot afterwards expel therefor.⁸⁶ So if a mutual benefit association by its conduct has induced a member to fall into the habit of delaying the payment of assessments beyond the time fixed for forfeiture for nonpayment, it cannot inflict the penalty of expulsion on him without first warning him of a change in its business conduct.⁸⁷

§ 3966. — — Mode of procedure to expel members. Before a member of a corporation can be expelled merely on the ground that he has committed an indictable offense, "it is necessary that there should be a previous conviction by a jury, according to the law of the land."⁸⁸ When the offense is against the member's duty to the corporation, he may be expelled on trial and conviction by the corporation.⁸⁹ A member of a corporation cannot be disfranchised or expelled without the agency of a tribunal competent to investigate the cause, and pronounce the sentence of the loss of the right to membership.⁹⁰ The power to expel a member is primarily in the whole body of members as constituting or representing the corporation, and cannot be exercised by the directors or trustees, or other

⁸⁵ *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S. W. 834.

⁸⁶ *Supreme Lodge Knights of Honor v. Hahn*, 43 Ind. App. 75, 84 N. E. 837; *Henton v. Sovereign Camp Woodmen of World*, 87 Neb. 552, 138 Am. St. Rep. 500, 127 N. W. 869.

Harmstead v. Washington Fire Co., 1 Leg. Gaz. (Pa.) 392, wherein it was held, in effect, that a fire company could not expel a member for joining another company in violation of a by-law, where it acquiesced therein.

⁸⁷ *Dougherty v. Supreme Court of Independent Order of Foresters*, 125 Minn. 142, 145 N. W. 813; *McMahon v. Maccabees of World*, 151 Mo. 522,

52 S. W. 384; *Seehorn v. Supreme Council Catholic Knights of America*, 95 Mo. App. 233, 68 S. W. 949; *Salvail v. Catholic Order of Foresters*, 70 N. H. 635, 50 Atl. 100.

See standard works on fraternal benefit associations and insurance.

⁸⁸ *Com. v. St. Patrick Benev. Society*, 2 Binn. (Pa.) 441, 4 Am. Dec. 453.

⁸⁹ *Com. v. St. Patrick Benev. Society*, 2 Binn. (Pa.) 441, 4 Am. Dec. 453, and cases cited in the notes following.

⁹⁰ *State v. Vincennes University*, 5 Ind. 77; *Gray v. Christian Society*, 137 Mass. 329, 50 Am. Rep. 310; and cases in the notes following.

officers,⁹¹ unless there is some provision to the contrary in the charter of the corporation, or unless the whole body of members have, by a duly adopted and valid by-law or resolution, authorized in the particular jurisdiction, delegated the exercise of the power to the board of directors or some other select body. Some of the courts have held that there can be no such delegation of the power unless it is expressly authorized by the charter of the corporation;⁹² but the better opinion is to the contrary.⁹³ The charter frequently confers upon a corporation the authority to delegate the power to expel members to a select board or committee or to certain officers, and of course, when this is so, the delegation of power is valid.⁹⁴

⁹¹ *Weber v. Zimmerman*, 22 Md. 156; *Gray v. Christian Society*, 137 Mass. 329, 50 Am. Rep. 310; *Hibernia Fire Engine Co. v. Com.*, 93 Pa. St. 264; *Hassler v. Philadelphia Musical Ass'n*, 14 Phila. (Pa.) 233; *State v. Chamber of Commerce of Milwaukee*, 20 Wis. 63.

⁹² *People v. Alpha Lodge No. 1 of Knights of Sobriety, Fidelity & Integrity*, 8 N. Y. App. Div. 591, 40 N. Y. Supp. 1147, 13 N. Y. Misc. 677, 35 N. Y. Supp. 214; *Hibernia Fire Engine Co. v. Com.*, 93 Pa. St. 264; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760; *State v. Chamber of Commerce of Milwaukee*, 20 Wis. 63.

In *State v. Chamber of Commerce of Milwaukee*, 20 Wis. 63, it was held that a provision in the charter of a corporation that it should have the power to admit as members such persons as it might see fit, and expel any member as it might see fit, did not give the corporation the power to delegate to its board of directors the power to expel members.

⁹³ *Hussey v. Gallagher*, 61 Ga. 86; *People v. Women's Catholic Order of Foresters*, 162 Ill. 78, 44 N. E. 401; *Pitcher v. Board of Trade of Chicago*, 121 Ill. 412, 13 N. E. 187; *People v. Board of Trade of Chicago*, 45 Ill. 112; *People v. Fire Department of Detroit*, 31 Mich. 458; *People v.*

New York Commercial Ass'n, 18 Abb. Pr. (N. Y.) 271; *White v. Brownell*, 2 Daly (N. Y.) 329. See *Green v. African M. E. Society*, 1 Serg. & R. (Pa.) 254; *Wood v. Chamber of Commerce of Milwaukee*, 119 Wis. 367, 96 N. W. 835.

In *Hussey v. Gallagher*, 61 Ga. 86, it was held that by-laws prescribing a trial before a select committee of members of an association, appointed by the president, and presided over by him, restricting witnesses to members, and prescribing that members should be dropped without trial if they should fail to pay fines, were not so unreasonable as to justify a court of equity in declaring them void, and enjoining their enforcement, where they were sanctioned by the charter.

⁹⁴ *Alabama. Medical & Surgical Society of Montgomery Co. v. Weatherly*, 75 Ala. 248.

Illinois. People v. Women's Catholic Order of Foresters, 162 Ill. 78, 44 N. E. 401.

New York. Haebler v. Produce Exchange, 149 N. Y. 414, 44 N. E. 87; *People v. New York Produce Exchange*, 149 N. Y. 401, 44 N. E. 84; *People v. Musical Mut. Protective Union*, 118 N. Y. 101, 23 N. E. 129, 47 Hun 273.

Pennsylvania. Young v. Grand Lodge Sons of Progress, 173 Pa. St.

An attempted expulsion of a member after the corporate charter has expired is a nullity and will not justify the corporation in excluding him from membership after a renewal of its charter.⁹⁵

In order that the action of a corporation in expelling a member for cause may be valid, it is essential, in the absence of a waiver, that there shall be a hearing or trial of the charge against him, with reasonable notice to him, and a fair opportunity to be heard in his defense.⁹⁶ And notice is generally held to be necessary even though

302, 33 Atl. 1038; *Com. v. Union League of Philadelphia*, 135 Pa. St. 301, 8 L. R. A. 195, 20 Am. St. Rep. 870, 19 Atl. 1030.

Texas. *Screwmen's Benev. Ass'n v. Benson*, 76 Tex. 552, 13 S. W. 379.

Wisconsin. *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760.

⁹⁵ *United Bros. v. Williams*, 126 Ga. 19, 115 Am. St. Rep. 64, 54 S. E. 907.

⁹⁶ **Alabama.** *Medical & Surgical Society of Montgomery Co. v. Weatherly*, 75 Ala. 248.

California. *Von Arx v. San Francisco Gruetli Verein*, 113 Cal. 377, 45 Pac. 685.

Colorado. *Denver Chamber of Commerce & Board of Trade v. Green*, 8 Colo. App. 420, 47 Pac. 140.

Connecticut. *Connelly v. Masonic Mut. Ben. Ass'n*, 58 Conn. 553, 9 L. R. A. 428, 18 Am. St. Rep. 296, 20 Atl. 671.

Georgia. *United Bros. v. Williams*, 126 Ga. 19, 115 Am. St. Rep. 64, 54 S. E. 907.

Illinois. *People v. Women's Catholic Order of Foresters*, 162 Ill. 78, 44 N. E. 401, aff'g 59 Ill. App. 390; *Supreme Lodge Ancient Order of United Workmen v. Zuhlke*, 30 Ill. App. 98, aff'd 129 Ill. 298, 21 N. E. 789.

Indiana. *Southern Plank Road Co. v. Hixon*, 5 Ind. 165; *Federal Life Ins. Co. v. Risinger*, 46 Ind. App. 146, 91 N. E. 533.

Kentucky. *Wallace v. Grand Lodge of United Brothers of Friendship*, 32 Ky. L. Rep. 1013, 107 S. W. 724.

Maryland. *Most Worshipful United Grand Lodge of F. & A. M. of Maryland v. Lee*, 128 Md. 42, 96 Atl. 872.

Massachusetts. *Horgan v. Metropolitan Mut. Aid Ass'n*, 202 Mass. 524, 88 N. E. 890; *Canadian Religious Ass'n v. Parmenter*, 180 Mass. 415, 62 N. E. 740; *Karcher v. Supreme Lodge, Knights of Honor*, 137 Mass. 368; *Gray v. Christian Society*, 137 Mass. 329, 50 Am. Rep. 310; *Mullen v. Dorchester Mut. Fire Ins. Co.*, 121 Mass. 171.

Michigan. *Erd v. Bavarian Nat. Aid & Relief Ass'n City of Detroit*, 67 Mich. 233, 34 N. W. 555; *People v. Fire Department of City of Detroit*, 31 Mich. 458; *People v. Mechanics' Aid Society*, 22 Mich. 86.

Minnesota. *Kulberg v. National Council Knights & Ladies of Security*, 124 Minn. 437, 145 N. W. 120.

Missouri. *Purdy v. Bankers' Life Ass'n*, 101 Mo. App. 91, 74 S. W. 486; *Seehorn v. Supreme Council Catholic Knights of America*, 95 Mo. App. 233, 68 S. W. 949; *Lysaght v. St. Louis Operative Stonemasons' Ass'n*, 55 Mo. App. 538.

Nebraska. *Grand Lodge Ancient Order United Workmen v. Brand*, 29 Neb. 644, 46 N. W. 95.

New Jersey. *D'Aloia v. Unione Fratellanza Italiana of Vineland*, 84 N. J. L. 683, 87 Atl. 472; *Venezia v. Italian Mut. Benev. Soc. of Perth Amboy*, 74 N. J. L. 433, 65 Atl. 898; *Byrne v. Supreme Circle Brotherhood of Union*, 74 N. J. L. 258, 65 Atl.

there is no provision therefor in the by-laws,⁹⁷ although the Texas courts

839; *Berkhout v. Supreme Council Royal Arcanum*, 62 N. J. L. 103, 43 Atl. 1; *Sibley v. Board of Management Carteret Club of Elizabeth*, 40 N. J. L. 295.

New York. *People v. Musical Mut. Protective Union*, 118 N. Y. 101, 23 N. E. 129; *Wachtel v. Noah Widows' & Orphans' Benev. Society*, 84 N. Y. 28, 38 Am. Rep. 478; *People v. Medical Society of Erie County*, 32 N. Y. 187; *People v. East Buffalo Live Stock Ass'n*, 88 App. Div. 619, 84 N. Y. Supp. 795, aff'd 179 N. Y. 598, 72 N. E. 1148; *People v. New York Benev. Soc. of Operative Masons*, 3 Hun 361; *Stein v. Marks*, 44 Misc. 140, 89 N. Y. Supp. 921; *People v. St. Francisus Benev. Soc. of Buffalo*, 24 How. Pr. 216.

North Carolina. *Delacy v. Neuse River Nav. Co.*, 1 Hawks 274, 9 Am. Dec. 636.

Pennsylvania. *Macavicza v. Workman's Club*, 246 Pa. 136, 92 Atl. 41; *Diligent Fire Engine Co. v. Com.*, 75 Pa. St. 291; *Com. v. German Society for Mut. Support & Assistance*, 15 Pa. St. 251; *Riddell v. Harmony Fire Co.*, 8 Phila. 310; *Com. v. Pennsylvania Beneficial Inst.*, 2 Serg. & R. 141; *Gill v. Ladies Catholic Benev. Ass'n*, 36 Pa. Super. Ct. 458.

Rhode Island. *Pepin v. Société St. Jean Baptiste*, 24 R. I. 550, 60 L. R. A. 626, 54 Atl. 47; *Sleeper v. Franklin Lyceum*, 7 R. I. 523.

Texas. *Supreme Council Catholic Knights of America v. Gambati*, 29 Tex. Civ. App. 80, 69 S. W. 114.

Washington. *State v. Corgiat*, 50 Wash. 95, 96 Pac. 689.

Wisconsin. *Langnecker v. Trustees of Grand Lodge, A. O. U. W. of Wisconsin*, 111 Wis. 279, 55 L. R. A. 185, 87 Am. St. Rep. 860, 87 N. W. 293.

England. *Fisher v. Keave*, 11 Ch. Div. 353.

"It is the fundamental law of the land that before a citizen can be affected either in his personal or property rights, he is entitled to notice of the proceedings against him or his property and the opportunity afforded him of being heard in defense of such rights." *Seehorn v. Supreme Council Catholic Knights of America*, 95 Mo. App. 233, 68 S. W. 949.

A mere oral declaration of the president of a branch of a benefit society that a member has been suspended for nonpayment of dues is insufficient to work such suspension. *Seehorn v. Supreme Council Catholic Knights of America*, 95 Mo. App. 233, 68 S. W. 949.

It is sufficient if he is given an opportunity though he does not take advantage of it. *Carlin v. Ancient Order of Hibernians*, 54 Pa. Super. Ct. 512.

Since such proceedings are impossible after the death of a member, his membership cannot be terminated nunc pro tunc after his death. *Langnecker v. Trustees of Grand Lodge, A. O. U. W. of Wisconsin*, 111 Wis. 279, 55 L. R. A. 185, 87 Am. St. Rep. 860, 87 N. W. 293.

As to expulsion of an insane member, see *Supreme Lodge Ancient Order of United Workmen v. Zuhlke*, 129 Ill. 298, 21 N. E. 789; *Hellenberg v. District No. 1 of Independent Order of B'nai B'rith*, 94 N. Y. 580; *Pfeiffer v. Weishaupt*, 13 Daly (N. Y.) 161.

As to waiver of hearing and notice, see § 3967, *infra*.

⁹⁷ *Seehorn v. Supreme Council Catholic Knights of America*, 95 Mo. App. 233, 68 S. W. 949; *Byrne v. Supreme Circle Brotherhood of Union*, 74 N. J. L. 258, 65 Atl. 839.

In such case "the law steps in and supplies the omission." *Seehorn v. Supreme Council Catholic Knights of*

have held to the contrary.⁹⁸ It has also been held that a by-law authorizing expulsion summarily and without notice is unreasonable and void,⁹⁹ at least to the extent that it deprives the member of a hearing from which he might possibly derive a benefit. But if it conclusively appears that no such result has followed its enforcement, the existence of such a provision in it will not invalidate proceedings taken under it.¹ By-laws providing for the suspension of a member of a mutual benefit association for nonpayment of assessments by a vote of the lodge at a regular meeting without notice or trial, have been upheld,² as have provisions that nonpayment of dues or assessments shall ipso facto result in suspension or expulsion.³

The notice must be personal,⁴ and not merely by posting the same on the premises of the corporation,⁵ and it must reasonably inform the member of the charge against him.⁶ Failure to serve notice is not excused by a mere change of the member's residence.⁷

The trial or hearing and the notice thereof must be in accordance

America, 95 Mo. App. 233, 68 S. W. 949.

See also cases cited in the preceding note.

⁹⁸ In *Manning v. San Antonio Club*, 63 Tex. 166, 51 Am. Rep. 639, it was held that the courts could give no relief to a member of a social club who was expelled therefrom without notice, where the by-laws did not require notice. See also *Lone Star Lodge, Knights & Ladies of Honor v. Cole*, 62 Tex. Civ. App. 500, 131 S. W. 1180.

⁹⁹ *People v. Fire Department of Detroit*, 31 Mich. 458.

¹ *Volpicelli v. Societa Vollandese Di Mutuo Soccorso*, 81 N. J. L. 374, 79 Atl. 1034.

This is true where a member is expelled because he has been convicted of a felony, where he was convicted on his own confession and is serving a sentence in prison, so that he could not have appeared even if he had been notified and given an opportunity to do so. *Berkhout v. Supreme Council Royal Arcanum*, 62 N. J. L. 103, 43 Atl. 1.

² *Supreme Conclave Knights of Da-*

mon v. Warwick, 110 Ga. 388, 35 S. E. 645; *Finnerty v. Supreme Council Catholic Knights of America*, 115 Iowa 398, 88 N. W. 834.

³ See § 3959, *supra*.

⁴ *Sibley v. Board of Management of Carteret Club of Elizabeth*, 40 N. J. L. 295; *Wachtel v. Noah Widows' & Orphans' Benev. Society*, 84 N. Y. 28, 38 Am. Rep. 478.

⁵ *Sibley v. Board of Management of Carteret Club of Elizabeth*, 40 N. J. L. 295.

⁶ *Spilman v. Supreme Council of Home Circle*, 157 Mass. 128, 31 N. E. 776; *Murdock v. Phillips Academy*, 12 Pick. (Mass.) 244; *Murdock's Case*, 7 Pick. (Mass.) 303; *Allnutt v. Subsidiary High Court*, 62 Mich. 110, 23 N. W. 802.

"He is entitled to notice and opportunity for defense, which includes a specification of the charge against which he is to defend." *Pepin v. Societe St. Jean Baptiste*, 24 R. I. 550, 60 L. R. A. 626, 54 Atl. 47.

⁷ *Wachtel v. Noah Widows' & Orphans' Benev. Society*, 84 N. Y. 28, 38 Am. Rep. 478.

with the charter and by-laws or regulations of the corporation, or the expulsion will be wrongful.⁸ If the mode of procedure is prescribed by the charter, it must be followed; but if no mode is thus prescribed, it may be fixed by the by-laws, provided they are reasonable and do not violate any rule of law or natural justice.⁹ To render an expulsion valid, it must be ordered at a legal meeting of the organization, duly called.¹⁰ But though an expulsion at an illegal meeting is void, the infirmity is cured by again adopting the

⁸ **Alabama.** *Medical & Surgical Society of Montgomery Co. v. Weatherly*, 75 Ala. 248.

⁹ **New Jersey.** *Jennings v. Supreme Lodge, Order of Shepherds of Bethlehem*, 67 N. J. L. 126, 50 Atl. 581.

New York. *People v. Alpha Lodge No. 1, Knights of Sobriety, Fidelity & Integrity*, 8 App. Div. 591, 40 N. Y. Supp. 1147, 13 Misc. 677, 35 N. Y. Supp. 214; *People v. Musical Mut. Protective Union*, 47 Hun 273; *People v. New York Benev. Soc. of Operative Masons*, 3 Hun 361.

Pennsylvania. *Young v. Grand Lodge Sons of Progress*, 173 Pa. St. 302, 33 Atl. 1038; *Society for Visitation of Sick & Burial of Dead v. Com.*, 52 Pa. St. 125; *Washington Beneficial Society v. Bacher*, 20 Pa. St. 425; *Com. v. Guardians of Poor of Philadelphia*, 6 Serg. & R. 469; *Com. v. Pike Beneficial Society*, 8 Watts & S. 247; *Gill v. Ladies Catholic Benev. Ass'n*, 36 Pa. Super. Ct. 458.

England. *Labouchere v. Earl of Wharreliffe*, 13 Ch. Div. 346; *Fisher v. Keane*, 11 Ch. Div. 353.

Provisions of the laws of the corporation on the subject must be strictly complied with. *Reed v. National Order Daughters of Isabella*, 95 N. Y. Misc. 695, 160 N. Y. Supp. 907, aff'd 177 N. Y. App. Div. 949, 164 N. Y. Supp. 1110.

The suspension of a member by an association in contravention of its by-laws and the statutes of the state prescribing the mode of procedure in such case is not valid. *Stein v. Marks*,

44 N. Y. Misc. 140, 89 N. Y. Supp. 921.

The fact that the charge upon which a member was expelled was preferred by an employee of the corporation, and not by another member, is immaterial. *Albers v. Merchants' Exch. of St. Louis*, 39 Mo. App. 583.

⁹ **Illinois.** *Reesley v. Chicago Journeymen Plumbers' Protective & Benevolent Ass'n*, 44 Ill. App. 278.

Indiana. *State v. Vincennes University*, 5 Ind. 77.

Massachusetts. *Spilman v. Supreme Council of Home Circle*, 157 Mass. 128, 31 N. E. 776; *Gray v. Christian Society*, 137 Mass. 329, 50 Am. Rep. 310.

New York. *People v. American Institute City of New York*, 44 How. Pr. 468.

Pennsylvania. *Com. v. German Soc. for Mut. Support & Assistance*, 15 Pa. St. 251.

A change of procedure so as to dispense with a trial where the offending member has been convicted of a felony or misdemeanor, and making a certified copy of the judgment of conviction and sentence thereon sufficient evidence for expulsion, is binding on one who became a member before the change was made. *Cunningham v. Supreme Council, Royal Arcanum*, 165 N. Y. App. Div. 52, 151 N. Y. Supp. 83.

¹⁰ *People v. Old Guard City of New York*, 87 N. Y. App. Div. 478, 84 N. Y. Supp. 766, aff'd 178 N. Y. 576, 70 N. E. 1105.

trial board's recommendation of expulsion at a legal meeting subsequently held.¹¹

If the trial is before a board, it must act as a board at a meeting regularly convened.¹² There must be a quorum present,¹³ and a majority of those present and participating in the trial must vote in favor of the suspension or expulsion, where there is nothing in the laws or rules of the order on the subject.¹⁴

In the case of charitable organizations the fact that the trial and expulsion take place on Sunday does not render them void, where the statute permits works of necessity and charity on that day,¹⁵ except perhaps where witnesses or counsel for the defendant are unwilling to attend on that day, and a request for a reasonable post-

Where the meeting is not called by the prescribed number of persons or by proper notice, expulsion ordered thereat is without binding force. *Stein v. Marks*, 44 N. Y. Misc. 140, 89 N. Y. Supp. 921.

Where the charter specially designates a particular meeting for the purpose of expelling members, or requires it to be called at a certain time, or in a particular mode, they cannot lawfully be expelled at any other meeting. *Weatherly v. Medical & Surgical Soc. of Montgomery Co.*, 76 Ala. 567; *Medical & Surgical Soc. of Montgomery Co. v. Weatherly*, 75 Ala. 248.

To consider the question of expelling a member, notice must have been given to all the members of the corporation of the intention to consider the expulsion of the particular person. *Weber v. Zimmerman*, 22 Md. 156.

¹¹ *People v. Old Guard City of New York*, 87 N. Y. App. Div. 478, 84 N. Y. Supp. 766, aff'd 178 N. Y. 576, 70 N. E. 1105.

¹² *Reed v. National Order Daughters of Isabella*, 95 N. Y. Misc. 695, 160 N. Y. Supp. 907, aff'd 177 N. Y. App. Div. 949, 164 N. Y. Supp. 1110.

¹³ *Reed v. National Order Daughters of Isabella*, 95 N. Y. Misc. 695, 160 N. Y. Supp. 907, aff'd 177 N. Y.

App. Div. 949, 164 N. Y. Supp. 1110.

¹⁴ The action of three of a board of six cannot be regarded as the action of the board, where they are the only ones present. *Jennings v. Supreme Lodge, Order of Shepherds of Bethlehem*, 67 N. J. L. 126, 50 Atl. 581.

Where the board consists of ten members, a member cannot be expelled by the affirmative vote of five of them when ten are present. *Reed v. National Order Daughters of Isabella*, 95 N. Y. Misc. 695, 160 N. Y. Supp. 907, aff'd 177 N. Y. App. Div. 949, 164 N. Y. Supp. 1110.

¹⁵ This is true, for example, in the case of a benevolent association. *People v. Young Men's Father Matthew Benev. Society*, 65 Barb. (N. Y.) 357; *Pepin v. Societe St. Jean Baptiste*, 24 R. I. 550, 60 L. R. A. 626, 54 Atl. 47.

Such a trial is not a judicial proceeding within the rule that judicial proceedings on Sunday are void. *Pepin v. Societe St. Jean Baptiste*, 24 R. I. 550, 60 L. R. A. 626, 54 Atl. 47.

But in *Society for Visitation of Sick & Burial of Dead v. Com.*, 52 Pa. St. 125, 91 Am. Dec. 139, it is intimated that a trial and expulsion of a member of a benevolent society on Sunday would be void, although the question is not decided because not properly raised.

ponement on that account is refused.¹⁶ If the by-laws provide for the filing of written charges, they must be sufficiently definite to enable the member to know their precise nature.¹⁷

If the method of trial is not regulated by the laws of the association, it should be analogous to ordinary judicial proceedings, so far, at least, as to permit substantial justice.¹⁸ The hearing must be conducted fairly and openly,¹⁹ and the body or person before whom it is had, and who are to decide, must be unprejudiced.²⁰ But the

¹⁶ *Pepin v. Societe St. Jean Baptiste*, 24 R. I. 550, 60 L. R. A. 626; 54 Atl. 47.

¹⁷ Mere indefiniteness is not a jurisdictional defect. If the member deems the charges indefinite, his remedy is by an application to the trial board to have them made specific. *Wood v. Chamber of Commerce of Milwaukee*, 119 Wis. 367, 96 N. W. 835.

¹⁸ *Reed v. National Order Daughters of Isabella*, 95 N. Y. Misc. 695, 160 N. Y. Supp. 907, aff'd 177 N. Y. App. Div. 949, 164 N. Y. Supp. 1110.

¹⁹ *Reed v. National Order Daughters of Isabella*, 95 N. Y. Misc. 695, 160 N. Y. Supp. 907, aff'd 177 N. Y. App. Div. 949, 164 N. Y. Supp. 1110; *People v. Alpha Lodge No. 1, Knights of Sobriety, Fidelity & Integrity*, 13 N. Y. Misc. 677, 35 N. Y. Supp. 214, aff'd 8 N. Y. App. Div. 591, 40 N. Y. Supp. 1147, 35 N. Y. Supp. 214. See also *Smith v. Nelson*, 18 Vt. 511.

"The matter must be decided judicially and fairly." *State v. Adams*, 44 Mo. 570.

"Hearings of this character are quasi judicial. They ought to be conducted in a spirit of impartiality, without prejudice, and reasonably full opportunity ought to be given to learn the nature of the charges preferred and to present evidence and arguments in reply." *Correia v. Supreme Lodge Portugese Fraternity of United States of America*, 218 Mass. 305, 105 N. E. 977.

The trial may be such a sham that

it will be void. *National Council Knights & Ladies of Security v. Turrovh*, 135 Minn. 455, 161 N. W. 225. In this case it was held that there was no such conduct on the part of the trial committee as to render the expulsion void.

In *Rigler v. National Council Knights & Ladies of Security*, 128 Minn. 51, 150 N. W. 178, it was held that there was no evidence to justify a finding that the accused was deprived of a fair opportunity to make her defense.

²⁰ *Bonacum v. Murphy*, 71 Neb. 463, 104 N. W. 180, 98 N. W. 1030; *Wilcox v. Supreme Council Royal Arcanum*, 210 N. Y. 370, 52 L. R. A. (N. S.) 806, 104 N. E. 624, aff'g 151 N. Y. App. Div. 297, 136 N. Y. Supp. 377; *Reed v. National Order of Daughters of Isabella*, 95 N. Y. Misc. 695, 160 N. Y. Supp. 907, aff'd 177 N. Y. App. Div. 949, 164 N. Y. Supp. 1110; *People v. Alpha Lodge No. 1, Knights of Sobriety, Fidelity & Integrity*, 13 N. Y. Misc. 677, 35 N. Y. Supp. 214, aff'd 8 N. Y. App. Div. 591, 40 N. Y. Supp. 1147, 35 N. Y. Supp. 214. See *Purdy v. Bankers' Life Ass'n*, 101 Mo. App. 91, 74 S. W. 486; *Smith v. Nelson*, 18 Vt. 511. See also *Jackson v. South Omaha Live Stock Exchange*, 49 Neb. 687, 68 N. W. 1051; *People v. Old Guard City of New York*, 87 N. Y. App. Div. 478, 84 N. Y. Supp. 766, aff'd 178 N. Y. 576, 70 N. E. 1105.

A committee of the supreme council of an order is disqualified to try a member on the charge of accusing

board or tribunal is not necessarily ousted of jurisdiction because the proceedings were instituted by one of its own members.²¹

At the hearing the member is generally entitled to be represented by counsel, if he so desires,²² although a by-law denying him the right to do so has been upheld.²³ He is also entitled to introduce evidence in his defense, and to cross-examine the witnesses against him.²⁴

If the board before which the trial is had finds the accused guilty, it is sometimes required to report its findings to the association with its recommendations as to the punishment to be inflicted, and the association, at a meeting of its members, then determines what such punishment shall be.²⁵

Where the judgment of a subordinate lodge is reversed by an appellate tribunal upon a technicality not involving the merits, the subordinate lodge has a right to a new trial of the charges preferred

the supreme council and its officers of graft, fraud and dishonesty, and their action in expelling him is invalid. *Wilcox v. Supreme Council Royal Arcanum*, 210 N. Y. 370, 52 L. R. A. (N. S.) 806, 104 N. E. 624, aff'g 151 N. Y. App. Div. 297, 136 N. Y. Supp. 377.

²¹ *Green v. Board of Trade of Chicago*, 174 Ill. 485, 49 L. R. A. 365, 51 N. E. 599, aff'g 63 Ill. App. 446. See also *Harris v. Aiken*, 76 Kan. 516, 123 Am. St. Rep. 149, 92 Pac. 537; *People v. Old Guard City of New York*, 87 N. Y. App. Div. 478, 84 N. Y. Supp. 766, aff'd 178 N. Y. 576, 70 N. E. 1105.

A board of directors of a chamber of commerce is not deprived of jurisdiction to try a member because the charges against him were made by a member of such board, where the by-laws require the board to examine all charges filed against a member, without any exception. *Wood v. Chamber of Commerce of Milwaukee*, 119 Wis. 367, 96 N. W. 835.

²² *Murdock v. Phillips Academy*, 12 Pick. (Mass.) 244. See also *Shelley v. McLean*, 66 N. Y. Misc. 231, 121 N. Y. Supp. 61.

²³ *Green v. Board of Trade of Chi-*

cago, 174 Ill. 585, 49 L. R. A. 365, 51 N. E. 599, aff'g 63 Ill. App. 446.

²⁴ *Murdock v. Phillips Academy*, 12 Pick. (Mass.) 244; *Kulberg v. National Council of Knights & Ladies of Security*, 124 Minn. 437, 145 N. W. 120.

He has a right to be confronted with all the witnesses and to hear their testimony. *Raych v. Hadida*, 72 N. Y. Misc. 469, 130 N. Y. Supp. 346.

He cannot be legally expelled on ex parte evidence. *Sleeper v. Franklin Lyceum*, 7 R. I. 523; *Labouchere v. Earl of Wharncliffe*, 13 Ch. Div. 346; *Fisher v. Keane*, 11 Ch. Div. 353.

An order of expulsion based in part on evidence taken at a time and place of which he had no notice, and when he was not present, is void. *Kulberg v. National Council Knights & Ladies of Security*, 124 Minn. 437, 145 N. W. 120.

As to the effect of improperly excluding evidence, see *Sperry's Appeal*, 116 Pa. St. 391, 9 Atl. 478; *Vaughn v. Herndon*, 91 Tenn. 64, 17 S. W. 793.

²⁵ *People v. Old Guard City of New York*, 87 N. Y. App. Div. 478, 84 N. Y. Supp. 766, aff'd 178 N. Y. 576, 70 N. E. 1105.

against the member, regardless of whether the appellate tribunal directed a new trial or had a right to do so.²⁶

Since the expulsion is in the nature of a judicial act, it should be made a matter of record in the proceedings.²⁷

§ 3967. — — Waiver of irregularities; estoppel and acquiescence.

A member waives irregularities in the procedure leading up to his suspension or expulsion by submitting his case for trial without objecting thereto.²⁸ So he waives objections to being tried by a particular board or any of its members by appearing and submitting his case for trial by them without objecting to the manner in which the board is constituted.²⁹

Failure to give any notice at all of the hearing, or insufficiency of notice, may be waived and rendered immaterial by an appearance and failure to object.³⁰ And lack of specificness in the charges will

²⁶ *Shelley v. McLean*, 66 N. Y. Misc. 231, 121 N. Y. Supp. 61.

²⁷ *Seehorn v. Supreme Council Catholic Knights of America*, 95 Mo. App. 233, 68 S. W. 949.

²⁸ *Pitcher v. Board of Trade of Chicago*, 121 Ill. 412, 13 N. E. 187.

²⁹ *Pitcher v. Board of Trade of Chicago*, 121 Ill. 412, 13 N. E. 187.

He waives the objection that the board is not properly constituted where he fails to raise that question before or at the hearing. *Raych v. Hadida*, 72 N. Y. Misc. 469, 130 N. Y. Supp. 346.

An order of the board of directors expelling a member is not subject to collateral attack because of prejudice and consequent disqualification of one of the directors, where no objection was taken during the trial of the charge before the board. *Jackson v. South Omaha Live Stock Exchange*, 49 Neb. 687, 68 N. W. 1051.

By replying in the negative, when asked whether he objected to being tried by any member of the board and by participating in the investigation and allowing same to proceed, a member was held to have waived objection to trial by the board or any of its members. *People v. Old Guard*

City of New York, 87 N. Y. App. Div. 478, 84 N. Y. Supp. 766, aff'd 178 N. Y. 576, 70 N. E. 1105.

³⁰ *California*. *Levy v. Magnolia Lodge No. 29*, I. O. O. F., 110 Cal. 297, 42 Pac. 887.

Kansas. See *Harris v. Aiken*, 76 Kan. 516, 123 Am. St. Rep. 149, 92 Pac. 537.

Minnesota. *National Council Knights & Ladies of Security v. Turov*, 135 Minn. 455, 161 N. W. 225.

New York. *People v. Coachman's Union Ben. Ass'n*, 4 Misc. 424, 24 N. Y. Supp. 114.

Pennsylvania. *Com. v. Pennsylvania Ben. Society*, 2 Serg. & R. 141; *Neff v. Pennsylvania Daughters of Liberty*, 62 Pa. Super. Ct. 251.

Compare Downing v. St. Columbia's R. C. T. A. B. Society, 10 Daly (N. Y.) 262.

"Mere irregularities in the manner of the preparation of the notice do not render the judgment void if the accused is really afforded an opportunity to be heard, and is present and is heard." *National Council Knights & Ladies of Security v. Turov*, 135 Minn. 455, 161 N. W. 225.

In *People v. Women's Catholic Or-*

not render the expulsion void where the accused member is present at the trial and has actual knowledge of the particular charge to be heard.³¹ Nor is a hearing necessary if the accused member admits the truth of the charge against him,³² especially where he has, by his own act, made it impossible for himself to appear before the tribunal of the society.³³ But the mere fact that he does not appear after due notice will not dispense with the necessity of proving the charges.³⁴

Since a void expulsion is merely a breach of contract, the expelled member may affirm or disaffirm it, at his election.³⁵ If he acquiesces

der of Foresters, 162 Ill. 78, 44 N. E. 401, aff'g 59 Ill. App. 390, irregularities in the character of the notice were held not to be sufficient to deprive the tribunal of jurisdiction so as to justify the member in failing to exercise his right of appeal within the order, where she was present at the meeting.

A member, while insane, cannot waive notice in person. *Supreme Lodge Ancient Order of United Workmen v. Zuhlke*, 129 Ill. 298, 21 N. E. 789.

³¹ *Pepin v. Societe St. Jean Baptiste*, 24 R. I. 550, 60 L. R. A. 626, 54 Atl. 47.

"Irregularities in the form or manner in which the charges are preferred are not fatal if he is advised of the charges against him, and, himself present, is tried on such charges." *National Council of Knights & Ladies of Security v. Turov*, 135 Minn. 455, 161 N. W. 225.

³² *Maxey's Appeal*, 9 Wkly. Notes Cas. (Pa.) 441.

Where a suspended member admits the correctness of the charge against him and pays a fine assessed against him at the time of his suspension, he cannot thereafter attack the validity of his suspension on a claim for sick benefits on the ground that the by-law under which he was suspended did not provide for a hearing, and that no notice was given him and no hearing had. *Volpicelli v.*

Societa Vollandese Di Mutuo Soccorso, 81 N. J. L. 374, 79 Atl. 1034.

Where the accused member was charged with failing to pay notes indorsed by the accuser to enable the accused to repay money misappropriated by him, but there was a dispute as to the amount which he owed the accuser, and all parties interested elected to have the corporate tribunal determine the amount, it was held that the accused was entitled to a hearing although he admitted that he was indebted to the accuser in a certain amount. *People v. East Buffalo Live Stock Ass'n*, 88 N. Y. App. Div. 619, 84 N. Y. Supp. 795, aff'd 179 N. Y. 598, 72 N. E. 1148.

³³ So the failure to give him notice and an opportunity to be heard will not invalidate proceedings to expel him on the ground that he has been convicted of a felony, where he was convicted on his own confession, and is serving a sentence in prison at the time of his expulsion. *Berkhout v. Supreme Council Royal Arcanum*, 62 N. J. L. 103, 43 Atl. 1.

³⁴ *People v. Young Men's Father Matthew Benev. Society*, 65 Barb. (N. Y.) 357. See also *Society for Visitation of Sick & Burial of Dead v. Com.*, 52 Pa. St. 125, 91 Am. Dec. 139.

³⁵ *Stolorow v. National Council Knights & Ladies of Security*, 130 Minn. 345, 153 N. W. 848; *Marcus v. National Council Knights & Ladies of Security*, 123 Minn. 145, 143 N. W.

in the expulsion, he and those claiming under him are estopped from thereafter asserting rights based on membership in good standing.³⁶ But in order that his acts may be deemed a waiver or acquiescence he must have knowledge that his expulsion was illegal and of his rights in the premises.³⁷ As in other cases, he must make his election within a reasonable time, and in some distinct manner, under the circumstances.³⁸ "Where he takes no steps of any kind to secure his reinstatement, allows dues which had accrued and were payable prior to the date of his expulsion to remain unpaid, and neither tenders such dues nor any subsequent accruing dues, he must be taken to have acquiesced in and consented to the sentence of expulsion or suspension."³⁹ But it has been held that mere silence or inaction by an expelled member of a mutual benefit association will not amount to acquiescence in the expulsion, so as to bar recovery on his certificate after his death, where the expulsion is void and the association has suffered no injury by such inaction.⁴⁰ And the fact that a suspended member signs a request for reinstatement does not estop him from asserting that such suspension was unlawful.⁴¹

§ 3968. — Review by the courts. The courts may review the action of a corporation in expelling a member, for the purpose of determining whether the cause of the expulsion was sufficient in law, whether the corporation proceeded in accordance with the law, upon reasonable notice to the member, and whether the hearing and expulsion were in good faith, and in compliance with its charter and by-laws, and, if the member was wrongfully expelled, he will be

265; *Glardon v. Supreme Lodge Knights of Pythias of World*, 50 Mo. App. 45.

³⁶ *Marcus v. National Council Knights & Ladies of Security*, 123 Minn. 145, 143 N. W. 265.

In *Kulberg v. National Council Knights & Ladies of Security*, 124 Minn. 437, 145 N. W. 120, the evidence was held not to show acquiescence.

³⁷ *Dague v. Grand Lodge, Brotherhood of Railroad Trainmen*, 111 Md. 95, 73 Atl. 735.

³⁸ *Konta v. St. Louis Stock Exchange*, 189 Mo. 26, 87 S. W. 969; *Glardon v. Supreme Lodge Knights*

of Pythias of World, 50 Mo. App. 45.

³⁹ *Glardon v. Supreme Lodge Knights of Pythias of World*, 50 Mo. App. 45, quoted with approval in *Konta v. St. Louis Stock Exchange*, 189 Mo. 26, 87 S. W. 969. See also *Marcus v. National Council Knights & Ladies of Security*, 123 Minn. 145, 143 N. W. 265; *Bange v. Supreme Council Legion of Honor of Missouri*, 128 Mo. App. 461, 105 S. W. 1092.

⁴⁰ *Purdy v. Bankers' Life Ass'n*, 101 Mo. App. 91, 74 S. W. 486.

⁴¹ *Kelly v. Supreme Court Independent Order of Foresters*, 195 Ill. App. 501.

reinstated.⁴² And if the laws of the association are deficient in stating what the rights of a member are, "and the method to be pursued to protect them, the court may intervene, ascertain those rights, and provide for their protection."⁴³ But the action of the corporation is conclusive, if it is within the powers conferred upon

42 California. *Otto v. Journeymen Tailors' Protective & Benevolent Union*, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217.

Georgia. *Savannah Cotton Exchange v. State*, 54 Ga. 668; *State v. Georgia Medical Society*, 38 Ga. 608, 95 Am. Dec. 408.

Kentucky. *Wallace v. Grand Lodge United Brothers of Friendship*, 32 Ky. L. Rep. 1013, 107 S. W. 724.

Maryland. *Most. Worshipful United Grand Lodge of F. & A. M. of Maryland v. Lee*, 128 Md. 42, 96 Atl. 872.

Nebraska. *Bonacum v. Murphy*, 71 Neb. 463, 104 N. W. 180, 98 N. W. 1030.

New Jersey. *Zeliff v. Grand Lodge of New Jersey Knights of Pythias*, 53 N. J. L. 536, 22 Atl. 63.

New York. *Wilcox v. Supreme Council Royal Arcanum*, 210 N. Y. 370, 52 L. R. A. (N. S.) 806, 104 N. E. 624, aff'g 151 App. Div. 297, 136 N. Y. Supp. 377; *Semken v. State Council Junior Order of United American Mechanics of State of New York*, 176 App. Div. 567, 163 N. Y. Supp. 193; *Reed v. National Order Daughters of Isabella*, 95 Misc. 695, 160 N. Y. Supp. 907, aff'd 177 App. Div. 949, 164 N. Y. Supp. 1110.

Pennsylvania. *Com. v. Union League of Philadelphia*, 135 Pa. St. 301, 8 L. R. A. 195, 20 Am. St. Rep. 870, 19 Atl. 1030; *Carlin v. Ancient Order of Hibernians*, 54 Pa. Super. Ct. 512.

Texas. *Screwmen's Benev. Ass'n v. Benson*, 76 Tex. 552, 13 S. W. 379; *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S. W. 834.

Washington. *State v. Corgiat*, 50 Wash. 95, 96 Pac. 689; *Hendryx v. People's United Church of Spokane*, 42 Wash. 336, 4 L. R. A. (N. S.) 1154, 7 Ann. Cas. 764, 84 Pac. 1123.

Wisconsin. *Wood v. Chamber of Commerce*, 119 Wis. 367, 96 N. W. 835. See also *Wuerfler v. Trustees of Grand Grove Wisconsin Order of Druids*, 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433.

"The courts may judge of the cause of the expulsion and the form of the proceedings, to see whether the corporate tribunal has acted within its jurisdiction and in the line of order." *Com. v. Union League of Philadelphia*, 135 Pa. St. 301, 8 L. R. A. 195, 20 Am. St. Rep. 870, 19 Atl. 1030; *Carlin v. Ancient Order of Hibernians*, 54 Pa. Super. Ct. 512.

"If the corporation violates its laws in the trial of one of its members, thereby committing jurisdictional error to the injury of the property rights of a member, equity will furnish him a remedy if he has none other." *Wood v. Chamber of Commerce of Milwaukee*, 119 Wis. 367, 96 N. W. 835.

The courts may make inquiry as to whether the tribunal of a church expelling a member was organized as required by the constitution of the church, and whether one of the persons sitting as a member of the tribunal was disqualified under the rules of the church. *Bonacum v. Murphy*, 71 Neb. 463, 104 N. W. 180, 98 N. W. 1030.

⁴³ *Shelley v. McLean*, 66 N. Y. Misc. 231, 121 N. Y. Supp. 61.

the corporation by its charter, and in accordance with the law,⁴⁴

44 California. *Levy v. Magnolia Lodge No. 29, I. O. O. F.*, 110 Cal. 297, 42 Pac. 887; *Otto v. Journeymen Tailors' Protective & Benevolent Union*, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217.

Connecticut. *Connelly v. Masonic Mut. Ben. Ass'n*, 58 Conn. 552, 9 L. R. A. 428, 18 Am. St. Rep. 296, 20 Pac. 671.

Illinois. *People v. Women's Catholic Order of Foresters*, 162 Ill. 78, 44 N. E. 401, aff'g 59 Ill. App. 390; *Pitcher v. Board of Trade of Chicago*, 121 Ill. 412, 13 N. E. 187; *Robinson v. Yates City Lodge No. 448, A. F. & A. Masons*, 86 Ill. 598; *People v. Board of Trade of Chicago*, 80 Ill. 134; *German v. Supreme Tribe of Ben Hur*, 201 Ill. App. 190; *High Court Independent Order of Foresters v. Zak*, 35 Ill. App. 613, aff'd 136 Ill. 185, 29 Am. St. Rep. 318, 26 N. E. 593.

Indiana. *Supreme Council Order of Chosen Friends v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818.

Iowa. *Woolsey v. Independent Order Odd Fellows, Lodge No. 23*, 61 Iowa 492, 16 N. W. 576.

Kentucky. *Wallace v. Grand Lodge United Brothers of Friendship*, 32 Ky. L. Rep. 1013, 107 S. W. 724.

Maryland. *Most Worshipful United Grand Lodge of F. & A. M. of Maryland v. Lee*, 128 Md. 42, 96 Atl. 872; *District Grand Lodge No. 5, Independent Order B'nai B'rith v. Independent Order B'nai B'rith*, 65 Md. 236, 3 Atl. 104; *Anacosta Tribe, No. Twelve, Improved Order of Red Men v. Murbach*, 13 Md. 91, 71 Am. Dec. 625.

Massachusetts. *Canadian Religious Ass'n v. Parmenter*, 180 Mass. 415, 62 N. E. 740; *Spilman v. Supreme Council of Home Circle*, 157 Mass. 128, 31 N. E. 776; *Burbank v. Boston Police Relief Ass'n*, 144 Mass. 434, 11 N. E. 691; *Gray v. Christian Society*,

137 Mass. 329, 50 Am. Rep. 310; *Gregg v. Massachusetts Medical Society*, 111 Mass. 185, 15 Am. Rep. 24.

Michigan. *Burt v. Grand Lodge Free & Accepted Masons*, 44 Mich. 208.

Missouri. *Seehorn v. Supreme Council Catholic Knights of America*, 95 Mo. App. 233, 68 S. W. 949.

Nebraska. *Wilber v. Lincoln Aerie No. 147, Fraternal Order of Eagles*, 99 Neb. 428, 156 N. W. 658; *Bonacum v. Murphy*, 71 Neb. 463, 104 N. W. 180, 98 N. W. 1030.

New Jersey. *Zeliff v. Grand Lodge of New Jersey Knights of Pythias*, 53 N. J. L. 536, 22 Atl. 63.

New York. *People v. New York Produce Exchange*, 149 N. Y. 401, 44 N. E. 84.

Pennsylvania. *Com. v. Union League of Philadelphia*, 135 Pa. St. 301, 8 L. R. A. 195, 20 Am. St. Rep. 870, 19 Atl. 1030; *Society for Visitation of Sick & Burial of Dead v. Com.*, 52 Pa. St. 125, 91 Am. Dec. 139; *Leech v. Harris*, 2 Brewst. 571; *Com. v. Pike Beneficial Society*, 8 Watts & S. 250; *Black & White Smith's Society v. Vandyeke*, 2 Whart. 309, 30 Am. Dec. 263; *Neff v. Pennsylvania Daughters of Liberty*, 62 Pa. Super. Ct. 251; *Badger v. Aeolian Council No. 17*, 39 Pa. Super. Ct. 406; *Crow v. Capital City Council*, 26 Pa. Super. Ct. 411.

Tennessee. *Vaughn v. Herndon*, 91 Tenn. 64, 17 S. W. 793.

Texas. *Screwmen's Benev. Ass'n v. Benson*, 76 Tex. 552, 13 S. W. 379; *Manning v. San Antonio Club*, 63 Tex. 166, 51 Am. Rep. 639; *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S. W. 834.

The power of suspension is in its nature judicial, and a judgment of suspension, if all the jurisdictional requirements have been met, is to be taken as at least *prima facie* legal, and will be so recognized by the

and under such circumstances the court will abide by its decision in respect to questions of fact,⁴⁵ and will not consider the weight of the evidence upon which it acted,⁴⁶ or review the case on its merits.⁴⁷ "In the matter of expulsion, the society acts in a quasi

courts. *Seehorn v. Supreme Council Catholic Knights of America*, 95 Mo. App. 233, 68 S. W. 949.

"The methods provided by the laws of a corporation for disciplining its members, unless void for unreasonableness or violative of some law of the corporation itself, or of the land, are supreme." *Wood v. Chamber of Commerce of Milwaukee*, 119 Wis. 367, 96 N. W. 835.

"In regard to matters of discipline, the courts will not interfere against the decision of the members of a club professing to act under its rules, unless it can be shown either that the rules are contrary to natural justice, or that what has been done is contrary to the rules, or that there has been mala fides or malice in arriving at the decision, or refusal to give the members a hearing." *Zeliff v. Grand Lodge of New Jersey Knights of Pythias*, 53 N. J. L. 536, 22 Atl. 63.

"Courts are always reluctant to interfere with the disciplinary powers of voluntary organizations, whether incorporated or unincorporated. Such interference will never be justified, unless the exercise of the power has been without jurisdiction, or marked by gross injustice or unfairness." *People v. Women's Catholic Order of Foresters*, 162 Ill. 78, 44 N. E. 401, aff'g 59 Ill. App. 390.

In matters of discipline and policy not manifestly violating private rights, incorporated voluntary associations are as supreme within their own field as a religious society. *Wuerfler v. Grand Grove of Wisconsin Order of Druids*, 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433.

The court will decline to review the acts and conclusions reached by the

governing authorities of a religious organization with a view to ascertaining whether the conclusion reached is in accordance with the usages of the church. *Bonacum v. Murphy*, 71 Neb. 463, 104 N. W. 180, 98 N. W. 1030.

⁴⁵ *Semken v. State Council Junior Order of United American Mechanics of State of New York*, 176 N. Y. App. Div. 567, 163 N. Y. Supp. 193.

⁴⁶ *Reed v. National Order Daughters of Isabella*, 95 N. Y. Misc. 695, 160 N. Y. Supp. 907, aff'd 177 N. Y. App. Div. 949, 164 N. Y. Supp. 1110.

"In the absence of any special provision of statute law, the courts in such cases are not appellate tribunals, and, if the society acted regularly, giving due notice and opportunity to be heard, it is immaterial that another tribunal, upon evidence which cannot be presumed to be the same, finds the members accused, tried, and dropped were not guilty." *Canadian Religious Ass'n v. Parmenter*, 180 Mass. 415, 62 N. E. 740.

If the finding of guilt is unsustained by any substantial evidence, the determination of the board should be considered as contrary to law and natural justice, and so subject to review and correction. *Reed v. National Order Daughters of Isabella*, 95 N. Y. Misc. 695, 160 N. Y. Supp. 907, aff'd 177 N. Y. App. Div. 949, 164 N. Y. Supp. 1110.

⁴⁷ *German v. Supreme Tribe of Ben Hur*, 201 Ill. App. 190; *Com. v. Union League of Philadelphia*, 135 Pa. St. 301, 8 L. R. A. 195, 20 Am. St. Rep. 870, 19 Atl. 1030; *Carlin v. Ancient Order of Hibernians*, 54 Pa. Super. Ct. 512.

judicial character, and so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land, or any inalienable right of the member, its sentence is conclusive, like that of a judicial tribunal.”⁴⁸

§ 3969. — Remedies for wrongful expulsion. By the overwhelming weight of authority, if a member of a corporation is wrongfully expelled without sufficient cause, or without a hearing, or without reasonable notice and an opportunity to be heard in his defense, or without compliance with the provisions of the charter and by-laws, mandamus will lie to compel the corporation to restore him to membership,⁴⁹ although there is some authority holding the contra-

⁴⁸ *Otto v. Journeymen Tailors' Protective & Benevolent Union*, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217.

⁴⁹ *Alabama*. *Medical & Surgical Society of Montgomery Co. v. Weatherly*, 75 Ala. 248.

California. *Otto v. Journeymen Tailors' Protective & Benevolent Union*, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217.

Georgia. *United Bros. v. Williams*, 126 Ga. 19, 115 Am. St. Rep. 64, 54 S. E. 907; *Savannah Cotton Exchange v. State*, 54 Ga. 668; *State v. Georgia Medical Society*, 38 Ga. 608, 95 Am. Dec. 408.

Massachusetts. *Horgan v. Metropolitan Mut. Aid Ass'n*, 202 Mass. 524, 88 N. E. 890.

Michigan. *Meurer v. Detroit Musicians' Benevolent & Protective Ass'n*, 95 Mich. 451, 54 N. W. 954; *Erd v. Bavarian National Aid & Relief Ass'n of Detroit*, 67 Mich. 233, 34 N. W. 555; *Allnutt v. Subsidiary High Court of United States Ancient Order of Foresters*, 62 Mich. 110, 28 N. W. 802; *People v. Mechanics' Aid Society*, 22 Mich. 86.

Missouri. *State v. Adams*, 44 Mo. 570; *Lysaght v. St. Louis Operative Stonemason's Ass'n*, 55 Mo. App. 538.

New Jersey. *Venezia v. Italian*

Mut. Benev. Soc. of Perth Amboy, 74 N. J. L. 433, 65 Atl. 898; *Byrne v. Supreme Circle Brotherhood of Union*, 74 N. J. L. 258, 65 Atl. 839; *Radice v. Italian-American Christopher Columbus Society*, 67 N. J. L. 196, 50 Atl. 691; *Jennings v. Supreme Lodge, Order of Shepherds of Bethlehem*, 67 N. J. L. 126, 50 Atl. 581; *State v. Grand Lodge of New Jersey Knights of Pythias*, 53 N. J. L. 536, 22 Atl. 63; *Sibley v. Board of Management Carteret Club of Elizabeth*, 40 N. J. L. 295. See also *Stahl v. Roumanian Young Men's Ass'n*, 77 N. J. L. 380, 71 Atl. 1114; *Piries v. First Russian-Slavonic Greek Catholic Benev. Society*, 83 N. J. Eq. 29, 89 Atl. 1036.

New York. *People v. Musical Mut. Protective Union*, 118 N. Y. 101, 23 N. E. 129, 47 Hun 273; *People v. Philip Bernstein Sick & Benefit Society*, 161 App. Div. 823, 146 N. Y. Supp. 886; *People v. Old Guard City of New York*, 87 App. Div. 478, 84 N. Y. Supp. 766, aff'd 178 N. Y. 576, 70 N. E. 1105; *Reed v. National Order Daughters of Isabella*, 95 Misc. 695, 160 N. Y. Supp. 907, aff'd 177 App. Div. 949, 164 N. Y. Supp. 1110; *Stein v. Marks*, 44 Misc. 140, 89 N. Y. Supp. 921; *People v. St. Francis Benev. Society*, 24 How. Pr. 216.

North Carolina. *Delacy v. Neuse*

ry.⁵⁰ In some jurisdictions it has been held that a suit in equity may be maintained by a member of a corporation to enjoin his wrongful expulsion, or compel reinstatement.⁵¹ But other courts hold that,

River Nav. Co., 1 Hawks 274, 9 Am. Dec. 636.

Ohio. State v. Lipa, 28 Ohio St. 665.

Pennsylvania. Beeman v. Supreme Lodge, Shield of Honor, 215 Pa. 627, 64 Atl. 792; Evans v. Philadelphia Club, 50 Pa. St. 107; Com. v. German Soc. for Mut. Support & Assistance, 15 Pa. St. 251; Com. v. St. Patrick Benev. Society, 2 Binn. 441, 4 Am. Dec. 453; Black & White Smith's Society v. Vandyke, 2 Whart. 309, 30 Am. Dec. 263.

Rhode Island. Lavalley v. Societe St. Jean Baptiste De Woonsocket, 17 R. I. 680, 16 L. R. A. 392, 24 Atl. 467.

Texas. Screwmen's Benev. Ass'n v. Benson, 76 Tex. 552, 13 S. W. 379; Thompson v. Grand International Brotherhood of Locomotive Engineers, 41 Tex. Civ. App. 176, 91 S. W. 834; Supreme Council Catholic Knights of America v. Gambati, 29 Tex. Civ. App. 80, 69 S. W. 114.

Washington. State v. Corgiat, 50 Wash. 95, 96 Pac. 689.

Wisconsin. State v. Chamber of Commerce of Milwaukee, 47 Wis. 670, 3 N. W. 760, 20 Wis. 63.

Although the relator is entitled to restoration to membership at the time when he applies for the writ, the writ should be denied and the proceeding dismissed where it is made to appear, by new matter set up in the answer, that the infirmity in his expulsion has been cured. People v. Old Guard City of New York, 87 N. Y. App. Div. 478, 84 N. Y. Supp. 766, aff'd 178 N. Y. 576, 70 N. E. 1105.

The denial of an application for a writ of mandamus to compel the reinstatement of a member who has been suspended from attending meetings is not a bar to an application to

compel his reinstatement after his subsequent expulsion from the society. People v. Philip Bernstein Sick & Benefit Society, 161 N. Y. App. Div. 823, 146 N. Y. Supp. 886.

Mandamus to compel reinstatement will not lie after judgment in an action to recover damages for the expulsion, which is pending on appeal. State v. Lipa, 28 Ohio St. 665.

⁵⁰ Schmidt v. Abraham Lincoln Lodge, 84 Ky. 490, 2 S. W. 156; Wallace v. Grand Lodge United Brothers of Friendship, 32 Ky. L. Rep. 1013, 107 S. W. 724.

Mandamus will not lie under the Ohio statute since the act is not one specially enjoined by law, and because the expelled member has a plain and adequate remedy in the ordinary course of the law by an action for damages or a suit for injunction. Fraternal Mystic Circle v. State, 61 Ohio St. 628, 76 Am. St. Rep. 446, 48 N. E. 940.

⁵¹ **United States.** Hall v. Supreme Lodge, Knights of Honor, 24 Fed. 450.

Maryland. See Most Worshipful United Grand Lodge of F. & A. M. of Maryland v. Lee, 128 Md. 42, 96 Atl. 872.

Missouri. Albers v. Merchants' Exchange of St. Louis, 140 Mo. App. 446, 120 S. W. 139; Albers v. Merchants' Exch. of St. Louis, 39 Mo. App. 583. See also Moffatt v. Board of Trade of Kansas City, 250 Mo. 168, 157 S. W. 579.

New Jersey. Altmann v. Benz, 27 N. J. Eq. 331.

New York. Stein v. Marks, 44 Misc. 140, 89 N. Y. Supp. 921; Olery v. Brown, 51 How. Pr. 92; Holcombe v. Leavitt, 124 N. Y. Supp. 980. See also White v. Brownell, 4 Abb. Pr. (N. S.) 162.

since the remedy at law by mandamus to compel restoration to membership is generally adequate; a court of equity will not assume jurisdiction unless there are peculiar circumstances rendering its interference necessary.⁵²

Ohio. See *Fraternal Mystic Circle v. State*, 61 Ohio St. 628, 76 Am. St. Rep. 446, 48 N. E. 940, where it is said that if an expelled member's remedy by an action for damages is inadequate, he is entitled to an injunction to prevent his further exclusion.

Pennsylvania. *Leech v. Harris*, 2 Brewst. 571; *Thomas v. Ellmaker*, 1 Pars. Eq. Cas. 98; *Neff v. Pennsylvania Daughters of Liberty*, 62 Pa. Super. Ct. 251.

South Carolina. *Smith v. Smith*, 3 Desauss. 557.

The court may enjoin the arbitrary expulsion of a member of a church where property rights are involved. *Holcombe v. Leavitt*, 124 N. Y. Supp. 980.

Where the proceedings for expelling members are illegal and void, they may maintain a suit in equity against the members of the corporation remaining in possession to have their expulsion declared void and to prevent the use of the assets for the accomplishment of purposes other than those specified by the corporate charter. In such case the legal remedy against the members of the association remaining in possession would be insufficient. *Stein v. Marks*, 44 N. Y. Misc. 140, 89 N. Y. Supp. 921.

Under a Missouri statute authorizing a suit for injunction to prevent the doing of any legal wrong, where an action for damages will not afford an adequate remedy, it was held that a member of a corporation, on being wrongfully suspended for nonpayment of a fine, might sue to enjoin enforcement of the order of suspension, although he would have been reinstated on payment of the fine under protest,

and might then recover it back, in an action at law. *Albers v. Merchants' Exch. of St. Louis*, 39 Mo. App. 583.

In *Hendryx v. People's United Church of Spokane*, 42 Wash. 336, 4 L. R. A. (N. S.) 1154, 7 Ann. Cas. 764, 84 Pac. 1123, a member of a church who had been fraudulently expelled was held to be entitled to sue in equity to prevent a fraudulent diversion of the church property.

Where a subordinate lodge refuses to obey the judgment of an appellate tribunal of the order reinstating an expelled member, who has a contract entitling him to sick and death benefits, of which he will be deprived unless the order of reinstatement is enforced, a court of equity, by mandatory injunction, will direct the subordinate lodge and its officers to restore him to membership. Under such circumstances it will be presumed that the appellate tribunal had jurisdiction, in the absence of a clear showing to the contrary. *Wilson v. Pine Knot Council No. 54*, 175 Ky. 502, 194 S. W. 537.

⁵² *Allen v. Chicago Undertakers' Ass'n*, 232 Ill. 458, 83 N. E. 952; *Bostedo v. Board of Trade of Chicago*, 227 Ill. 90, 81 N. E. 42, aff'g 130 Ill. App. 560; *Pitcher v. Board of Trade of Chicago*, 121 Ill. 412, 13 N. E. 187; *Sturges v. Board of Trade of Chicago*, 86 Ill. 441; *Baxter v. Board of Trade of Chicago*, 83 Ill. 146; *Fisher v. Board of Trade of Chicago*, 80 Ill. 85; *O'Brien v. Rittman*, 176 Ill. App. 237; *Champion v. Hannahan*, 138 Ill. App. 387; *Gregg v. Massachusetts Medical Society*, 111 Mass. 185, 15 Am. Rep. 24.

An injunction is a preventive remedy, and will not issue to compel the restoration to membership of a mem-

An expelled member of an incorporated beneficial association cannot have the sufficiency of the evidence upon which his expulsion was based or the regularity of the proceedings inquired into in a collateral action for the recovery of benefits alleged to be due him, where the expulsion was voted after notice, trial and conviction in accordance with the provisions of the charter and by-laws, and upon a charge thereby made a cause for expulsion.⁵³ But the jurisdiction of the body before whom the trial was had may be attacked collaterally in such an action.⁵⁴

By the weight of authority, a member of a corporation who has been wrongfully expelled may maintain an action against the corporation to recover any damages which he may have sustained by reason of the expulsion, and is not restricted to his remedy to compel reinstatement,⁵⁵ although there is authority which holds the contra-

ber who has been expelled. *Champion v. Hannahan*, 138 Ill. App. 387.

⁵³ *Rigler v. National Council Knights & Ladies of Security*, 128 Minn. 51, 150 N. W. 178; *Beeman v. Supreme Lodge, Shield of Honor*, 215 Pa. 627, 64 Atl. 792; *Black & White Smith's Society v. Vandyke*, 2 Whart. (Pa.) 309, 30 Am. Dec. 263.

See also standard works on fraternal benefit associations.

⁵⁴ *Wilcox v. Supreme Council Royal Arcanum*, 210 N. Y. 370, 52 L. R. A. (N. S.) 806, 104 N. E. 624, aff'g 151 N. Y. App. Div. 297, 136 N. Y. Supp. 377.

⁵⁵ *United States. Republican Newspaper Co. v. Northwestern Associated Press*, 51 Fed. 377; *Crosby Lunber Co. v. Smith*, 51 Fed. 63.

Kentucky. *Wallace v. Grand Lodge United Brothers of Friendship*, 31 Ky. L. Rep. 1013, 107 S. W. 724.

Mississippi. *Independent Order Sons & Daughters of Jacob of America v. Wilkes*, 98 Miss. 179, 52 L. R. A. (N. S.) 817, 53 So. 493.

Missouri. *Ludowski v. Polish Roman Catholic St. Stanislaus Koska Benev. Society*, 29 Mo. App. 337.

New Jersey. *D'Aloia v. Unione Fratellanza Italiana di Vineland*, 84 N. J. L. 683, 87 Atl. 472.

New York. *People v. Musical Mut. Protective Union*, 118 N. Y. 101, 23 N. E. 129.

Ohio. *Fraternal Mystic Circle v. State*, 61 Ohio St. 628, 76 Am. St. Rep. 446, 48 N. E. 940.

Texas. *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S. W. 834; *Supreme Council Catholic Knights of America v. Gambati*, 29 Tex. Civ. App. 80, 69 S. W. 114; *Benson v. Screwmen's Benev. Ass'n*, 2 Tex. Civ. App. 66, 21 S. W. 562.

This is true where membership has a direct pecuniary value, and the damage resulting from the expulsion cannot be remedied by reinstatement. *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S. W. 834.

That an order expelling a member of a fraternal benefit association is void for want of notice and trial is not a defense to an action by the expelled member to recover insurance premiums paid by him. *Supreme Council Catholic Knights of America v. Gambati*, 29 Tex. Civ. App. 80, 69 S. W. 114.

When a shareholder is wrongfully excluded from a corporation, and his interest therein declared forfeited, and in an action for damages he re-

ry.⁵⁶ He may also maintain such an action against a third person who wrongfully procures his expulsion.⁵⁷ It is not necessary that the expelled member exhaust his remedies within the corporation to correct its wrongful action before suing for damages.⁵⁸ Nor will the fact that he takes an appeal within the order which results in his reinstatement amount to a waiver of his right to recover damages.⁵⁹ Publication of a notice of expulsion in the official magazine of the order is a proper element of damage if the expulsion is wrongful, but not otherwise.⁶⁰

covers the value of his interest at the time it was taken from him, including the profits and the increase in value of the assets, he is entitled to interest on the amount found due from the time he was excluded. *Crosby Lumber Co. v. Smith*, 51 Fed. 63.

A fraternal association may be made liable for a wrongful expulsion of a member of a subordinate lodge where the supreme officer of the association, with knowledge of the facts, confirms the expulsion. *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S. W. 834.

The powers of a nonstock incorporated religious society with reference to business and property matters were by provision of the corporate charter required to be exercised by a board of trustees. Not more than two-thirds of these trustees were required to be members of the church, and action taken by them was subject to rejection by the congregation. The trustees were without authority with reference to discipline or expulsion of members. The court held that for expulsion of a member by the congregation the incorporated society was not liable in damages, since the suit did not involve a property right which the corporation had invaded through its trustees, nor relate to an act for which the corporation was in any sense responsible. *Reinke v. German Evangelical Lutheran Trinity Church*, 17 S. D. 262, 96 N. W. 90.

⁵⁶ *Peyre v. Mutual Relief Soc. of French Zouaves*, 90 Cal. 240, 27 Pac. 191; *Lavalle v. Societe St. Jean Baptiste de Woonsocket*, 17 R. I. 680, 16 L. R. A. 392, 24 Atl. 467.

In *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S. W. 834, it is said that the *Peyre* case, *supra*, can hardly be said to sustain the proposition that an action for damages will not lie, and it is pointed out that the court there held that the demurrer to the petition was properly sustained on the ground that the facts alleged did not entitle the plaintiff to recover damages of defendants, quite irrespective of the question whether he should have sought reinstatement by mandamus as his only remedy, which question was not, in fact, directly decided at all.

⁵⁷ *St. Louis Southwestern R. Co. of Texas v. Thompson*, 102 Tex. 89, 19 Ann. Cas. 1250, 113 S. W. 144; *Id.* — Tex. Civ. App. —, 192 S. W. 1095.

⁵⁸ See § 3970, *infra*.

⁵⁹ Such an appeal and reinstatement will not prevent a member of a labor union from recovering damages for the acts of the local union in procuring his employer to discharge him on his failure to pay a fine imposed as part of his punishment. *Blanchard v. Newark Joint Dist. Council United Brotherhood of Carpenters & Joiners of America*, 77 N. J. L. 389, 71 Atl. 1131.

⁶⁰ *Thompson v. Grand International*

§ 3970. — **Necessity for exhausting remedies within the organization.** It is a well-settled rule that the courts will not act in reinstatement of a member of a corporation, claiming to have been wrongfully expelled, until he has pursued and exhausted all his remedies, by appeal or otherwise, within the organization itself.⁶¹

Brotherhood of Locomotive Engineers, 41 Tex. Civ. App. 176, 91 S. W. 834.

61 California. *Levy v. Magnolia Lodge No. 29, I. O. O. F.*, 110 Cal. 297, 42 Pac. 887; *Peyre v. Mutual Relief Soc. of French Zouaves*, 90 Cal. 240, 27 Pac. 191; *Robinson v. Irish-American Benev. Society*, 67 Cal. 135, 7 Pac. 435.

Georgia. *Harrington v. Workingmen's Benev. Ass'n*, 70 Ga. 340.

Illinois. *People v. Women's Catholic Order of Foresters*, 162 Ill. 78, 44 N. E. 401, aff'g 59 Ill. App. 390; *Robinson v. Yates City Lodge No. 448, A. F. & A. M.*, 86 Ill. 598; *O'Brien v. Rittman*, 176 Ill. App. 237. See also *Spier v. Douglas Mut. Benefit & Aid Society*, 144 Ill. App. 195.

Indiana. *Bauer v. Samson Lodge, Knights of Pythias*, 102 Ind. 262, 1 N. E. 571.

Iowa. *Finnerty v. Supreme Council Catholic Knights of America*, 115 Iowa 398, 88 N. W. 834.

Kansas. *Reno Lodge No. 99, I. O. O. F. of Hutchinson v. Grand Lodge, I. O. O. F. of Kansas*, 54 Kan. 73, 26 L. R. A. 98, 37 Pac. 1003.

Maine. *Jeane v. Grand Lodge, Ancient Order United Workmen*, 86 Me. 434, 30 Atl. 70.

Maryland. *Most Worshipful United Grand Lodge of F. & A. M. of Maryland v. Lee*, 128 Md. 42, 96 Atl. 872; *Camp No. 6 Patriotic Order Sons of America v. Arrington*, 107 Md. 319, 68 Atl. 548.

Massachusetts. *Correia v. Supreme Lodge Portuguese Fraternity of United States of America*, 218 Mass. 305, 105 N. E. 977; *Horgan v. Metropolitan Mut. Aid Ass'n*, 202 Mass. 524, 88 N. E. 890; *Oliver v. Hopkins*, 144 Mass.

175, 10 N. E. 776; *Karcher v. Supreme Lodge, Knights of Honor*, 137 Mass. 368; *Chamberlain v. Lincoln*, 129 Mass. 70; *Grosvenor v. United Society of Believers*, 118 Mass. 78.

Michigan. *People v. St. George's Soc. of Detroit*, 28 Mich. 261.

Minnesota. *National Council Knights & Ladies of Security v. Turov*, 135 Minn. 455, 161 N. W. 225; *Rigler v. National Council Knights & Ladies of Security*, 128 Minn. 51, 150 N. W. 178; *Kulberg v. National Council Knights & Ladies of Security*, 124 Minn. 437, 145 N. W. 120; *Marcus v. National Council Knights & Ladies of Security*, 123 Minn. 145, 143 N. W. 265.

Missouri. *Crutcher v. Eastern Division No. 321, Order of Railway Conductors of America*, 151 Mo. App. 629, 132 S. W. 307. See also *Moffatt v. Board of Trade of Kansas City*, 250 Mo. 168, 157 S. W. 579.

Nebraska. *Wilbur v. Lincoln Aerie No. 147, Fraternal Order of Eagles*, 99 Neb. 428, 156 N. W. 658.

New Jersey. *Ocean Castle, Knights of Golden Eagle, No. 11 v. Smith*, 58 N. J. L. 545, 33 Atl. 849, 59 N. J. L. 198, 35 Atl. 917; *Zeliff v. Grand Lodge of New Jersey Knights of Pythias*, 53 N. J. L. 536, 22 Atl. 63; *Van Houten v. Pine*, 36 N. J. Eq. 133.

New York. *Moyse v. New York Cotton Exchange*, 143 App. Div. 265, 128 N. Y. Supp. 112; *Raych v. Hadida*, 72 Misc. 469, 130 N. Y. Supp. 346. See also *Ewald v. Medical Society of New York*, 144 App. Div. 82, 128 N. Y. Supp. 886, rev'g judgment 70 Misc. 615, 130 N. Y. Supp. 1024.

Pennsylvania. See *Carlin v. Ancient Order of Hibernians*, 54 Pa. Super. Ct. 512.

And a by-law requiring that the remedies provided by the society shall first be exhausted before any suit at law or in equity shall be instituted under such circumstances is a reasonable regulation for the settlement of disputes arising in the society, and is binding on the members.⁶²

Texas. *Screwmen's Benev. Ass'n v. Benson*, 76 Tex. 552, 13 S. W. 379; *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S. W. 834; *Supreme Council Catholic Knights of America v. Gambati*, 29 Tex. Civ. App. 80, 69 S. W. 114; *Benson v. Screwmen's Benev. Ass'n*, 2 Tex. Civ. App. 66, 21 S. W. 562. See also *St. Louis Southwestern R. Co. of Texas v. Thompson*, 102 Tex. 89, 19 Ann. Cas. 1250, 113 S. W. 144.

Wisconsin. See *State v. Board of Officers Gegenseitige Unterstuetzungs Gesellschaft Germania*, 144 Wis. 516, 129 N. W. 630.

England. See *Labouchere v. Earl of Wharnccliffe*, 13 Ch. Div. 346; *Fisher v. Keane*, 11 Ch. Div. 353; *Littleton v. Blackbourne*, 45 L. Ch. 29; *Bache v. Billingham*, [1894] 1 Q. B. 107.

This is true although the appellate body is a corporation of another state. *State v. Grand Lodge of New Jersey Knights of Pythias*, 53 N. J. L. 536, 22 Atl. 63.

"It is the purpose of the appeal to correct irregularities and errors, and it is to be presumed that the error will be corrected or the irregularity cured by the appellate tribunal." *National Council Knights & Ladies of Security v. Turov*, 135 Minn. 455, 161 N. W. 225.

Of course this rule has no application where the provision for an appeal within the corporation does not apply to expulsions of the character in question. *People v. Philip Bernstein Sick & Benefit Society*, 161 N. Y. App. Div. 823, 146 N. Y. Supp. 886.

"There is a clear distinction be-

tween the obligation to appeal from the lower to the higher tribunals of the society itself resting upon one who presents a question of discipline, and such obligation so far as it concerns one who asserts a claim to money due upon a contract. Where the controversy is concerning the discipline or policy or doctrine of the order or fraternity, the member must resort to the method of procedure prescribed by the association including the remedy by appeal, before invoking the power of the courts. But it is otherwise, where a member claims money due from the society on its contract, or where the beneficiary of a deceased member claims money due from the society on its contract of insurance; in such case, the right to resort to the courts to coerce payment will not be abridged by the right of appeal from a lower to a higher tribunal of the society as conferred by its laws and rules." In the latter case, "it is sufficient for the beneficiary to show that the judgment of expulsion was invalid, without further showing the exhaustion of all remedies within the order or society for the purpose of having the judgment vacated." *People v. Women's Catholic Order of Foresters*, 162 Ill. 78, 44 N. E. 401, aff'g 59 Ill. App. 390. See also *Zeliff v. Grand Lodge of New Jersey Knights of Pythias*, 53 N. J. L. 536, 22 Atl. 63.

⁶² *Camp No. 6 Patriotic Order Sons of America v. Arrington*, 107 Md. 319, 68 Atl. 548; *Beeman v. Supreme Lodge, Shield of Honor*, 215 Pa. 627, 64 Atl. 792.

Where there is such a provision, a

A court of equity will not restrain a corporation from trying a member on charges filed against him.⁶³ Nor will it interfere to deprive the proper corporate tribunal of jurisdiction upon the theory that if permitted to proceed it will commit jurisdictional error,⁶⁴ or will act arbitrarily or unlawfully,⁶⁵ or that the member will not have a fair hearing,⁶⁶ or that the charges filed do not constitute an offense under the constitution or laws of the association,⁶⁷ or are not sufficiently definite to enable the accused to know their precise nature.⁶⁸ Nor can a member of a corporation who has been cited to show cause why he should not be disfranchised for violation of its by-laws maintain a suit, in advance of action by the corporation, to obtain an adjudication as to the validity of the by-laws, unless he can show that he will sustain irreparable injury.⁶⁹

It has been held that the rule requiring a member to exhaust his remedies within the corporation before resorting to the courts does not apply where the difficulties of appeal in the association have been made so great as to constitute a virtual denial of justice, and where no relief could be obtained even if such appeal were attempted,⁷⁰ or

court of equity will not restore a suspended member to membership pending the determination of his appeal. *Camp No. 6 Patriotic Order Sons of America v. Arrington*, 107 Md. 319, 68 Atl. 548.

⁶³ *Moyse v. New York Cotton Exchange*, 143 N. Y. App. Div. 265, 128 N. Y. Supp. 112. See also *Ewald v. Medical Society of New York*, 144 N. Y. App. Div. 82, 128 N. Y. Supp. 886, rev'g judgment 70 N. Y. Misc. 615, 130 N. Y. Supp. 1024.

⁶⁴ *Wood v. Chamber of Commerce of Milwaukee*, 119 Wis. 367, 96 N. W. 835.

⁶⁵ *Moffatt v. Board of Trade of Kansas City*, 250 Mo. 168, 157 S. W. 579.

⁶⁶ *Wood v. Chamber of Commerce of Milwaukee*, 119 Wis. 367, 96 N. W. 835.

⁶⁷ *Moffatt v. Board of Trade of Kansas City*, 250 Mo. 168, 157 S. W. 579.

Whether the facts alleged constitute an offense against the laws of the corporation is a question for the

corporate tribunal in the first instance. *Moyse v. New York Cotton Exchange*, 143 N. Y. App. Div. 265, 128 N. Y. Supp. 112; *People v. Young Men's Father Matthew Benev. Society*, 65 Barb. (N. Y.) 357.

By his membership in the corporation the member is bound to submit that question to the corporate tribunal the same as he is bound to submit the question of his guilt or innocence. *Wood v. Chamber of Commerce of Milwaukee*, 119 Wis. 367, 96 N. W. 835.

⁶⁸ The corporate tribunal "has ample jurisdiction to hear all complaints of that kind, and a court of equity cannot, in advance of its acting at all, assume that when called upon to do so it will either refuse to perform its duty or commit jurisdictional error otherwise." *Wood v. Chamber of Commerce of Milwaukee*, 119 Wis. 367, 96 N. W. 835.

⁶⁹ *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45, 8 L. R. A. 175, 24 N. E. 24.

⁷⁰ *Brown v. Supreme Court I. O. F.*, 176 N. Y. 132, 68 N. E. 145. See also

where the higher body has prejudged the matter in issue.⁷¹ And it is generally held that an appeal need not be taken to a higher body within the corporation where the expulsion is void,⁷² although there is authority to the contrary.⁷³ It has also been held that a

State v. Board of Officers Gegenseitige Unterstuetzungs Gesellschaft Germania, 144 Wis. 516, 129 N. W. 630.

"The method of appeal must not impose undue hardship on the member or it will be void." **National Council Knights & Ladies of Security v. Turovh**, 135 Minn. 455, 161 N. W. 225.

A failure to appeal within the order is not excused because of the delay involved in such a course, where it does not appear that such delay will necessarily or probably deprive the member of his just rights, and therefore it must be presumed that if successful on appeal he will be fully restored to all his rights, including any lost pending the hearing of the appeal. **O'Brien v. Rittman**, 176 Ill. App. 237.

⁷¹ See **Correia v. Supreme Lodge Portugese Fraternity of United States of America**, 218 Mass. 305, 105 N. E. 977, where it was held, however, that it had not been made to appear that the supreme lodge was so biased and prejudged against the expelled member that an appeal to it would be an idle ceremony.

⁷² **Illinois**. **People v. Women's Catholic Order of Foresters**, 162 Ill. 78, 44 N. E. 401, aff'g 59 Ill. App. 390.

Minnesota. **National Council Knights & Ladies of Security v. Turovh**, 135 Minn. 455, 161 N. W. 225; **Kulberg v. National Council Knights & Ladies of Security**, 124 Minn. 437, 145 N. W. 120.

Missouri. **Glardon v. Supreme Lodge Knights of Pythias of World**, 50 Mo. App. 45. See **Purdy v. Bankers' Life Ass'n**, 101 Mo. App. 91, 74 S. W. 91.

Pennsylvania. **Gill v. Ladies Catholic Benev. Ass'n**, 36 Pa. Super. Ct. 458.

Wisconsin. **Trustees of Langnecker v. Grand Lodge, A. O. U. W. of Wisconsin**, 111 Wis. 279, 55 L. R. A. 185, 87 Am. St. Rep. 860, 87 N. W. 293. See also **State v. Board of Officers Gegenseitige Unterstuetzungs Gesellschaft Germania**, 144 Wis. 516, 129 N. W. 630.

"Where the judgment of expulsion is void, and the member treats it as such, he continues a member and need not seek reinstatement." **Glardon v. Supreme Lodge Knights of Pythias of World**, 50 Mo. App. 45.

"The proceeding for expulsion must be in accordance with the constitution and by-laws of the society, to the extent that the member expelled shall have notice, and shall be tried upon a charge within the jurisdiction of the tribunal trying him." Otherwise the member is under no obligation to seek the remedy by appeal afforded by the laws of the society. **People v. Women's Catholic Order of Foresters**, 162 Ill. 78, 44 N. E. 401, aff'g 59 Ill. App. 390.

The judgment is void within the meaning of this rule "if the tribunal has been given no power to render the judgment, or if the charge if established does not justify the judgment rendered, or if jurisdiction of the accused has not been acquired." **National Council Knights & Ladies of Security v. Turovh**, 135 Minn. 455, 161 N. W. 225. And see, to the same effect, **Rigler v. National Council Knights & Ladies of Security**, 128 Minn. 51, 150 N. W. 178.

⁷³ In Texas the remedies within the corporation must be exhausted even where the order of expulsion is void for want of notice or trial, or want of power to make it. **Screwmen's**

member who has been expelled without notice or an opportunity to be heard is under no obligation to appeal until notified of his conviction and expulsion.⁷⁴ It is not necessary that the expelled member exhaust his remedies within the corporation to correct its wrongful action before suing for damages.⁷⁵

XXIX. CONTROL OF CORPORATION BY STOCKHOLDERS OR MEMBERS; POWER OF THE MAJORITY

A. General Rules

§ 3971. Scope of subdivision. This subdivision is intended to treat generally of the respective rights of majority and minority stockholders. The rights and remedies of minority stockholders are considered more or less at length not only in preceding subdivisions of this chapter but also in other chapters both in preceding and subsequent volumes in connection with particular subjects. In fact, in most cases where it is merely held that stockholders may or may not interfere under certain conditions, the objecting stockholders are in reality minority stockholders, although no reference is made thereto in the decisions, especially where the acts of corporate officers are attacked. It follows that, to avoid repetition, it is proper and necessary in this subdivision to merely state the general rules governing the rights of majority and minority stockholders.

Matters excluded, and treated of in other chapters or other subdivisions of this chapter, include the power of a majority to enact by-laws,⁷⁶ or to accept a charter,⁷⁷ or to approve a corporate mortgage,⁷⁸ or to consolidate or merge the corporation with another cor-

Benev. Ass'n v. Benson, 76 Tex. 552, 13 S. W. 379; Supreme Council Catholic Knights of America v. Gambati, 29 Tex. Civ. App. 80, 69 S. W. 114.

⁷⁴Kidder v. Supreme Commandery United Order of Golden Cross, 192 Mass. 326, 78 N. E. 469. In this case it was further held that notice to a third person, not shown to have authority to act for the expelled member, was ineffectual.

⁷⁵Independent Order Sons & Daughters of Jacob of America v. Wilkes, 98 Miss. 179, 52 L. R. A. (N. S.) 817, 53 So. 493; St. Louis Southwestern R. Co. of Texas v. Thompson, 102 Tex. 89, 19 Ann. Cas. 1250, 113 S. W. 144;

Thompson v. Grand International Brotherhood of Locomotive Engineers, 41 Tex. Civ. App. 176, 91 S. W. 834; Benson v. Screwmen's Benev. Ass'n, 2 Tex. Civ. App. 66, 21 S. W. 562.

But in Supreme Council Catholic Knights of America v. Gambati, 29 Tex. Civ. App. 80, 69 S. W. 114, it was held that an expelled member of a benefit association was obliged to pursue his remedy by appeal within the order before he could maintain an action to recover insurance premiums paid by him.

⁷⁶See § 487, vol. 1.

⁷⁷See § 242, supra.

⁷⁸See § 1301, supra.

poration,⁷⁹ or to voluntarily dissolve a corporation,⁸⁰ the rights and remedies as to dividends,⁸¹ the rights of minority stockholders where excessive salaries are paid to corporate officers,⁸² the right of stockholders to sue corporate officers,⁸³ the effect of preference to majority stockholders or officers in issuing stock,⁸⁴ the rights of dissenting stockholders where fictitious stock is issued, or where other subscribers or purchasers are secretly allowed to acquire shares without payment, or on part payment only, or are given the right to withdraw and receive back what they have paid,⁸⁵ the rights of a person or persons owning a majority of the stock to act individually as the corporation, or for the corporation, where not an officer or agent,⁸⁶ the right of minority stockholders to attack the validity of elections of corporate officers, or enjoin the holding of an illegal or fraudulent election, or compel by mandamus the calling of an election,⁸⁷ and the right of a minority to the appointment of a receiver.⁸⁸ The remedies of minority stockholders on the refusal of officers to call a stockholders' meeting,⁸⁹ the power of a majority faction to withdraw from a stockholders' meeting and hold a meeting in another place,⁹⁰ the power of the majority to adjourn a stockholders' meeting,⁹¹ and cumulative voting to secure representation of minority stockholders on the board of directors,⁹² and other matters relating to the rights of minority stockholders in connection with stockholders' meetings, are stated in a preceding chapter entitled "Corporate Meetings and Elections."^{92a} So the remedy known as stockholders' suits is exhaustively treated in a subsequent subdivision of this chapter.⁹³

§ 3972. Powers and duties of majority—In general. Holders of a majority of the stock of a corporation may (1) control the company's business, (2) prescribe its general policy,* (3) make themselves its agents, and (4) take reasonable compensation for their services. On the other hand, in thus assuming the control, they take upon themselves the correlative duty of diligence and good faith,

⁷⁹ See chapter on Consolidation, *infra*.

⁸⁰ See chapter on Dissolution, *infra*.

⁸¹ See §§ 3652, 3687 et seq., *supra*.

⁸² See § 2779, *supra*.

⁸³ See §§ 2679-2685, *supra*, and also subd. xxxii, this chapter, *infra*.

⁸⁴ See § 3588, *supra*.

⁸⁵ See § 3585, *supra*.

⁸⁶ See § 1728, *supra*.

⁸⁷ See §§ 1700, 1701, 1763, 1765, *supra*.

⁸⁸ Chapter on Receivers, *infra*.

⁸⁹ See § 1632, *supra*.

⁹⁰ See § 1652, *supra*.

⁹¹ See § 1653, *supra*.

⁹² See § 1682, *supra*.

^{92a} Chap. 39.

⁹³ See subd. xxxii of this chapter, *infra*.

and cannot manipulate the company's business in their own interests to the injury of minority stockholders.⁹⁴ It is one of the duties of the majority stockholders to make the property of the corporation produce the largest possible amount.⁹⁵ However, there is no duty on the part of majority stockholders to financially assist the corporation in its money difficulties and thereby shield it from financial destruction.⁹⁶

The powers and rights of majority stockholders are so interwoven, ordinarily, with the powers and rights of minority stockholders, that it is impossible to state the two separately—the one being the converse of the other under most circumstances. The rights and powers of majority stockholders may be viewed from two standpoints. First, their rights and powers as limited or measured by the rights and powers of the directors and other officers of the corporation—a matter already treated of in a preceding chapter;⁹⁷ and, second, their rights and powers as against minority stockholders, which is the subject of this subdivision. This latter branch of the subject is merely another way of stating the rights of minority stockholders, since if it be held that majority stockholders may do certain things then minority stockholders cannot interfere, while if the contrary be held as to majority stockholders then the minority may interfere where the former nevertheless proceed to act. Nearly all the substantive law governing this matter is subject to precise classification and governed by well settled rules, viz.:

1. Discretion of majority as to matters within the power of the corporation, and not forbidden by statute, cannot be questioned by the minority in the absence of fraud or oppression.⁹⁸

2. Ultra vires and illegal acts of the majority may be attacked by the minority.⁹⁹

3. Fraudulent acts of the majority, including bad faith and oppressive acts, may be remedied by the minority by a resort to the courts.¹ Stated in another way, fraudulent acts of the majority may always be attacked by the minority, whether ultra vires or intra vires and whether relating to internal management or not, provided there is no laches or estoppel.

⁹⁴ *Meeker v. Winthrop Iron Co.*, 17 Fed. 48; *Kelly v. Fahrney*, 145 Ill. App. 80, aff'd 242 Ill. 240, 89 N. E. 984.

⁹⁵ *McManus v. Durant*, 168 N. Y. App. Div. 643, 154 N. Y. Supp. 580, sale of all the stock and property of a corporation.

⁹⁶ *Kelly v. Fahrney*, 145 Ill. App. 80, 96, aff'd 242 Ill. 240, 84 N. E. 984.

⁹⁷ See §§ 1726, 1733-1736, *supra*.

⁹⁸ See § 3991, *infra*.

⁹⁹ See § 3994, *infra*.

¹ See §§ 3997-3999, *infra*.

The relative rights of majority and minority stockholders must first be determined by investigating the terms of the charter and of the by-laws. The majority stockholders cannot act except at a corporate meeting called and conducted according to law.²

§ 3973. — Majority stockholders as trustees for minority. A stockholder, even though he owns a majority of the stock, does not occupy a trust relation towards the other stockholders merely because of his holding of such stock,³ and in at least one state it has been vigorously asserted that majority stockholders are in no case trustees for the minority.⁴ According to most of the decisions, however, a trust relation arises under certain circumstances;⁵ and it is generally held that, in order to establish a trust relation, the majority, whether one or more stockholders, must actually control the affairs of the company for his or their own benefit and to the prejudice of the minority stockholders. The actual control of the property "is the basis in all of the cases of the trust relation."⁶ Thus it is held that

² See § 1630, *supra*.

³ *Rothchild v. Memphis & C. R. Co.*, 113 Fed. 476.

⁴ *Colgate v. United States Leather Co.*, 73 N. J. Eq. 72, 67 Atl. 657.

However, in a later New Jersey case, it is said that "when the majority of the stockholders do act fraudulently and do attempt to divert the assets of the company to themselves to the exclusion either of a minority of the stockholders or the creditors, for all practical purposes they become trustees." *Morse v. Metropolitan S. S. Co.*, 87 N. J. Eq. 217, 100 Atl. 219.

⁵ There are circumstances under which the majority stockholders occupy substantially the same relation of trust towards the minority as the board of directors occupy towards the stockholders generally. *Farmers' Loan & Trust Co. v. New York & N. R. Co.*, 150 N. Y. 410, 434, 34 L. R. A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043.

⁶ *Rothchild v. Memphis & C. R. Co.*, 113 Fed. 476. See *Glengary Consol. Min. Co. v. Boehmer*, 28 Colo. 1, 62 Pac. 839; *Farmers' Loan & Trust Co.*

v. New York & N. R. Co., 150 N. Y. 410, 430, 34 L. R. A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043.

There is no trust relation unless the majority stockholder or stockholders have actual control of the corporation and its property either personally or through corporate officers who will do as they dictate. *Rothchild v. Memphis & C. R. Co.*, 113 Fed. 476, 481.

In other words, the majority stockholder or a combination of stockholders so as to form a majority, occupy a fiduciary relation and assume the duties of trustees only when he or they assume control of the corporation either personally or by dictating the actions of the directors. "The majority stockholder is not made a trustee for the minority stockholder in any sense by the mere fact that he holds a majority of the stock, or by the further fact that he uses the voting power of his stock to elect a board of directors for the corporation. The majority stockholder does not necessarily control the directors whom he appoints, and in fact he has

when a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders.⁷ If a majority stockholder actually dominates the company, although not himself an officer, through his control of a majority of the board of directors, he stands in the same fiduciary relation to the other stockholders as he would have sustained if he had been a director or other officer.⁸

Of course, if a corporation is the majority stockholder in another company engaged in the same line of business, and it elects a majority of the directors, the acts of such directors elected by it will be presumed to be controlled by the majority corporation, and in such a case it would seem that the trusteeship is complete without any further showing of actual control.

§ 3974. — Majority stockholders as possessing powers of corporation. A stockholder, although he owns a majority or all of the stock of the corporation, is not the corporation, and he cannot make a contract which will bind the corporation merely because of his status as stockholder, according to the general rule.⁹ Moreover, if

no right to control them." *Robotham v. Prudential Ins. Co. of America*, 64 N. J. Eq. 673, 53 Atl. 842.

The rule, independently of any statute, is that one or more in control of the majority of the stock of a corporation, whether one person or several, or whether a corporation or part of the stockholders in another corporation, occupy a fiduciary relation towards the minority stockholders, and are charged with the duty of exercising a high degree of good faith, care and diligence for the protection of such minority interests, and every act in the interest of the majority to the detriment of the minority is a breach of duty and of trust, so as to warrant plenary relief from a court of equity in behalf of the minority stockholders. *Hyams v. Calumet & H. Min. Co.*, 221 Fed. 529, 537; *Marks v. Merrill Paper Mfg. Co.*, 188 Fed. 850.

⁷*Jones v. Missouri-Edison Elec. Co.*, 144 Fed. 765; *Riley v. Callahan Min. Co.*, 28 Idaho 525, 155 Pac. 665; *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356.

If the holders of a majority of the stock combine "to elect directors and to dictate their acts and the acts of the corporation for the purpose of carrying out a predetermined plan" they stand in the shoes of the corporation and are "actual, if not technical, trustees for the holders of the minority of the stock." Per Judge Sanborn in *Jones v. Missouri-Edison Elec. Co.*, 144 Fed. 765.

⁸*Steinfeld v. Nielsen*, 12 Ariz. 381, 100 Pac. 1094; *Farmers' Loan & Trust Co. v. New York & N. R. Co.*, 150 N. Y. 410, 34 L. R. A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043.

⁹See § 1728, *supra*.

The acts of a majority stockholder cannot be considered a waiver of a

not authorized to act on the ground that he is a corporate officer, a person owning a majority or all the stock of a corporation cannot contract in behalf of the company, although he is also a director or other officer.¹⁰

§ 3975. — Majority as owning property of corporation. The owner of a majority, or all or nearly all of the stock of a corporation, whether an individual, a collection of individuals, or another corporation, does not own the property of the corporation. For instance, a corporation owning all the stock of another company does not own the property of the latter corporation.¹¹ This is on the theory of the separate entity of a corporation distinct from its stockholders.¹²

§ 3976. — Power of majority to ratify. It has already been stated in a preceding volume that stockholders may ratify voidable acts of directors or other officers, but that they cannot ratify ultra vires or illegal acts, nor can a majority of the stockholders ratify a fraudulent corporate contract as against the minority.¹³ Ratification of fraudulent or illegal acts rests upon the same ground as the original transaction. In other words, fraudulent or illegal acts on the part of majority stockholders may be attacked by minority stockholders, and it follows as a necessary corollary that a ratification by majority stockholders of fraudulent or illegal acts of corporate officers or others is not binding upon minority stockholders.¹⁴

claim by the corporation. *Sanborn-Cutting Co. v. Paine*, 244 Fed. 672.

¹⁰ See §§ 1730, 1732, *supra*.

¹¹ *Com. v. Muir*, 170 Ky. 435, 186 S. W. 194.

¹² See § 25, *supra*.

¹³ See § 2190, *supra*.

Majority stockholders who have no power to do an act, because ultra vires, have no power to ratify such an act so as to make it binding on minority stockholders. *Schwab v. E. G. Potter Co.*, 129 N. Y. App. Div. 36, 113 N. Y. Supp. 439.

Ratification by a majority of the stockholders of an illegal and incomplete transfer of the corporate property may be enjoined by minority stockholders. *Forrester v. Butte & M. Consol. Copper & Silver Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353.

“Even if a majority of the stock-

holders consented to ratify an illegal use of its funds, their assent would not bind a protesting minority, or prevent them from obtaining equitable relief.” *Von Arnim v. American Tube Works*, 188 Mass. 515, 518, 74 N. E. 680.

A contract between the corporation and one or more of its officers is not necessarily valid, so far as minority stockholders are concerned, because authorized or ratified by the majority stockholders. *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393.

¹⁴ See *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138. But see *Kessler & Co. v. Ensley Co.*, 129 Fed. 397, which appears to be the only case tending to the contrary rule.

Can an interested officer in a corporation vote, as a stockholder, to ratify a contract made between himself and the corporation? This has been decided in the affirmative as already stated in preceding volumes.¹⁵ Another question now presents itself. Is the action of such officer, as a stockholder, to be regarded oppressive towards the minority of stockholders within the rule that the act of stockholders in voting in their own personal interests "must not be so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority of the stockholders lie wholly outside of, and in opposition to, the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or fraudulent destruction of the rights of such minority?"¹⁶ In England, it is held that the act of a director in voting, as a stockholder, to ratify a contract between himself and the corporation was not necessarily oppressive towards the minority stockholders merely because he individually owned a majority of the stock.¹⁷ And this is undoubtedly the true rule. The burden of establishing his good faith is not on the interested stockholder,¹⁸ and the question whether the effect of the ratification is oppressive on the rights of the minority depends upon the facts of the particular case.¹⁹ If there is in fact fraud in the original transaction, the ratification by the votes of the interested officers is not binding on the minority stockholders.²⁰

§ 3977. — Liability of majority for misconduct of officers elected by them. Of course majority stockholders who elect corporate offi-

¹⁵ See §§ 1662, 2187, *supra*.

¹⁶ See, on this subject, *Camden Land Co. v. Lewis*, 101 Me. 78, 101, 63 Atl. 523.

¹⁷ *North-West Transp. Co. v. Beaty*, L. R. 12 App. Cas. 589.

¹⁸ *Merriman v. National Zinc Corporation*, 82 N. J. Eq. 493, 500, 89 Atl. 764.

¹⁹ See *Merriman v. National Zinc Corporation*, 82 N. J. Eq. 493, 89 Atl. 764.

²⁰ *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 614, 83 N. E. 434, *rev'g* 135 Ill. App. 234.

"I think that where the action of the majority is plainly a fraud upon, or, in other words, is really oppressive to the minority shareholders, and

the directors or trustees have acted with and formed part of the majority, an action may be sustained by one of the minority shareholders," but it is not "every question of mere administration or of policy in which there is a difference of opinion that enables the minority to claim that the action of the majority is oppressive, and which justifies the minority in coming to a court of equity to obtain relief. * * * The court would not be justified in interfering even in doubtful cases, where the action of the majority might be susceptible of different constructions." *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 98, 9 L. R. A. 527, 25 N. E. 201.

cers are not liable to third persons, as stockholders, for mismanagement of such officers, merely because they elected them.²¹

§ 3978. Power of minority to rescind contract. Where a contract made by corporate officers in behalf of the corporation is voidable but not void, and subject to ratification by a majority of the stockholders, the majority stockholders may elect to rescind the contract but no such power is vested in a minority of the stockholders, where there is no fraud or bad faith. For instance, where a contract is made between two corporations, and a majority of the directors of one company are also the directors of the other company, then if the contract be deemed voidable merely because of the common directors, a minority of the stockholders cannot obtain a rescission of the contract.²²

§ 3979. What constitutes a majority. This matter has been treated of in a preceding volume, in connection with the chapter relating to corporate meetings and elections.²³

§ 3980. Right to purchase majority of stock. One or more persons have the legal right to purchase the majority of the stock of a corporation with the intent to obtain control thereof.²⁴ It follows that if a corporation has power to purchase stock in other companies, it may purchase the majority of the stock of another company merely for the purpose of obtaining control thereof,²⁵ provided such purchase is not against public policy, as where it is intended to stifle competition.²⁶ So a minority stockholder cannot enjoin a sale of their stock by the other stockholders to another corporation although it might be detrimental to him to have another corporation control the majority of the stock.²⁷ But it has been held that stockholders

²¹ *Higgins v. Lansing*, 154 Ill. 301, 357, 40 N. E. 362.

²² *Continental Ins. Co. v. New York & H. R. Co.*, 103 N. Y. App. Div. 282, 93 N. Y. Supp. 27; *Metropolitan El. R. Co. v. Manhattan R. Co.*, 14 Abb. N. Cas. (N. Y.) 103.

²³ See § 1647, *supra*.

²⁴ *Northern Securities Co. v. United States*, 193 U. S. 197, 361, 48 L. Ed. 679; *Pearsall v. Great Northern R. R.*, 161 U. S. 646, 671, 40 L. Ed. 838; *Hart v. Ogdensburg & L. C. R. Co.*,

89 Hun (N. Y.) 316, 35 N. Y. Supp. 566.

See generally subd. XVIII of this chapter, *supra*.

A stockholder may purchase a controlling interest even in another competing corporation. *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204, 212.

²⁵ See § 3988, *infra*.

²⁶ See § 3988, *infra*, and also § 1131, *supra*.

²⁷ *Ingraham v. National Salt Co.*, 72 N. Y. App. Div. 582, 76 N. Y.

cannot combine to sell their shares of stock in a railroad company, for the express purpose of enabling them to abandon the rights and duties conferred and imposed upon them by the act incorporating the company, and of putting the control of their corporation into the hands of its rival, since such an act would be contrary to the public policy of the state.²⁸

§ 3981. Validity of agreements between stockholders for control of corporation. Agreements between a part of the stockholders to combine to control the corporation are valid where entered into in good faith and for purposes not detrimental to the interests of the corporation and other stockholders,²⁹ although there is some conflict of opinion as to the validity of voting trusts.³⁰

§ 3982. Extent of stock holdings as affecting rights and remedies. Relief may be obtained, in a proper case, at the suit of a single stockholder.³¹ And it is undoubtedly true that in many cases the rights of one or more minority stockholders are the same regardless of how small or how great an amount of stock is held by them. For instance, a minority stockholder has enforceable rights although he owns but one share of stock in a corporation having a million shares, and such rights are the same as if he owned forty-nine per cent of the stock. Thus, in one noted case³² a mining company was enjoined from transferring its property at the suit of two persons holding one

Supp. 1016, 74 N. Y. Supp. 388. To same effect see *Phelan v. Edison Elec. Illuminating Co.*, 24 N. Y. Misc. 109, 53 N. Y. Supp. 305.

²⁸ *Pennsylvania R. Co. v. Com.* (Pa.), 7 Atl. 368.

²⁹ *Beitman v. Steiner*, 98 Ala. 241, 13 So. 87; *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373; *Seruggs v. Cotterill*, 67 N. Y. App. Div. 583, 73 N. Y. Supp. 882. See also *Teich v. Kaufman*, 174 Ill. App. 306. But see *Funkhouser v. Capps*, — Tex. Civ. App. —, 174 S. W. 897.

"It is not illegal or against public policy for two or more stockholders owning the majority of the shares of stock to unite upon a course of corporate policy or action, or upon the officers whom they will elect. * * * Shareholders have the right to combine their interests and voting

powers to secure such control of the corporation and the adoption of and adhesion by it to a specific policy and course of business. Agreements upon a sufficient consideration between them, of such intendment and effect, are valid and binding, if they do not contravene any express charter or statutory provision or contemplate any fraud, oppression, or wrong against other stockholders or other illegal object." *Manson v. Curtis*, 223 N. Y. 313, 119 N. E. 559.

³⁰ See §§ 1707-1716, *supra*.

³¹ *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 5, 14; *Gifford v. New Jersey R. & Transp. Co.*, 10 N. J. Eq. 171.

³² *Forrester v. Butte & M. Consol. Copper & Silver Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353.

hundred shares each out of a total of one hundred and fifty thousand shares, and where there were nearly nineteen hundred stockholders and it did not appear that any of the other stockholders objected to the sale.

On the other hand, the relative holdings of the minority and majority stockholders is a fact to be considered when the good faith and good judgment of a transaction on the part of majority stockholders is involved.³³ In one case, it was said that "it is always a suspicious circumstance where a single stockholder, among a large number of a corporation, rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so where the amount of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim *de minimis non curat lex* very properly applicable."³⁴ In a Washington case it was said that "when a man with only \$25 worth of stock in a given corporation commences a proceeding to enjoin the action of those owning over 93 per cent of the stock, worth many thousands of dollars, it should be countenanced only upon a very satisfactory showing."³⁵ And in Missouri it is the rule that the financial injury to a small stockholder who sues alone may be so small that equity will not interfere.³⁶ So, in a federal case, it was intimated that a temporary injunction should be refused where a suit is brought by the holder in trust of one share of stock out of a total of over one hundred and fifty thousand shares.³⁷ In one case it was said that while the fact that "a very small proportion of the stockholders of the defendant company are engaged in prosecuting this suit" is "no bar to relief, it is pertinent upon the question of balancing equities; that is, upon the question whether greater inconveniences and losses will come to the complainants or defendants in the granting or withholding of preliminary relief."³⁸

³³ "The principle of law invoked is the same, and will protect the plaintiffs in their rights, whether they own 1 or 1,000 shares; but when a court of equity comes to adjust the rights of the parties, the proportion of stock held by them, respectively, is a fact to be taken into consideration in selecting the remedy to be afforded the plaintiffs." *Tanner v. Lindell R. Co.*, 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155.

³⁴ *Dannmeyer v. Coleman*, 11 Fed. 97.

³⁵ *Pitcher v. Lone Pine-Surprise Consol. Min. Co.*, 39 Wash. 608, 81 Pac. 1047.

³⁶ *Albers v. Merchants' Exch. of St. Louis*, 45 Mo. App. 206, where loss was 78 cents.

³⁷ *Greenough v. Alabama Great Southern R. Co.*, 64 Fed. 22.

³⁸ *Aldrich v. Union Bag & Paper Co.*, 81 N. J. Eq. 244, 87 Atl. 65.

To sum up, the rule deducible from the decisions and founded on good reason, is that the rights of the minority exist regardless of how small an interest such minority represents, although perhaps where the interest of the suing stockholder can be measured in money it may be so small as to warrant a refusal of relief; that where bad faith is alleged the fact that the objecting stockholder or stockholders represent a very small interest may be material as bearing on the existence of any bad faith; and that the remedy is sometimes affected by the extent of the objecting interests.

§ 3983. Right of minority to information regarding corporate affairs. It seems that minority stockholders are entitled to information concerning the management and affairs of the corporation, and this right may be enforced, in a proper case, by an action for an accounting.³⁹

B. Particular Forms of Corporate Control

§ 3984. In general. Corporate control is usually the result of one person owning a majority of the stock,⁴⁰ or ownership of a majority of the stock by another corporation,⁴¹ or ownership of a majority of the stock by a part of the stockholders of another corporation,⁴² or a combination of stockholders so as to control a majority of the stock.⁴³ However, this is of little importance. The relative rights of majority and minority stockholders are the same whether the majority is represented by a single individual, a combination of individuals, another corporation, or a part of the stockholders in another corporation.

§ 3985. One person as majority stockholder. If a majority of the stock is owned by one person, his rights and duties are practically the same as in case of the rights and duties where the majority ownership is by a corporation or a combination of stockholders. It is sometimes said that the sole owner of the majority of the stock is a trustee for the minority. This, however, is not wholly true. He is a trustee where he assumes control but not otherwise, according to the general rules governing majority stockholders.⁴⁴ For instance, he is not a trustee where he merely votes for directors and in no way

³⁹ Weir v. Bay State Gas Co. of Delaware, 91 Fed. 940; Sage v. Culver, 71 Hun (N. Y.) 42, 24 N. Y. Supp. 514, aff'd 147 N. Y. 241, 41 N. E. 513.

⁴⁰ See § 3985, *infra*.

⁴¹ See § 3988, *infra*.

⁴² See § 3986, *infra*.

⁴³ See § 3987, *infra*.

⁴⁴ See § 3973, *supra*.

attempts to govern their actions. The situation where one person owns a majority of the stock and then purchases the property from the corporation is ably summed up by Justice Sanborn as follows: "The holder of the majority of stock of a corporation has the power, by the election of biddable directors and by the vote of his stock, to do everything that the corporation can do. His power to control and direct the action of the corporation places him in its shoes, and constitutes him the actual, if not the technical, trustee for the holders of the minority of the stock. * * * In effect he holds an irrevocable power of attorney from the minority stockholders to manage and to sell the property of the corporation, for himself and for them. * * * This devolution of unlimited power imposes on a single holder of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through him, the duty to exercise good faith, care and diligence to make the property of the corporation produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property. Any sale of the property of the corporation by him to himself for less than he could obtain for it from another, or any other act in his interest to the detriment of the holders of the minority of the stock,* becomes a breach of duty and of trust, renders the sale or act voidable at the election of the minority stockholders, and invokes plenary relief from a court of chancery." ⁴⁵ A person who is himself a majority stockholder must not do anything to the detriment of minority stockholders, and if he sells their stock he must account to them for the profits made on the sale where he failed to disclose to them the true nature of the transaction.⁴⁶ Although one stockholder owns a large majority of the stock, he cannot waive or release a claim existing in favor of the corporation, at least as against creditors of the corporation,⁴⁷ and he cannot make a contract binding the corporation.⁴⁸

§ 3986. Control by stockholders of another corporation. It sometimes happens that instead of a corporation holding the majority

⁴⁵ *Wheeler v. Abilene Nat. Bank Bldg. Co.*, 159 Fed. 391, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917.

This statement, however, is subject to criticism as assuming that the majority stockholder is always a trustee.

⁴⁶ *McManus v. Durant*, 168 N. Y. App. Div. 643, 154 N. Y. Supp. 580.

⁴⁷ *Pennsylvania Steel Co. v. New York City R. Co.*, 194 Fed. 543.

⁴⁸ See § 1728, *supra*.

stock in another corporation, such stock is owned by its majority stockholders. In such a case, of course, the majority cannot favor either corporation but they owe the duty to minority stockholders to act in good faith towards them. Where the business and affairs of a corporation are taken over by the agents and officers of other concerns whose controlling shareholders also control such corporation, and the business of the latter is managed in the interest of such other concerns, and the minority stockholders deprived of their just rights, the latter have a remedy in equity, and the remedy at law is not adequate.⁴⁹

§ 3987. Control by combination of stockholders. Ordinarily part of the stockholders may combine to control the corporation. But if they do combine for such purpose, and actually control the acts of the corporation, they are generally considered trustees, with the attendant duties of trustees towards the beneficiaries, i. e., the minority stockholders.⁵⁰ One of the clearest statements of the duty owing by such a combination is to be found in a federal opinion rendered by Judge Sanborn, as follows: "A combination of the holders of a majority * * * of the stock of a corporation to elect directors, to dictate their acts and the acts of the corporation for the purpose of carrying out a predetermined plan, places the holders of such stock in the shoes of the corporation and constitutes them actual, if not technical trustees for the holders of the minority of the stock. The devolution of power imposes correlative duty. The members of such a combination become in practical effect the corporation itself, because they draw to themselves and use the powers of the corporation. In a sale of its property, in a consolidation of the corporation with another, in every act and contract of the corporation which they cause, they make themselves the trustees and agents of the holders of the minority of the stock, because it is only through them that the latter may act or contract regarding the corporate property or preserve or protect their interests in it. Such a majority of the holders of stock owe to the minority the duty to exercise good faith, care and diligence to make the property of the corporation in their charge produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and deliver to them their just proportion of the income and of the proceeds of

⁴⁹ *Ames v. Goldfield Merger Mines Co.*, 227 Fed. 292, 303. See also *Jones v. Missouri-Edison Elec. Co.*, 199 Fed. 64.

⁵⁰ See § 3973, *supra*.

the property. Any sale of the corporate property to themselves, any disposition by them of the corporation or of its property, to deprive the minority holders of their just share of it, or to get gain for themselves at the expense of the holders of the minority of the stock, becomes a breach of duty and of trust, which invokes plenary relief from a court of chancery."⁵¹

The creation, validity and effect of combinations of stockholders to control corporate action by voting their stock as a unit, including what are known as voting trusts, have been exhaustively considered in a preceding volume.⁵²

§ 3988. Corporation as majority stockholder—In general. It has been shown in a preceding volume that while there is some conflict in the decisions, the general rule is that a corporation has no implied power to purchase stock of another corporation,⁵³ although such purchases are now quite generally authorized by statute.⁵⁴ If it has no power to purchase generally, then of course it cannot purchase for the purpose of obtaining control.⁵⁵ Now, going further, if there is power to purchase the stock of another company, there seems to be no good reason why a corporation, as well as a single person, cannot purchase a majority of the stock for the purpose of obtaining control,⁵⁶ provided always such a purchase is not against public policy as tending to create a monopoly by destroying competition.⁵⁷ How-

⁵¹ *Jones v. Missouri-Edison Elec. Co.*, 144 Fed. 765.

⁵² See §§ 1696-1698, 1705-1721, *supra*.

⁵³ See §§ 1116-1118, *supra*.

⁵⁴ See § 1122, *supra*.

A corporation expressly authorized to purchase and hold stock in other corporations may purchase and hold a majority of the stock in several street railway corporations operating street railways in widely separated cities. *Clark v. Memphis St. R. Co.*, 123 Tenn. 232, 130 S. W. 751.

⁵⁵ The true rule, notwithstanding some apparently contrary statements, is that "while for certain purposes power to acquire stock may exist as incidental to other powers, there never can be an implied power to purchase for control. A purchase for control without express authority to purchase stock, is necessarily *ultra vires*.

A purchase for other purposes, without such authority, is also *ultra vires* unless the requisite power can be implied." *Noyes, Intercorporate Relations* (2nd Ed.), § 298.

⁵⁶ *Hart v. Ogdensburg & L. C. R. Co.*, 89 Hun (N. Y.) 316, 35 N. Y. Supp. 566.

⁵⁷ See § 1131, *supra*, and also *United States v. Union Pac. R. Co.*, 226 U. S. 61, 57 L. Ed. 124; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849; *Dunbar v. American Telephone & Telegraph Co.*, 224 Ill. 9, 115 Am. St. Rep. 132, 8 Ann. Cas. 57, 79 N. E. 423; *In re Attorney-General*, 32 N. Y. Misc. 1, 12, 66 N. Y. Supp. 129. See also § 114, notes 43-46, *supra*. But see *Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618, 56 N. Y. Supp. 288.

Even if a corporation has power to

ever, it has been held that if a purchase of the majority of the stock in another company is mainly for the purpose of promoting public convenience and interests, it is immaterial that competition is eliminated thereby.⁵⁸

The mere fact that one corporation is dominated by another through ownership of a majority of the stock, where such ownership is legal, does not warrant equitable relief in favor of a minority stockholder, provided the domination is not exercised unlawfully or inequitably.⁵⁹ Ownership of a majority of the stock of a corporation, even if by another corporation, in the same business, does not show that the former dominates the business of the latter nor that competition between them is thereby excluded; and even if there is a presumption that ownership of a majority of shares constitutes a suppression of competition, within anti-trust statutes, such presumption is a rebuttable one.⁶⁰

But if a corporation owns a majority of the stock of another purchase stock of another company, it has no power to purchase a majority of the stock of another company for the purpose of controlling the latter and preventing competition. Relief may be obtained either on the ground of ultra vires or fraud. *Dunbar v. American Telephone & Telegraph Co.*, 224 Ill. 9, 22, 29, 115 Am. St. Rep. 132, 8 Ann. Cas. 57, 79 N. E. 423.

Such acquisition of a majority of the stock in a competing business has been held in violation of the federal anti-trust statute. *Bigelow v. Calumet & H. Min. Co.*, 155 Fed. 869.

Anti-trust statutes, see § 3386 et seq., *supra*.

Statutes authorizing the purchase of stock of other companies are limited by statutes prohibiting combinations to create a monopoly. *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945; *Burrows v. Interborough Metropolitan Co.*, 156 Fed. 389; *Bigelow v. Calumet & H. Min. Co.*, 155 Fed. 869.

The fact that the obtaining control will not result in a complete monopoly because there are other concerns engaged in the same business, does

not make the transaction lawful. *Dunbar v. American Telephone & Telegraph Co.*, 224 Ill. 9, 115 Am. St. Rep. 132, 8 Ann. Cas. 57, 79 N. E. 423.

In some states statutes expressly limit the power to hold stock in other corporations to stock in noncompeting corporations. *Mannington v. Hocking Valley R. Co.*, 183 Fed. 133, holding that Ohio statute relating to "private corporations" applies to railroads.

A valuable case in this connection, which somewhat limits the rule stated in the text, holds it not invalid to purchase to prevent competition, in the case of gas companies, since the production and price is subject to regulation by the legislature and it is the policy of New York to discourage competition between such companies. *Attorney General v. Consolidated Gas Co.*, 124 N. Y. App. Div. 401, 108 N. Y. Supp. 823.

⁵⁸ *United States v. Reading Co.*, 183 Fed. 427, 479 (separate opinion of Justice Lanning).

⁵⁹ *Theis v. Spokane Falls Gas Light Co.*, 49 Wash. 477, 95 Pac. 1074.

⁶⁰ *Bigelow v. Calumet & H. Min. Co.*, 167 Fed. 721.

corporation which it thereby controls, it is a trustee of the assets of the latter, so far as its other stockholders and its creditors are concerned, and it is bound to the exercise of the utmost good faith.⁶¹ For instance, a railroad company which controls another company through stock ownership cannot lawfully sell to the controlled company a line of road owned by itself where the chief purpose is for its own benefit.⁶² A corporation owning a majority of the stock of another corporation has no right to operate the controlled company for the benefit of the controlling company; and minority stockholders in the controlled company may enjoin such acts or obtain other appropriate relief.⁶³ So it is clear that a corporation which has purchased a majority of the stock of another corporation cannot, after obtaining control of the affairs of the latter, "divert the income of its business, refuse business which would enable the defaulting company to pay its interest, and then institute an action in equity to enforce its obligations, for the avowed purpose of obtaining entire control of its property to the injury of the minority stockholders."⁶⁴ If a corporation acquires control of another corporation, its legal rights and duties as the majority stockholder are the same as if the majority stock was owned by an individual.

Ownership of a majority of the shares of a corporation by another company does not affect the separate existence of the two companies,⁶⁵

⁶¹ *Vallery v. Denver & R. G. R. Co.*, 236 Fed. 176; *Pennsylvania Canal Co. v. Brown*, 235 Fed. 669; *Hyams v. Calumet & H. Min. Co.*, 221 Fed. 529; *Boyd v. New York & H. R. Co.*, 220 Fed. 174; *Hunnewell v. New York Cent. & H. River R. Co.*, 196 Fed. 543; *Male v. Atchison, T. & S. F. R. Co.*, 179 N. Y. App. Div. 87, 166 N. Y. Supp. 593.

The leading case on this subject is *Farmers' Loan & Trust Co. v. New York & N. R. Co.*, 150 N. Y. 410, 34 L. R. A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043.

⁶² *Union Pac. R. Co. v. Frank*, 226 Fed. 906, 920.

⁶³ *Hunnewell v. New York Cent. & H. River R. Co.*, 196 Fed. 543; *Turner v. Calumet & H. Min. Co.*, 187 Mich. 238, 153 N. W. 718; *Baillie v. Columbia Gold Min. Co.*, 86 Ore. 1, 167 Pac. 1167, 166 Pac. 965.

Especially will equity afford relief in favor of minority stockholders where the majority stock is purchased by a competing company which elects officers of its choosing and runs the company so as to increase its own profits and diminish the profits of the controlled company. *De Neufville v. New York & N. R. Co.*, 81 Fed. 10; *George v. Central Railroad & Banking Co.*, 101 Ala. 607, 14 So. 752; *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L. R. A. 605, 16 Am. St. Rep. 81, 7 So. 108; *Farmers' Loan & Trust Co. v. New York & N. R. Co.*, 150 N. Y. 410, 34 L. R. A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043.

⁶⁴ *Farmers' Loan & Trust Co. v. New York & N. R. Co.*, 150 N. Y. 410, 431, 34 L. R. A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043, leading case.

⁶⁵ *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, 29 L.

nor show that they are agents of each other,⁶⁶ and each will be presumed to be managed in its own interest.⁶⁷ In such a case, the two corporations continue to exist as before and each acts through its own directors and officers. So service of process cannot be made on the controlling corporation by serving it on an officer of the controlled corporation.⁶⁸

It is well settled that the ownership of the majority of the stock of a corporation, while it gives a certain control of the corporation, does not confer such a control as to make the holder of the stock responsible for the acts of the controlled company.⁶⁹ A corporation owning a majority of the stock of another corporation is not liable for the infringement of a patent by the latter.⁷⁰

§ 3989. — Minority interest as controlling interest. The acquisition of less than a majority of the stock of a corporation may nevertheless constitute the obtaining control of a corporation, where the stock is distributed among many stockholders, so as to be invalid as obtaining the control of a competing company in restraint of trade.⁷¹

§ 3990. — Holding companies. Sometimes a corporation is referred to as a holding company when strictly it is not such a company, as where it is not chartered as a holding company but engages in a separate business and incidentally holds a majority of the stock of one or more corporations. Such corporations are not considered in this section. What is here considered are corporations created especially for the purpose of acquiring and holding the stocks of other corporations.⁷² The advantages of a holding company over a consolidation, purchase or lease, have been readily recognized by corporate interests and have resulted in the creation of many corporations merely for the purpose of holding the control of other

Ed. 499; *Missouri Pac. Ry. Co. v. Boling*, 66 Ark. 646, 48 S. W. 806. See also § 1133, *supra*.

⁶⁶ *Southern Pac. R. Co. v. W. T. Meadors & Co.*, 104 Tex. 469, 140 S. W. 427.

⁶⁷ *Bigelow v. Calumet & H. Min. Co.*, 167 Fed. 721.

⁶⁸ *Peterson v. Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. Ed. 841.

⁶⁹ *Pennsylvania R. Co. v. Jones*, 155 U. S. 333, 39 L. Ed. 176; *Stone v. Cleveland, C., C. & St. L. R. Co.*, 202 N. Y. 352, 35 L. R. A. (N. S.) 770,

95 N. E. 816; *Senior v. New York City R. Co.*, 111 N. Y. App. Div. 39, 97 N. Y. Supp. 645.

⁷⁰ *Westinghouse Elec. & Mfg. Co. v. Allis-Chalmers Co.*, 168 Fed. 91.

⁷¹ *United States v. Union Pac. R. Co.*, 226 U. S. 61, 95, 57 L. Ed. 124, where *Union Pacific* acquired 46 per cent of stock of *Southern Pacific*.

⁷² Corporations dealing in stocks are not necessarily holding corporations. Power to vote stock held by company, see § 1672, *supra*.

corporations by acquiring a majority of their stock.⁷³ The validity of such holding corporations depends upon statutory authority to form a corporation for such a purpose, considerations of public policy, comity between states and the applicability of federal and state anti-trust statutes.⁷⁴ The power to create a corporation for the purpose of acquiring and holding stock in other corporations has been stated in a preceding volume.⁷⁵ Conceding that a corporation may be organized for such a purpose in a proper case, nevertheless it is settled by numerous decisions that a holding company organized to prevent competition between rival companies is invalid as tending to create a monopoly.⁷⁶ The illegality of a holding company, as creating a monopoly, where there is assigned to it a majority of the stock of two or more competing corporations engaged in interstate commerce, is undoubted since the decision of the Supreme Court of the United States in 1903 which held that the Northern Securities Company created by Hill and his associates of the Great Northern Railway Company, and Morgan and his associates of the Northern Pacific

⁷³ Advantages of holding corporations, see Noyes, *Intercorporate Relations* (2nd Ed.), § 285.

⁷⁴ See Noyes, *Intercorporate Relations* (2nd Ed.), § 285.

⁷⁵ See § 129, *supra*.

Independently of statute, a holding company created to hold stock of other companies, which purchases a majority of the stock of all the gas companies in a city in order to destroy competition and monopolize the gas business, is not created for a lawful purpose, where no statute confers the right to purchase stock, and such acts are void. *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798.

⁷⁶ *United States v. Standard Oil Co.* of New Jersey, 173 Fed. 177; *State v. Standard Oil Co.*, 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541, 30 N. E. 279. But see *MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 428, 75 Pac. 89, upholding creation of Amalgamated Copper Company.

The organization of a holding company, in order to stifle competition, is illegal, independently of statute. *Southern Elec. Securities Co. v. State*, 91 Miss. 195, 124 Am. St. Rep. 638, 44 So. 785.

Holding companies, to prevent competition, are a violation of state anti-trust statutes. *Burrows v. Interborough Metropolitan Co.*, 156 Fed. 389, monopoly of street railway lines in New York City; *State v. Virginia-Carolina Chemical Co.*, 71 S. C. 544, 51 S. E. 455. See also *State v. American Sugar Refining Co.*, 138 La. 1005, 71 So. 137; *State v. Polar Wave Ice & Fuel Co.*, 259 Mo. 578, 169 S. W. 126; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

The New York statute prohibiting monopolies has been held not applicable to railroad companies and hence does not apply to a holding company controlling the street car lines of New York City. *Continental Securities Co. v. Interborough Rapid Transit Co.*, 203 Fed. 521.

Railway Company, was illegal as a violation of the federal anti-trust statute.⁷⁷

Stockholders in holding companies are not stockholders, nor entitled to the rights of stockholders, in other corporations a part of whose stock is owned by the holding company, and hence a sale or lease of all the property of a corporation controlled by the holding company by its ownership of stock does not require the unanimous consent of the stockholders of the holding company but it is sufficient that there is unanimous consent of the stockholders of the company whose property is leased or sold.⁷⁸

The creation of a holding company does not affect the separate and continuing existence of the corporations whose stock it holds.⁷⁹ A holding company is not a "common carrier" although it controls the stock of a corporation which is a common carrier.⁸⁰

C. In What Cases Minority May Resort to Courts

§ 3991. General rule. The general rule is that minority stockholders cannot obtain relief from the courts in connection with acts of the majority within the powers of the corporation, where there is no fraud,⁸¹ but may obtain relief where the act is illegal, ultra vires,⁸² or fraudulent.⁸³

Actions by stockholders against corporate officers have been incidentally noticed in a preceding volume,⁸⁴ while the rules governing stockholders' suits in general are stated in a subsequent subdivision of this chapter.⁸⁵

§ 3992. Intra vires acts where there is no bad faith—Rule stated. The governing rule is that minority stockholders cannot question, by recourse to the courts, the acts of majority stockholders unless such acts are either (1) ultra vires,⁸⁶ (2) illegal, or (3) fraudulent.⁸⁷ Stated in another way, the courts will not interfere, at the suit of the minority, in regard to matters intra vires, unless there is fraud

⁷⁷ Northern Securities Co. v. United States, 193 U. S. 197, 48 L. Ed. 679.

⁷⁸ Sabre v. United Traction & Electric Co., 225 Fed. 601.

⁷⁹ State v. Tacoma Railway & Power Co., 61 Wash. 507, 32 L. R. A. (N. S.) 720, 112 Pac. 506, applying rule where it was sought to compel a universal transfer system on street car lines.

⁸⁰ United States v. Union Stock-

yard & Transit Co. of Chicago, 192 Fed. 330, 342.

⁸¹ See § 3992, *infra*.

⁸² See § 3994, *infra*.

⁸³ See § 3997, *infra*.

⁸⁴ See §§ 2679-2685, *supra*.

⁸⁵ See subd. xxxii, *infra*.

⁸⁶ See § 3994, *infra*.

⁸⁷ See § 3997, *infra*.

or oppression. "The majority rules" is the basic rule as to the internal affairs of a corporation so long as the acts of the corporation are within its express or implied powers. It is of no moment that the acts of the majority are unwise or inexpedient so long as they act in good faith. When the management of a corporation is vested in the stockholders collectively as constituting the corporation, and they act at a meeting called and conducted in accordance with the charter and by-laws of the corporation, and differences of opinion arise as to the policy to be pursued; the vote of the majority must govern, where the majority act in good faith, and within the powers of the corporation, and do not violate any contract rights of the other stockholders. No principle in the law of corporations is better settled than the principle that every person who subscribes for or purchases shares in a corporation, or otherwise acquires shares therein, impliedly agrees that, upon any matter which comes within the powers expressly or impliedly conferred upon the corporation by its charter, he will be bound by the will of the majority, so long as they act in good faith, and according to law.⁸⁸

88 United States. *Korn v. Mutual Assur. Soc. of Virginia*, 6 Cranch 192, 3 L. Ed. 195; *Leo v. Union Pac. Ry. Co.*, 19 Fed. 283; *Meeker v. Winthrop Iron Co.*, 17 Fed. 48.

Alabama. *Sullivan v. Central Land Co.*, 173 Ala. 426, 55 So. 612.

Arkansas. *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340.

Iowa. *Peatman v. Centerville Light, Heat & Power Co.*, 100 Iowa 245, 69 N. W. 541.

Kansas. *Inscho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917 B 546, 146 Pac. 1014; *Feess v. Mechanics' State Bank*, 84 Kan. 828, L. R. A. 1915 A 606, 115 Pac. 563.

Maryland. *Shaw v. Davis*, 78 Md. 308, 23 L. R. A. 294, 28 Atl. 619.

Missouri. *Hingston v. Montgomery*, 121 Mo. App. 451, 97 S. W. 202.

Utah. *Skeen v. Warren Irrigation Co.*, 42 Utah 602, 132 Pac. 1162.

Washington. *Theis v. Spokane Falls Gas Light Co.*, 49 Wash. 477, 95 Pac. 1074.

West Virginia. *Smiley v. New River Co.*, 72 W. Va. 221, 77 S. E. 976.

Many other citations to support this elementary rule are found in the books, some of which are cited to this point in subd. xxxii, *infra*.

Thus, a minority stockholder cannot insist upon the creation of a debt to enlarge the business of the corporation as against the wishes of the majority, at least unless in a case of extreme emergency. *Theis v. Spokane Falls Gas Light Co.*, 49 Wash. 477, 95 Pac. 1074.

"It seems to be the first suggestion of reason that an act done by a simple majority of a collective body of men, which concerns the common interest, should be binding on the whole, and this is the principle of the rule adopted by the common law of England with respect to aggregate corporations." 1 Kyd, *Corporations*, 422.

"We suppose," said Chief Justice Bigelow in a leading Massachusetts case, "it may be stated as an indisputable proposition, that every person who becomes a member of a corporation aggregate by purchasing and

If the action or threatened action of the majority of the stockholders is within the powers of the corporation, the courts will not interfere at the suit of the minority, unless it appears that the

holding shares agrees by necessary implication that he will be bound by all acts and proceedings, within the scope of the powers and authority conferred by the charter, which shall be adopted or sanctioned by a vote of the majority of the corporation, duly taken and ascertained according to law. This is the unavoidable result of the fundamental principle that the majority of the stockholders can regulate and control the lawful exercise of the powers conferred on a corporation by its charter. A holder of shares in an incorporated body, so far as his individual rights and interests may be involved in the doings of the corporation; acting within the legitimate sphere of its corporate power, has no other legal control over them than that which he can exercise by his single vote in the meetings of the company. To this extent, he has parted with his personal right or privilege to regulate the disposition of that portion of his property which he has invested in the capital stock of the corporation, and surrendered it to the will of a majority of his fellow corporators. The *jus disponendi* is vested in them so long as they keep within the line of the general purpose and object for which the corporation was established, although their action may be against the will of a minority, however large. It cannot, therefore, be justly said that the contract, express or implied, between the corporation and the stockholders is infringed or impaired by any act or proceeding of the former which is authorized by a majority, and which comes within the terms of the original statute creating and establishing their franchise, and conferring on them capacity to exercise control over the rights and

property of their members. On the contrary, the fair and reasonable implication resulting from the legal relation of the stockholder and the corporation is, that the majority may do any act either coming within the scope of the corporate authority, or which is consistent with the terms and conditions of the original charter, without and even against the consent of an individual member." *Durfee v. Old Colony & F. River R. Co.*, 5 Allen (Mass.) 230.

"It is true that a majority of stockholders, no matter how great, have not the right to divert the funds of a joint-stock incorporated company to any other than the purposes for which it was organized; and if such funds are about to be so diverted, a stockholder may file a bill in equity against the company to restrain it by injunction from such diversion or misapplication. * * * But relief will not be granted unless the corporation is about to do some act outside of the scope of its authority, or in disobedience to the provisions of its constitution, for so long as it exercises the powers granted by the charter the acts of the company must be treated by the courts as the acts of all the stockholders. Each and every stockholder contracts that the will of the majority shall govern in all matters coming within the limits of the act of incorporation." *Dudley v. Kentucky High School*, 9 Bush (Ky.) 576.

In Georgia, the common-law rules are reiterated by statutory provisions. See *Bartow Lumber Co. v. Enwright*, 131 Ga. 329, 62 S. E. 233.

Minority stockholders cannot have an acceptance of a municipal franchise by the directors set aside, since such acceptance is within the powers

action of the majority is or will be a fraud upon the rights of the minority, or unless it clearly appears that there is an abuse of discretion. The fact that there is a difference of opinion among the stockholders as to the advisability of the action of the majority, and that the court's opinion agrees with that of the minority, will not justify the court's interference. Nor can the court interfere because of mere error or mistake of judgment.⁸⁹

of the directors and consent of all or even a part of the stockholders is not necessary. *Venner v. Chicago City Ry. Co.*, 236 Ill. 349, 86 N. E. 266.

The majority have the right to impose upon the minority additional by-laws not inconsistent with the charter. *G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 125 Ark. 65, 187 S. W. 1068.

Minority stockholders cannot enjoin the sale of corporate products below cost, where there is nothing to show bad faith. *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912.

Right of minority to compel declaration of dividends, see § 3656, *supra*.

⁸⁹ *Dudley v. Kentucky High School*, 9 Bush (Ky.) 576; *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201.

As was said by Judge Peckham in an often cited New York case: "The court would not be justified in interfering even in doubtful cases, where the action of the majority might be susceptible of different constructions. To warrant the interposition of the court in favor of the minority shareholders in a corporation or joint-stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could

have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company and in a manner inconsistent with its interests. Otherwise the court might be called upon to balance probabilities of profitable results to arise from the carrying out of the one or the other of different plans proposed by or on behalf of different shareholders in a corporation, and to decree the adoption of that line of policy which seemed to it to promise the best results, or at least to enjoin the carrying out of the opposite policy. This is no business for any court to follow." *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201.

"Even where the management of the majority appears to be unwise and injurious," said the court in a federal case, "equity will not interfere if such management be not dishonest or ultra vires, but will require the complaining stockholder to seek relief within the corporation. When the management is not shown to be fraudulent or dishonest, and when it is a matter of opinion whether it is wise or unwise, advantageous, or disadvantageous, if the acts complained of be intra vires, there is no authority for equity to interfere. To do so would be to place the control indirectly in the hands of the minority whenever interference removes from control the officers selected by the majority. There is certainly no presumption

This question is treated of at greater length in a subsequent subdivision of this chapter.⁹⁰

§ 3993. — Compromise of claims. Since a corporation has power to compromise claims,⁹¹ the majority stockholders may compromise a claim against the wishes of the minority,⁹² although the minority may obtain relief if the compromise is a fraud on their rights.⁹³

§ 3994. Ultra vires acts—Rule stated. Ultra vires acts, whether the acts of the board of directors or of other officers or of a majority of the stockholders, are not binding upon nonassenting stockholders if they seek relief promptly and are not estopped by their acts. This is settled beyond dispute.⁹⁴

The power of the majority extends to such transactions only as are within the powers expressly or impliedly conferred upon the corporation by its charter, for they can have no greater powers than the corporation for which they act; and if they undertake to do ultra vires acts, a dissenting stockholder may sue in equity to enjoin them, or to set the transaction aside. The application of this rule is noticed at length in a subsequent subdivision of this chapter.⁹⁵ In addition to what is there stated, and as further illustrating the rule, it is held that if a holding company permits stock owned by it to stand in the name of certain of its directors and allows them to vote it as they desire, a minority may compel the company to have the stock transferred to its own name.⁹⁶ So minority stockholders of the selling

that a minority stockholder is right, and a majority stockholder is wrong, in opinion as to the values and the management of the corporate property." *North American Land & Timber Co. v. Watkins*, 109 Fed. 101.

⁹⁰ See subd. xxxii, *infra*.

⁹¹ See § 823, *supra*.

⁹² *Hallenborg v. Cobre Grande Copper Co.*, 200 U. S. 239, 50 L. Ed. 458; *Continental Ins. Co. v. New York & H. R. Co.*, 187 N. Y. 225, 79 N. E. 1026. See also *Post v. Buck's Stove & Range Co.*, 200 Fed. 918, 43 L. R. A. (N. S.) 498 with note.

⁹³ *Menier v. Hooper's Tel. Works*, 30 L. T. R. (N. S.) 209.

⁹⁴ See § 1526, *supra*.

⁹⁵ See subd. xxxii, *infra*.

Injunction to restrain illegal or un-

authorized issue of stock, see § 3495, *supra*.

Suit to prevent consolidation of corporations, see chapter on Consolidation, *infra*.

Ultra vires acts, strictly speaking, which a dissenting stockholder may sue to remedy, include not only those beyond the powers of the directors or other officers but also those beyond the powers of a majority or all of the stockholders. If the acts are within the power of a majority of the stockholders but beyond the power of the directors, a stockholder can sue only when the acts of the directors have not been ratified by a majority of the stockholders, since in such a case the act is not ultra vires.

⁹⁶ *Hyams v. Old Dominion Co.*, 113

company may restrain an ultra vires purchase of the majority stock by another corporation to prevent competition.⁹⁷ And minority stockholders may enjoin the ultra vires act of increasing the amount of capital stock in excess of the amount authorized by the charter.⁹⁸

§ 3995. — Power of minority to prevent creation of monopoly. Dissenting or minority stockholders may enjoin the corporation from entering into an illegal combination, trust or monopoly.⁹⁹ Moreover, in some cases it has been held that where a corporation acquires the majority of the stock of a rival to stifle competition, such stifling may be prevented by minority stockholders of the controlled company by restraining the controlling corporation from voting its stock.¹

§ 3996. — Donations by majority. A majority cannot give away the rights of a minority without consideration.² A fortiori, the majority cannot make a donation of all the corporate property.³

§ 3997. Bad faith or fraud—Rule stated. The right of the majority stockholders to control the corporation is subject to the qualification that they must act in good faith and for the interests of the corporation. Acts of a majority, whether a ratification of acts of corporate officers or original transactions, are not binding on the minority where fraudulent. The majority stockholders cannot manage the corporation for their own interest or profit, to the exclusion of other stockholders. If they attempt to do this, even though the particular act done may not be beyond the powers conferred upon the corporation by its charter, they may be enjoined or compelled to account at the suit of other stockholders.⁴ The right of a majority

Me. 294, L. R. A. 1915 D 1128, 93 Atl. 747.

⁹⁷ *Dunbar v. American Telephone & Telegraph Co.*, 224 Ill. 9, 115 Am. St. Rep. 132, 8 Ann. Cas. 57, 79 N. E. 423.

⁹⁸ *Macon Gas Co. v. Richter*, 143 Ga. 397, 85 S. E. 112.

⁹⁹ *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945; *Harding v. American Glucose Co.*, 182 Ill. 551.

¹ See § 1672, *supra*, and § 4028, *infra*.

² Since a majority of the stockholders of a corporation cannot give away

any rights of the corporation, a resolution passed by a majority of the stockholders of a corporation, authorizing one who has already purchased its plant to use its name, being without consideration, is not binding on stockholders who do not consent. *Armington v. Palmer*, 21 R. I. 109, 117; 43 L. R. A. 95, 79 Am. St. Rep. 786, 42 Atl. 308.

³ *Tillis v. Brown*, 154 Ala. 403, 45 So. 589.

⁴ *Meeker v. Winthrop Iron Co.*, 17 Fed. 48; *Peabody v. Flint*, 6 Allen (Mass.) 52; *Farmers' Loan & Trust Co. v. New York & N. R. Co.*, 150 N.

of the stockholders either to originally direct or affirm a contract between the company and corporate directors or other officers is not absolute and unqualified, but is subject to the qualification that the affirmance or adoption must not be brought about by unfair or improper means, and must not be illegal or fraudulent, or oppressive towards those stockholders who oppose it.⁵ As has been well said, "while courts cannot compel directors or stockholders, proceeding by a vote of the majority, to act wisely, they can compel them to act honestly, or undo their work if they act otherwise."⁶ Moreover, it is immaterial that the scheme is lawful on its face, and the rule has been laid down that "where a majority of the directors, or stockholders, or both, acting in bad faith, carry into effect a scheme which, even if lawful upon its face, is intended to circumvent the minority stockholders and defraud them out of their legal rights, the courts interfere and remedy the wrong."⁷

The different forms which this fraud or bad faith may assume are numerous.⁸ The fraud on the part of majority stockholders may take

Y. 410, 34 L. R. A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; *Continental Ins. Co. v. New York & H. R. Co.*, 103 N. Y. App. Div. 282, 93 N. Y. Supp. 27; *Hinds v. Fishkill & M. Equitable Gas Co.*, 96 N. Y. App. Div. 14, 88 N. Y. Supp. 954; *Menier v. Hooper's Tel. Works*, 9 Ch. App. 350; *Atwood v. Merryweather*, L. R. 5 Eq. 464, note.

See also subds. xxxi and xxxii, this chapter, *infra*.

Fraud of the majority stockholders is always a ground for relief in favor of minority stockholders who are defrauded. *Wetherbee v. Bowles*, 142 N. Y. App. Div. 407, 126 N. Y. Supp. 954.

"The owners of a majority of the capital stock of a corporation," said Judge Baxter, "may legally control the company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus assuming the control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company's business in their own interests to the injury of other corpo-

rators." *Meeker v. Winthrop Iron Co.*, 17 Fed. 48.

⁵ *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393.

The minority may obtain relief where the acts of the majority are fraudulent or oppressive; and oppressive, as the word is used in this connection, is merely another name for fraud.

⁶ *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493, 507, 55 N. E. 520.

⁷ *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493, 507, 55 N. E. 520.

⁸ Majority stockholders cannot defeat the rights of minority equitable stockholders by refusing to issue a certificate of stock to them and in the meantime transferring all the corporate property to themselves; and in the case so holding it was said that "it may be that invention will never cease to be exercised in devising plans for wrongful appropriation; but courts of equity will never countenance any scheme to defraud, no matter how novel and ingenious." *Citizens' Savings & Trust Co. v. Illinois Cent. R. Co.*, 182 Fed. 607.

the form of voting increased or excessive salaries to themselves as officers,⁹ or may consist in the majority stockholder obtaining an inequitable contract from the corporation,¹⁰ or in the majority stockholder operating the business in its favor as a competitor rather than in the interest of all the stockholders.¹¹ It may also consist in the purchase of property at an exorbitant price,¹² or in a taking over by the majority stockholder (another corporation) of the property of the corporation without consideration.¹³

On the other hand, where a sale is necessary because of the exigencies of the case, the fact that the property is sold for less than its value does not of itself show fraud on the part of the majority stockholders as against the minority.¹⁴ And the mere fact that property sold by majority stockholders was disposed of by the transferee for much more than the price paid does not necessarily imply an unfair advantage, so as to require an accounting by the transferee at the suit of minority stockholders.¹⁵ So it is not necessarily fraudulent so as to authorize relief in behalf of a minority stockholder that the failure to give him notice of the stockholders' meeting which authorized a transfer of all the corporate property was intentional.¹⁶ A lease of a railroad at ten per cent a year, with a certain guaranty, has been held not necessarily oppressive against the minority.¹⁷

To sum up as to what constitutes fraud warranting interference by the courts, according to the decisions, and especially the leading case of *Gamble v. Queens County Water Company*,¹⁸ it is possible to formulate the following rules: 1. Mere difference of opinion among the stockholders does not show that the action of the majority is

⁹ See § 3998, *infra*.

¹⁰ See § 4035, *infra*.

¹¹ Where the majority are interested in another corporation, and the two corporations have contracts between them, it is fraudulent for the majority to manage the affairs of the first corporation for the benefit of the second, and in such a case a court of equity will intervene and protect the minority upon an application by them. *Farmers' Loan & Trust Co. v. New York & N. R. Co.*, 150 N. Y. 410, 430, 34 L. R. A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; *Jacobus v. American Mineral Water Mach. Co.*, 38 N. Y. Misc. 371, 77 N. Y. Supp. 898.

¹² *Donald v. American Smelting &*

Refining Co., 61 N. J. Eq. 458, 48 Atl. 786.

¹³ *Pondir v. New York, L. E. & W. R. Co.*, 72 Hun (N. Y.) 384, 25 N. Y. Supp. 560.

¹⁴ *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

¹⁵ *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

¹⁶ *Sawyer v. Dubuque Printing Co.*, 77 Iowa 242, 42 N. W. 300.

¹⁷ *Flynn v. Brooklyn City R. Co.*, 9 N. Y. App. Div. 269, 41 N. Y. Supp. 566, *aff'd* 158 N. Y. 493, 53 N. E. 520.

¹⁸ *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201.

oppressive nor authorize a court to decide as between different plans or policies according to its views.¹⁹

2. A court cannot interfere, even in doubtful cases, where the action of the majority is susceptible of different constructions.

3. Relief cannot be granted unless it is plainly shown that the act of the majority "is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company and in a manner inconsistent with its interests."²⁰

4. If a contract is fraudulent or oppressive towards the minority, then the act of the majority in authorizing or ratifying it is fraudulent and oppressive.²¹

5. Fraud need not be shown as a fact nor need the individual stockholders be actuated by any fraudulent intent, but it is sufficient that the existence of fraud is the necessary legal inference from facts found.²²

§ 3998. — Misappropriation or diversion of corporate funds or assets. Of course, a majority of the stockholders, no matter how large, has no right to divert to itself assets of the company to the detriment of minority stockholders.²³ If majority stockholders divert or misappropriate corporate funds, minority stockholders may sue them to recover such funds.²⁴ This rule applies to a diversion by voting themselves illegal or unreasonable salaries.²⁵

¹⁹In the absence of evidence of fraud, it is not within the province of a court of equity, at the suit of a minority stockholder, to determine whether its judgment agreed with the minority or with the majority. *Continental Ins. Co. v. New York & H. R. Co.*, 103 N. Y. App. Div. 282, 301, 93 N. Y. Supp. 27.

²⁰This often quoted rule is from the opinion of Justice Peckham in *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 99, 9 L. R. A. 527, 25 N. E. 201. While it was laid down in connection with a statement of the law as to the effect of ratification of corporate contracts by interested officers whose votes as stockholders effect the ratification, the language used applies equally well to any act of majority stockholders.

²¹See *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493, 508, 53 N. E. 520, where, however, the intention of all to defraud is stated in enunciating the rule.

²²See *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 100, 9 L. R. A. 527, 25 N. E. 201.

²³*Morse v. Metropolitan S. S. Co.*, 87 N. J. Eq. 217, 100 Atl. 219; *Colgate v. United States Leather Co.*, 73 N. J. Eq. 72, 67 Atl. 657.

²⁴*Harvey v. Meigs*, 17 Cal. App. 353, 119 Pac. 941; *Dodd v. Pittsburg, C., C. & St. L. R. Co.*, 127 Ky. 762, 16 L. R. A. (N. S.) 898, 106 S. W. 787; *Hingston v. Montgomery*, 121 Mo. App. 451, 97 S. W. 202.

²⁵See § 2755, *supra*, and also § 4035, *infra*.

§ 3999. — **Division of assets.** The majority stockholders cannot divide the assets among themselves to the exclusion of the minority.²⁶ This is so apparent that exhaustive citation of authority is useless.

§ 4000. **Impairment of contracts.** A majority of the stockholders or members of a corporation cannot impair the rights of another stockholder or member under a contract between him and the corporation. Thus, a majority of the stockholders or members of a mutual insurance company or a building and loan association can do nothing to impair the contract between other members or stockholders and the corporation.²⁷ And where a stockholder's certificate of stock binds the corporation to pay interest on his subscription, he cannot be compelled, by the majority of the stockholders, to receive for the interest due the bond or other obligation of the company, instead of money.²⁸

D. Rights of Minority in Regard to Amendments of Charter

§ 4001. **Amendments authorized by charter.** A majority of the stockholders of a corporation clearly have the power to make any alterations or changes in the constitution of the corporation which are authorized by its charter, for this power is within the contract between the corporation and its stockholders. Thus, the majority, where authority is conferred upon the corporation by its charter, may bind the minority by a vote to increase or reduce the capital stock,²⁹ or to issue preferred stock,³⁰ or to consolidate with another corporation.³¹ And a railroad company may, by vote of the majority, change the location of its road, or extend the road beyond the terminus fixed by its charter, if the charter confers such power upon it.³²

In some states there are general laws authorizing corporations to alter or amend their articles or charter, subject to prescribed limita-

²⁶ Beha v. Martin, 161 Ky. 838, 171 S. W. 393.

²⁷ See Barton v. Enterprise Loan & Building Ass'n, 114 Ind. 226, 5 Am. St. Rep. 608, 16 N. E. 486; Schwarzwaelder v. German Mut. Fire Ins. Co., 59 N. J. Eq. 589, 44 Atl. 769.

²⁸ McLaughlin v. Detroit & M. Ry. Co., 8 Mich. 100.

²⁹ Chicago City Ry. Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. Ed. 902; Port Edwards, C. & N. Ry. Co. v. Arpin, 80 Wis. 214, 49 N. W. 828.

³⁰ See subd. xiv, this chapter, supra.

³¹ Sprague v. Illinois River R. Co., 19 Ill. 174; Bish v. Johnson, 21 Ind. 299; Sparrow v. Evansville & C. R. Co., 7 Ind. 369; Lynch v. Eastern, L. F. & M. Ry. Co., 57 Wis. 430, 15 N. W. 743, 825.

See also chapter on Consolidation, infra.

³² Sims v. Street R. Co., 37 Ohio St. 556.

tions, and such laws are binding, of course, upon all persons who become stockholders of corporations while they are in force. Under a statute providing that a corporation may amend its charter so as to enlarge or diminish the purposes for which it was formed, but that the original purposes shall not be substantially changed, it has been held that a corporation formed for the purpose of manufacturing and furnishing gas to a city and its inhabitants may amend its charter so as to authorize it to employ for that purpose both gas and electricity.³³

In some states, statutes authorize a change in the nature of the business of the company by the vote of a certain per cent of the stock.³⁴

§ 4002. Amendments not authorized by charter—In general. A very different question arises where a majority of the stockholders of a corporation undertake to bind the minority, against their dissent, by accepting and continuing under an act of the legislature altering or amending the charter of the corporation. The power of the legislature, as between the corporation and the state, to alter, amend or repeal a charter in the interest of the public, is considered at length in a subsequent chapter.³⁵ We are to consider here the power of the majority of the stockholders of a corporation to bind a dissenting minority by accepting an alteration or amendment of the charter enacted by the legislature, not in the interest of the public, but in the interest of the corporation. It is a difficult question, and one upon which the courts have not agreed. As we shall see in the following paragraphs, the question depends, according to the weight of authority, upon whether the alteration or amendment radically or fundamentally changes the character or objects of the corporation, or whether it is merely in furtherance of the original objects.

§ 4003. — Radical or fundamental changes. It is well settled that there is a contract between a corporation and every person who becomes a stockholder or member thereof, either at the time of its creation or afterwards, that the business of the corporation shall be conducted within the limits fixed by the charter, and that there shall be no departure from the objects for which the corporation was created. It is very clear, therefore, that a majority of the stockholders of a corporation have no power, merely by reason of their control

³³ Picard v. Hughey, 58 Ohio St. Leather Co., 75 N. J. Eq. 229, 19 Ann. 577, 51 N. E. 133. Cas. 1262, 72 Atl. 126.

³⁴ See Colgate v. United States ³⁵ Chap. 57, *infra*.

over the corporation, to bind a dissenting minority by accepting and acting under an amendment of the charter of the corporation, where the amendment fundamentally or radically changes its character or objects, so as to make it, in effect, a different corporation, or so as to authorize it to engage in a different enterprise from that originally authorized, although of the same general kind. And it is equally clear that, if the state has not reserved the power to alter, amend or repeal the charter of the corporation, or if, although there is such a reservation, it is to be construed, as is held by most courts, as intended merely for the protection of the public, and not for the purpose of enabling the legislature to change the contract between the corporation and its stockholders,³⁶ the legislature has no power to authorize a majority of the stockholders to bind the minority by accepting such an amendment, for this would be to impair the obligation of the contract between the corporation and the dissenting stockholders, by forcing them into a different contract, and would therefore be within the constitutional prohibition against laws impairing the obligation of contracts.³⁷ A fortiori, the unanimous con-

³⁶ See § 4005, *infra*.

³⁷ **United States.** *Ashton v. Burbank*, 2 Dill. 435, Fed. Cas. No. 582.

Arkansas. *Witter v. Mississippi, O. & R. River R. Co.*, 20 Ark. 463.

Georgia. *Alexander v. Atlanta & W. P. R. Co.*, 108 Ga. 151, 33 S. E. 866.

Kentucky. *Fry's Ex'r v. Lexington & B. S. R. Co.*, 2 Mete. 314.

Louisiana. *State v. Atchafalaya Railroad & Banking Co.*, 5 Rob. 63; *Hoey v. Henderson*, 32 La. Ann. 1069; *State v. Accommodation Bank*, 26 La. Ann. 288.

Massachusetts. *Middlesex Turnpike Corporation v. Locke*, 8 Mass. 268.

Mississippi. *Hester v. Memphis & C. R. Co.*, 32 Miss. 378; *New Orleans, J. & G. N. R. Co. v. Harris*, 27 Miss. 517.

New Hampshire. *Dow v. Northern R. Co.*, 67 N. H. 1, 36 Atl. 510; *Proprietors of Union Locks & Canals v. Towne*, 1 N. H. 44, 8 Am. Dec. 32.

New Jersey. *In re Newark Library Ass'n*, 64 N. J. L. 217, 43 Atl. 435; *Black v. Delaware & R. Canal Co.*, 24

N. J. Eq. 455; *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617; *Kean v. Johnson*, 9 N. J. Eq. 401.

New York. *Troy & R. R. Co. v. Kerr*, 17 Barb. 581; *Hartford & N. H. R. Co. v. Croswell*, 5 Hill 383, 40 Am. Dec. 354.

North Carolina. *First Nat. Bank v. Charlotte*, 85 N. C. 433.

Ohio. *Marietta & C. R. Co. v. Elliott*, 10 Ohio St. 57.

Pennsylvania. *Manheim, P. & L. Turnpike or Plank Road Co. v. Arndt*, 31 Pa. St. 317.

Tennessee. *Woodfork v. Union Bank*, 3 Cold. 488.

Utah. *Garey v. St. Joe Min. Co.*, 32 Utah 497, 12 L. R. A. (N. S.) 554, 91 Pac. 369.

Wisconsin. *Kenosha, R. & R. I. R. Co. v. Marsh*, 17 Wis. 13.

England. *Ware v. Grand Junct. Water Works*, 2 Russ. & M. 470; *Ffooks v. Southwestern Ry. Co.*, 1 Smale & G. 142; *Natusch v. Irving, Gow, Partnership, App'x vi.*, p. 398.

sent of the stockholders is necessary to the acceptance of a proposed fundamental amendment,³⁸ unless it is otherwise provided by statute.

Moreover, the mere fact that a fundamental alteration in the charter of a corporation is beneficial to the corporation cannot give the majority the power to accept it against the dissent of the minority. Nor can it make any difference that the majority, in accepting it, act in good faith, and for what they deem to be the best interests of all the stockholders. A stockholder has a right to stand upon the terms of his contract of membership, and to insist that the funds of the corporation shall not be applied to any other purpose than that authorized by the charter of the corporation when he became a member.³⁹

By common consent, no exact formula for the determination of the line of demarcation between fundamental changes, and those which are auxiliary or incidental, under all conditions, can be furnished.⁴⁰ Decisions set forth in the notes illustrate some of the holdings relating to insurance companies,⁴¹ navigation companies and railroad

³⁸ *Atlanta Steel Co. v. Mynahan*, 138 Ga. 668, 75 S. E. 980.

As between the incorporators of any company, the corporate objects expressed in the articles of incorporation cannot be changed without the unanimous consent of the stockholders or members, unless changed by some act of legislation which may be read into the contract. *Colgate v. United States Leather Co.*, 75 N. J. Eq. 229, 19 Ann. Cas. 1262, 72 Atl. 126.

³⁹ *Proprietors of Union Locks & Canals v. Towne*, 1 N. H. 44, 8 Am. Dec. 32; *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545.

⁴⁰ *Perkins v. Coffin*, 84 Conn. 275, 288, Ann. Cas. 1912 C 1188, 79 Atl. 1070.

⁴¹ This doctrine was laid down by Lord Eldon in a leading English case, in which the majority of an unincorporated insurance company, formed for the purpose of fire and life insurance, attempted to change its articles so as to authorize it to engage also in the business of marine insurance. An injunction was granted in a suit by

a dissenting member, and this notwithstanding an offer by the company to pay him what he had put into the company, with interest. *Natusch v. Irving, Gow, Partnership*, App'x vi., p. 398. See also *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 573.

There was a like decision by Judge Dillon in this country, where a corporation organized for the purpose of transacting a "life and accident insurance" business accepted, by vote of a majority of the stockholders, an amendment of its charter authorizing it to transact the business of "fire, marine, and inland insurance." It was held that a dissenting stockholder was discharged from liability on his subscription for stock in the company. *Ashton v. Burbank*, 2 Dill. 435, Fed. Cas. No. 582.

The legislature cannot authorize a mutual insurance company to transform itself into a joint stock company against the will of a member who has acquired membership by contract with the company prior to the grant of such authority. *Schwarzwaelder v.*

companies.⁴³ And it has been held that a majority of the stockholders of a corporation, as of a railroad company, for example, cannot bind the minority by accepting an amendment authorizing a transfer of all the property, rights and franchises of the corporation to another corporation,⁴⁴ at least where the condition of things is not such as to render such a step necessary;⁴⁵ and that, where a railroad company is authorized by its charter to construct and operate a railroad between certain points, a majority of the stockholders cannot bind the dissenting minority by accepting and acting under an amendatory act authorizing the company to lease its road to another company for ninety-nine years.⁴⁶

By the weight of authority, a majority of the stockholders of a railroad, turnpike or canal company cannot bind the minority by accepting an amendment of the charter authorizing the corporation to construct its road or canal along a different route from that originally authorized, or beyond the original terminus, where the change is so radical as to make the enterprise essentially different from what

German Mut. Fire Ins. Co., 59 N. J. Eq. 589, 44 Atl. 769, aff'g 58 N. J. Eq. 319, 43 Atl. 587.

⁴³ Where a corporation was created for the purpose of rendering a river navigable between certain points, and for that purpose to purchase land not exceeding six acres, and to collect tolls for forty years, not averaging over twelve per cent on the capital invested, it was held that a majority of the stockholders could not bind the minority, against their dissent, by accepting an amendatory act abolishing all limitation upon the amount of toll to be collected, and the duration of its collection, and authorizing the corporation to purchase and hold one hundred acres of land. *Proprietors of Union Locks & Canals v. Towne*, 1 N. H. 44, 8 Am. Dec. 32.

Where the charter of a railroad company authorized it to construct and operate a railroad between certain points, it was held that the majority of the stockholders could not bind the minority by accepting an amendment authorizing the company to establish a line of water communi-

cation in connection with the railroad, and to purchase and hold a number of steamboats for that purpose, at a large additional expense, and to increase its capital stock for such purpose. *Hartford & N. H. R. Co. v. Croswell*, 5 Hill (N. Y.) 383, 40 Am. Dec. 354. See also *Marietta & C. R. Co. v. Elliott*, 10 Ohio St. 57.

Where the charter of a railroad company authorized a continuous railroad across the state as a continuous project under one management, with a common interest, it was held that a majority of the stockholders could not bind a dissenting stockholder by accepting an amendatory act dividing the project into three parts, under separate management and control. *Board Sup'rs Fulton Co. v. Mississippi & W. R. Co.*, 21 Ill. 338. And see *First Nat. Bank v. Charlotte*, 85 N. C. 433.

⁴⁴ *New Orleans, J. & G. N. R. Co. v. Harris*, 27 Miss. 517.

⁴⁵ See § 4001, *supra*, and § 4011 *et seq.*, *infra*.

⁴⁶ *Dow v. Northern R. R.*, 67 N. H. 1, 36 Atl. 510.

was originally contemplated,⁴⁷ although it is otherwise if the change or extension is not so great as to radically change the enterprise.⁴⁸

A majority of the stockholders of a corporation, as of a railroad company, for example, cannot bind the minority by accepting an amendment of its charter authorizing it to consolidate with another corporation,⁴⁹ unless the consolidation is such that it does not change the objects of the corporation, but is merely in furtherance thereof.⁵⁰

A mere majority of the stockholders of a corporation cannot accept an amendment of its charter changing the number of votes to which each stockholder is entitled under the charter.⁵¹

If the majority of the stockholders make a radical or fundamental

47 Arkansas. Witter v. Mississippi, O. & R. River R. Co., 20 Ark. 463.

Georgia. Winter v. Muscogee R. Co., 11 Ga. 438.

Massachusetts. Middlesex Turnpike Corporation v. Swan, 10 Mass. 384, 6 Am. Dec. 139; Middlesex Turnpike Co. v. Locke, 8 Mass. 268.

Mississippi. Hester v. Memphis & C. R. Co., 32 Miss. 378.

New Jersey. Zabriskie v. Hackensack & N. Y. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.

New York. Hartford & N. H. R. Co. v. Croswell, 5 Hill 383, 40 Am. Dec. 354.

North Carolina. First Nat. Bank v. Charlotte, 85 N. C. 433; Thompson v. Guion, 5 Jones Eq. 113.

Ohio. Marietta & C. R. Co. v. Elliott, 10 Ohio St. 57.

Pennsylvania. Manheim, P. & L. Turnpike or Plank Road Co. v. Arndt, 31 Pa. St. 317.

Vermont. Stevens v. Rutland & B. R. Co., 29 Vt. 545.

Wisconsin. Kenosha, R. & R. I. R. Co. v. Marsh, 17 Wis. 13.

But compare Massachusetts and New York decisions cited in § 4006, *infra*.

⁴⁸ See § 4003, *infra*.

⁴⁹ **United States.** Clearwater v. Meredith, 1 Wall. 25, 17 L. Ed. 604; Knoxville v. Knoxville & O. R. Co., 22 Fed. 758; Mowrey v. Indianapolis

& C. R. Co., 4 Biss. 78, Fed. Cas. No. 9,891.

Illinois. Illinois Grand Trunk R. Co. v. Cook, 29 Ill. 237; Fulton County Sup'rs v. Mississippi & W. R. Co., 21 Ill. 338.

Indiana. Shelbyville & R. Turnpike Co. v. Barnes, 42 Ind. 498; Booe v. Junction R. Co., 10 Ind. 93; McCray v. Junction R. Co., 9 Ind. 358; Fisher v. Evansville & C. R. Co., 7 Ind. 407; Sparrow v. Evansville & C. R. Co., 7 Ind. 369.

Kentucky. Botts v. Simpsonville & B. C. Turnpike Road Co., 88 Ky. 54, 2 L. R. A. 594, 10 S. W. 134.

Massachusetts. Hamilton Mut. Ins. Co. v. Hobart, 2 Gray 543.

Michigan. Tuttle v. Michigan Air Line R. Co., 35 Mich. 247.

New Jersey. Mills v. Central R. Co., 41 N. J. Eq. 1, 2 Atl. 453; Kean v. Johnson, 9 N. J. Eq. 401.

New York. Gardner v. Hamilton Mut. Ins. Co., 33 N. Y. 421.

Pennsylvania. Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

Wisconsin. Kenosha, R. & R. I. R. Co. v. Marsh, 17 Wis. 13.

Compare Hale v. Cheshire R. Co., 161 Mass. 443, 37 N. E. 307.

⁵⁰ See § 4004, *infra*.

⁵¹ In re Newark Library Ass'n, 64 N. J. L. 217, 43 Atl. 435.

change in the character or objects of the corporation, a dissenting stockholder will be released from liability on his subscription, and may set up the change as a defense in an action thereon.⁵² Or he may sue to enjoin the corporation from making the change, and acting under the amendment.⁵³ And such a suit cannot be defeated by an offer to pay the plaintiff what he has put into the company, with interest, for he has a right to remain a stockholder and hold the company to the purposes of its creation until it is wound up and its assets distributed in accordance with the law.⁵⁴

§ 4004. — Amendments in furtherance of objects of corporation.

What has been said in the preceding paragraphs does not apply to alterations or amendments of a charter which do not fundamentally or radically change the character of the corporation, or its objects, but which are merely in furtherance of the objects for which it was created, and for the purpose of enabling it the better to carry out those objects. Such an amendment may be accepted by a majority of the stockholders, against the dissent of the minority, for it may well be held that every stockholder impliedly agrees that he will be bound by the vote of the majority in accepting amendments in furtherance of the original purposes of the corporation.⁵⁵ The fact that the exercise

⁵² See § 647, *supra*.

⁵³ *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617; *Kean v. Johnson*, 9 N. J. Eq. 401; *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545.

⁵⁴ *Natusch v. Irving, Gow, Partnership*, App'x vi., p. 398.

⁵⁵ *Connecticut*. *Perkins v. Coffin*, 84 Conn. 275, Ann. Cas. 1912 C 1188, 79 Atl. 1070; *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56.

Georgia. *Chattanooga, R. & C. R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988.

Illinois. *Park v. Modern Woodmen of America*, 181 Ill. 214, 54 N. E. 932; *Banet v. Alton & S. R. Co.*, 13 Ill. 504.

Maine. *Old Colony & L. R. Co. v. Veazie*, 39 Me. 580; *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547.

Maryland. *Taggart v. Western*

Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760.

Massachusetts. *Durfee v. Old Colony & F. River R. Co.*, 5 Allen 230.

Minnesota. *Mower v. Staples*, 32 Minn. 284.

New York. *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Troy & R. R. Co. v. Kerr*, 17 Barb. 581; *Northern R. Co. v. Miller*, 10 Barb. 282.

Ohio. *Milford & C. Turnpike Co. v. Brush*, 10 Ohio 111, 36 Am. Dec. 78.

Tennessee. *Woodfork v. Union Bank*, 3 Cold. 488.

Vermont. *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545.

The Massachusetts and New York cases go even further than the proposition stated in the text, but to this extent they are contrary to the weight of authority. See § 4006, *infra*.

of a new power will involve large and costly constructions and the creation of heavy financial burdens is of no significance in determining whether such new power accomplishes a fundamental change in the character and purposes of the corporation, since it is the element of quality rather than magnitude that is decisive on that question.⁵⁶ The fact that an increase of stockholders' liability would result from entering into the new business authorized by a charter amendment does not show that the change effected by the amendment is a fundamental one, nor does the fact that the new business will expose the corporation to taxation upon so much of its property as should be acquired for its conduct whereas it had been before altogether exempt from taxation.⁵⁷ Where the amendment contains separable and independent matters, not mutually connected and dependent upon each other, the amendment may become effective as to a portion or portions of the attempted grant of powers by majority action, although unanimous consent is necessary to give effect to other portions.⁵⁸

In accordance with this rule, it has been held that a majority of the stockholders of a corporation may accept an amendment of its charter changing its name,⁵⁹ or the number of its directors,⁶⁰ authorizing an increase or reduction of capital stock,⁶¹ or authorizing the issue of preferred stock for the purpose of raising money to carry out the legitimate objects of the corporation,⁶² or authorizing the corpora-

⁵⁶ Perkins v. Coffin, 84 Conn. 275, 294, Ann. Cas. 1912 C 1188, 79 Atl. 1070.

⁵⁷ Perkins v. Coffin, 84 Conn. 275, 295, Ann. Cas. 1912 C 1188, 79 Atl. 1070.

⁵⁸ Perkins v. Coffin, 84 Conn. 275, 285, Ann. Cas. 1912 C 1188, 79 Atl. 1070.

⁵⁹ Bucksport & B. R. Co. v. Buck, 68 Me. 81; Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336; Clark v. Monongahela Nav. Co., 10 Watts (Pa.) 364.

⁶⁰ Mower v. Staples, 32 Minn. 284, 20 N. W. 225.

⁶¹ Rice v. Rock Island & A. R. Co., 21 Ill. 93; Peoria & O. R. Co. v. Elting, 17 Ill. 429; Durfee v. Old Colony & Fall River R. Co., 5 Allen (Mass.) 230; Buffalo & N. Y. City R. Co. v.

Dudley, 14 N. Y. 336; Joslyn v. Pacific Mail Steamship Co., 12 Abb. Pr. N. S. (N. Y.) 329; Tröy & Rutland R. Co. v. Kerr, 17 Barb. (N. Y.) 581.

But in Georgia it is held that increasing the capital stock in excess of the amount authorized by its charter is a fundamental change of the original contract, and cannot be done without the consent of all the stockholders. Goswick v. Alpharetta Bank, 143 Ga. 309, 85 S. E. 112; Atlanta Steel Co. v. Mynahan, 138 Ga. 668, 75 S. E. 980.

⁶² Covington v. Covington & C. Bridge Co., 10 Bush (Ky.) 69; Williston v. Michigan Southern & N. I. R. Co., 13 Allen (Mass.) 400; Davis v. Proprietors of Lowell Second Universalist Meeting House, 8 Mete. (Mass.) 321; Curry v. Scott, 54 Pa. St. 270; Everhart v. West Chester & P. R. Co., 28 Pa. St. 339; Chaffee v. Rutland R.

tion to lease or sell, or divide among the stockholders, property not needed for the purposes of the corporation.⁶³

A majority of the stockholders of a corporation may accept an amendment of the charter granting additional privileges, where the grant is not such as to essentially change the objects of the corporation. Thus, a majority of the stockholders of a corporation created for the purpose of improving the navigation of a river, and authorized to take tolls, may accept an amendment of its charter authorizing it to extend its dams, although this may increase its indebtedness beyond the amount originally authorized.⁶⁴ So where a corporation was chartered for the public purpose of improving navigation of a river, with the right to build wharves and piers, collect tolls, own mills adjacent to the water power, etc., it was held that a charter amendment authorizing the construction and development of an electric power plant and electric transmission system, and in connection therewith the generation, sale and delivery of electricity, did not create a fundamental change in the corporate powers which before had included the right to sell water power.⁶⁵ And the majority of the stockholders of a railroad or turnpike company, or of a hotel company, may accept an amendment extending the time for completing or commencing the construction of its road or hotel.⁶⁶

A majority of the stockholders of a railroad or turnpike company may accept an amendment changing its route, or authorizing an extension of its road, if the change or extension is not so great as to make the enterprise radically different from what was originally contemplated, but is merely in furtherance of the original purpose.⁶⁷ It is

Co., 55 Vt. 110; Rutland & B. R. Co. v. Thrall, 35 Vt. 536. And see Eichbaum v. Chicago Grain Elevators, [1891] 3 Ch. 459; Stevens v. South Devon Ry. Co., 9 Hare 313.

Compare, however, Kent v. Quicksilver Min. Co., 78 N. Y. 159; Knoxville, C. G. & L. R. Co. v. Knoxville, 98 Tenn. 1, 37 S. W. 883.

⁶³ Webster v. Cambridge Female Seminary, 78 Md. 193, 28 Atl. 25; Merchant v. Western Land Ass'n, 56 Minn. 327, 57 N. W. 931.

That the legislature may authorize a waterworks corporation, by vote of the majority, to sell its plant to the city, see Peabody v. Westerly Water Works, 20 R. I. 176, 37 Atl. 807.

⁶⁴ Gray v. Monongahela Nav. Co., 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500.

⁶⁵ Perkins v. Coffin, 84 Conn. 275, Ann. Cas. 1912 C 1188, 79 Atl. 1070.

⁶⁶ Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; Agricultural Branch R. Co. v. Winchester, 13 Allen (Mass.) 29; Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536; Milford & C. Turnpike Co. v. Brush, 10 Ohio 111, 36 Am. Dec. 78.

⁶⁷ Florida. Johnson v. Pensacola & G. R. Co., 9 Fla. 299.

Georgia. Chattanooga, R. & C. B. Co. v. Warthen, 98 Ga. 599, 25 S. E. 988; Wilson v. Wills Valley R. Co., 33 Ga. 466.

otherwise, however, if the change is so radical as to make the enterprise essentially different from that authorized by the charter.⁶⁸ A majority of the stockholders of a toll road company may accept an amendment authorizing a change of the location of the tollgates.⁶⁹

A majority of the stockholders of a railroad company or other corporation may accept an amendment authorizing consolidation with another company, if the consolidation does not materially change the enterprise for which the corporation was created.⁷⁰ Ordinarily, however, the consolidation of a corporation with another is so radical a change that it cannot be made under an amendment of the charter without the unanimous consent of all the stockholders.⁷¹

§ 4005. Effect of reservation by state of power to alter, amend or repeal charter—In general. As a rule, in granting charters or authorizing the creation of corporations under general laws, the state expressly reserves the power of alteration, amendment or repeal, and such a reservation, of course, becomes a part of the contract between the state and the corporation, and is binding, not only upon the corporation, but also upon every individual stockholder.⁷² No stockholder, therefore, can successfully contend that his contract with the corporation is impaired by any amendment of the charter of the corporation which comes properly within such a reservation. The difficulty has been in construing such a reservation and determining what amendments are properly within it, and on this question there has

Illinois. *Ross v. Chicago, B. & Q. R. Co.*, 77 Ill. 127; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654; *Peoria & O. R. Co. v. Elting*, 17 Ill. 429; *Banet v. Alton & S. R. Co.*, 13 Ill. 504.

Iowa. *Peoria & R. I. R. Co. v. Preston*, 35 Iowa 115.

Massachusetts. *Durfee v. Old Colony & F. River R. Co.*, 5 Allen 230.

Missouri. *Pacific R. Co. v. Hughes*, 22 Mo. 291, 64 Am. Dec. 265; *Pacific R. Co. v. Renshaw*, 18 Mo. 210.

New York. *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336.

Ohio. *Milford & C. Turnpike Co. v. Brush*, 10 Ohio 111, 36 Am. Dec. 78; *Pennsylvania & O. Canal Co. v. Webb*, 9 Ohio 136.

Pennsylvania. *Cross v. Peach Bottom Ry. Co.*, 90 Pa. St. 392; *Irvin v.*

Susquehanna & P. Turnpike Road Co., 2 Penr. & W. 470, 23 Am. Dec. 53.

⁶⁸ See § 4003, *supra*.

⁶⁹ *Bardstown & G. River Turnpike Co. v. Rodman*, 12 Ky. L. Rep. 151, 13 S. W. 917.

⁷⁰ *Sprague v. Illinois River R. Co.*, 19 Ill. 174; *Hanna v. Cincinnati & Ft. W. R. Co.*, 20 Ind. 30.

⁷¹ See § 4003, *supra*.

⁷² *Durfee v. Old Colony & F. River R. Co.*, 5 Allen (Mass.) 230, and see *Chap. 57, infra*.

Whatever alteration of a charter may be imposed upon a corporation in the exercise of the reserved power may be offered to it for acceptance by the majority. *Perkins v. Coffin*, 84 Conn. 275, 296, Ann. Cas. 1912 C 1188, 79 Atl. 1070.

been some difference of opinion. There is no use trying to reconcile all the decisions on this point, for they are irreconcilable.

§ 4006. — **Massachusetts and New York doctrine.** First, it is proper to consider the Massachusetts and New York doctrine. In some of the cases in which the courts have been called upon to determine the power of the majority of the stockholders of a corporation to bind a dissenting minority by accepting and continuing under an amendment of its charter, great stress has been placed upon the fact that the state had reserved the power to alter, amend or repeal the charter; and because of such a reservation, the majority of the stockholders have been allowed to bind the minority by accepting an amendment of a charter made for the benefit of the corporation, and adding to the powers of the corporation so as to materially change the enterprise for which it was originally created, where the additional powers conferred were of the same general kind as those originally conferred.⁷³ In a leading Massachusetts case, a railroad company had been created for the purpose of constructing and operating a railroad from Fall River to Boston, and the charter was amended so as to authorize the company to extend its road from the terminus in Fall River to the Rhode Island line, and to unite with a railroad from the latter point to Newport, in Rhode Island. It was held that, as the state had reserved the power to alter or amend the charter of the company, this reservation was binding on the stockholders, and that a majority could bind a dissenting minority by accepting the amendment, by constructing a road to the Rhode Island line, and by leasing the road of another company from the latter point to Newport for ten years at an annual rent, to be paid for the full term in advance, and to be used by the latter company in constructing its road. The court held that a dissenting stockholder could not maintain a suit for an injunction, and he was therefore forced, against his will, into a clearly different enterprise from that originally contemplated.⁷⁴ There was a similar de-

⁷³ See *Durfee v. Old Colony & F. River R. Co.*, 5 Allen (Mass.) 230; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336. See also *Hinckley v. Schwarzschild & Sulzberger Co.*, 107 N. Y. App. Div. 470, 95 N. Y. Supp. 357.

⁷⁴ *Durfee v. Old Colony & F. River R. Co.*, 5 Allen (Mass.) 230.

"In creating a corporation, no contract is made by the legislature with

the individual members or stockholders, any further than they are represented by the artificial body which the act of incorporation calls into being. They have no other rights except those which exist or grow out of the constitution of the body corporate of which they are members. To this only can we look, in order to ascertain whether there has been any breach of contract or violation of chartered

cision in New York, where a railroad company had been created for the purpose of constructing and operating a railroad from Hornells-ville to Attica, and its charter was amended so as to authorize it to

rights. It constitutes, of itself, the contract by which the rights of all parties are to be governed. When, therefore, it is expressly provided between the legislature on the one hand and the corporation on the other, as part of the original contract of incorporation, that the former may change or modify or abrogate it or any portion of it, it cannot be said that any contract is broken or infringed when the power thus reserved is exercised with the consent of the artificial body of whose original creation and existence such reservation formed an essential part. The stockholder cannot say that he became a member of the corporation on the faith of an agreement made by the legislature with the corporation, that the original act of incorporation should undergo no change except with his assent. Such a position might be asserted with more plausibility, if there was an absence of a clause in the original act of incorporation providing for an alteration in its terms. In such a case it might perhaps be maintained that there was a strong implication that the charter should remain inviolate, and that the holders of shares invested their property in the corporation relying upon a contract entered into between it and the legislature that the provisions of the act creating it should remain unchanged. But it is difficult to see how such a construction can be put on a contract which contains an express stipulation that it shall be subject to amendment and alteration. If it be asked by whom such amendment or alteration is to be made, the answer is obvious: by the parties to the contract, the legislature on the one hand and the corporation on the other; the former expressing its intention by means of a

legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter. It is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the assent of the other contracting party. In such case, all persons claiming derivative rights or interests under the original contract, with notice of its terms, would be bound by the amendment or alteration to which the parties should agree. * * * It is a mistake, therefore, to say that the contract of a stockholder with a corporation established under our statutes binds the latter to undertake no new enterprise and engage in no business or operation other than that contemplated by the original charter. This interpretation puts aside the express provision authorizing an amendment or alteration of the act of incorporation, and gives it no effect as against a stockholder without his assent, although he bought his stock or subscribed for his shares subject to the legal effect of such a stipulation. * * * The real contract into which the stockholder enters with the corporation is, that he agrees to become a member of an artificial body which is created and has its existence by virtue of a contract with the legislature, which may be amended or changed with the consent of the company, ascertained and declared in the mode pointed out by law. Having, by virtue of the relation which subsists between himself and the corporation as a holder of shares, assented to the terms of the original act of incorporation, he cannot be heard to say that he will not be bound by a vote of the majority of the stockholders accepting an amend-

extend its road to Buffalo, thirty-one miles beyond Attica, and to increase its capital stock for such purpose from \$750,000 to \$1,500,000. It was held that the amendment did not release a dissenting stockholder from liability on his subscription.⁷⁵

§ 4007. — Majority rule. The reasoning of the Massachusetts court in the case above referred to is based upon the assumption that the reservation by the state of the power to alter, amend or repeal the charter of a corporation is intended, not merely for the protection of the public, but also to enable the legislature to authorize a corporation to engage in new enterprises solely for its own benefit, and whether any interests of the public are concerned or not. If the reasoning is sound, then the legislature, under such a reservation, might authorize a majority of the stockholders of a manufacturing company to engage in banking, insurance or railroading, against the dissent of the minority. In a word, the money invested by a stockholder in a corporation is at the mercy of the legislature and a majority of the stockholders. This certainly cannot be the proper construction of a constitutional or statutory provision reserving to the state the power to alter or amend charters. And such a construction is not supported by the weight of authority. The true view is that the power to alter, amend or repeal charters is reserved by the state "solely" for the purpose of avoiding the effect of the decision in the Dartmouth College Case;⁷⁶ that the charter of a corporation is a contract between the state and the corporation within the constitutional prohibition against laws impairing the obligation of contracts,⁷⁷ and that the purpose of the reservation is to enable the state to impose such restraints upon corporations as the legislature may deem advisable for protection of the public.⁷⁸ Such power is not reserved in any sense for the benefit of the corporation, or of a majority of the stockholders, upon any idea that the legislature can alter the contract between the corporation and its stockholders, nor for the purpose of enabling it to do so. If this view is sound,—and that it is so seems clear,—the power of a majority of the stockholders to bind a dissenting minority by

ment or alterations of the charter made in pursuance of an express authority reserved to the legislature, and which by such acceptance has become binding on the corporation." *Durfee v. Old Colony & F. River R. Co.*, 5 Allen (Mass.) 230.

⁷⁵ *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336, wherein Judge,

Selden questioned the case of *Hartford & N. H. R. Co. v. Croswell*, 5 Hill (N. Y.) 383, 40 Am. Dec. 354. See also *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102.

⁷⁶ See Chap. 57, *infra*.

⁷⁷ See Chap. 57, *infra*.

⁷⁸ See § 4003, *supra*.

accepting an amendment of the charter does not depend at all upon whether the state has reserved the power to alter or amend the charter, but depends "essentially upon the question whether the change is of such a character that it may be deemed so far in furtherance of the original undertaking, and incidental to it, as to be fairly within the power of the corporation to bind its individual members by its corporate assent, or whether it is such a departure from the original purpose that no member should be deemed to have authorized the corporation to assent to it for him."⁷⁹ It was said in a New Jersey case: "The object and purpose of these provisions are so plain, and so plainly expressed in the words, that it seems strange that any doubt could be raised concerning it. It was a reservation to the state, for the benefit of the public, to be exercised by the state only. The state was making what had been decided to be a contract, and it reserved the power of change, by altering, modifying, or repealing the contract. Neither the words nor the circumstances, nor apparent objects for which this provision was made, can, by any fair construction, extend it to giving a power to one part of the corporators against the other, which they did not have before."⁸⁰ And in a later case it was said, in substance, that "after shareholders have entered into a contract among themselves, under legislative sanction, and expended their money in the execution of the plan mutually agreed upon, the plan cannot, even by virtue of legislative enactment, be radically changed by the majority alone, and dissentient stockholders be compelled to engage in a new and totally different undertaking, because such action would impair the obligation of the dissenting stockholders with their associates and the state."⁸¹

⁷⁹ **Maine.** *Old Town & L. R. Co. v. Veazie*, 39 Me. 571.

New Hampshire. *Dow v. Northern R. Co.*, 67 N. H. 1.

New Jersey. *In re Newark Library Ass'n*, 64 N. J. L. 217, 43 Atl. 435; *Mills v. Central R. Co.*, 41 N. J. Eq. 1, 2 Atl. 453; *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617.

New York. *Troy & R. R. Co. v. Kerr*, 17 Barb. 581.

Wisconsin. *Kenosha, R. & R. I. R. Co. v. Marsh*, 17 Wis. 13.

In line with this rule is an able and exhaustive opinion by Justice Straup

in *Garey v. St. Joe Min. Co.*, 32 Utah 497, 12 L. R. A. (N. S.) 554, 91 Pac. 369, in which it is held that a statute authorizing majority stockholders to amend the articles of incorporation so as to make nonassessable stock assessable, affects the contractual relations of the stockholders among themselves, and impairs the obligation of a contract within the federal prohibition.

⁸⁰ *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617.

⁸¹ *Mills v. Central R. Co.*, 41 N. J. Eq. 1, 2 Atl. 453.

According to this doctrine, even when the state has reserved the power to alter, amend or repeal a charter, a majority of the stockholders cannot bind a dissenting minority by acceptance of an amendment which is so radical a change as to authorize the corporation to engage in a different enterprise from that for which it was created. It has been held, therefore, that a majority of the stockholders cannot accept an amendment authorizing the company to extend its road considerably beyond the terminus originally fixed, and to increase its capital stock for such purpose, or to consolidate with another company with which it connects, or to materially change its route.⁸²

§ 4008. — Alteration and change distinguished. There is another view which leads to substantially the same result. A reservation of the power to alter, amend or repeal a charter cannot be construed as giving the legislature the power to authorize a majority of the stockholders to engage in a different enterprise, for this is not an amendment or alteration, but a change. The legislature, said the New Jersey court, "can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one, and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense. Power to alter a mansion house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep up its identity; and a matter of the same kind, wholly or chiefly new, substituted for another, is not an alteration; it is a change."⁸³

§ 4009. Exercise of power of eminent domain. When a corporation is of such a character that the legislature may delegate to it the power of eminent domain, as in the case of railroad companies, the legislature may, if the good of the public so requires, authorize a consolidation against the dissent of some of the stockholders, provided it makes adequate provision for just compensation to the dissenting stockholders for their shares.⁸⁴

⁸² *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617.
⁸³ *Kenosha, R. & R. I. R. Co. v. Marsh*, 17 Wis. 13.
⁸⁴ *Black v. Delaware & R. Canal Co.*, 24 N. J. Eq. 455. See also chapter on Consolidation, *infra*.

E. Rights of Minority as to Sale, Exchange or Lease of Corporate Property

§ 4010. **In general.** It is sometimes deemed advisable to sell, exchange or lease all the corporate property. This is not a part of the ordinary business of the corporation and hence it is not within the powers of the board of directors.⁸⁵ But it may be accomplished, except in the case of quasi public corporations, even where such a transfer is not expressly authorized by the charter or other statutes,⁸⁶ by a vote of all the stockholders, and creditor cannot object thereto unless the transfer is fraudulent.⁸⁷

Conceding that all the stockholders may authorize such a transfer, the question then arises as to whether a majority of the stockholders may bind the minority by such a transfer; and in answering this question the courts generally draw a distinction between a transfer demanded by the exigencies of the business, as where the corporation is insolvent or unable to further continue business for any other reason, and a transfer where the corporation is a prosperous going concern and there is no necessity for a transfer. In the former case, it is held that the majority may act; in the latter case it is generally held that the majority cannot act against the dissent of one or more stockholders.⁸⁸ Oftentimes, however, a statute expressly authorizes a transfer on a vote of a majority or a certain per cent, usually two-thirds or three-fourths, of the stock.⁸⁹

Conceding that the majority may "sell" the corporate property, the next question that arises is whether it may transfer the property for stock in another corporation which is either held by the company or to be distributed among its stockholders. As to this matter, there is apparently some conflict, but the better rule seems to be that the minority cannot be bound by any such deal but may at least demand the value of their stock in cash.⁹⁰

Still another question may arise. Conceding that the majority may transfer the property to a third person or to a firm or corporation in which they are not interested, can they transfer the property to themselves as individuals or to a corporation which they form for the purpose of taking over the property or to a corporation in which they are heavily interested? This question is answered in the following subdivision.⁹¹

⁸⁵ See § 1998, *supra*.

⁸⁶ See § 1210, *supra*.

⁸⁷ See § 1205, *supra*.

⁸⁸ See § 4011 et seq., *infra*.

⁸⁹ See § 1210, *supra*, and also § 4018, *infra*.

⁹⁰ See § 4016, *infra*.

⁹¹ See §§ 4029-4049, *infra*.

§ 4011. Power of majority to dispose of all of corporate property—
General rule. Certain elementary rules may properly be referred to before discussing this subject. First, there is no question but that the directors, as distinguished from the stockholders, have no power to sell or transfer all the corporate property, unless authorized to do so by all, or in some cases a majority or more, of the stockholders, except where a part of the corporate business or where necessary to pay debts.⁹²

Second, all the stockholders may authorize a transfer of all the corporate property even though the corporation is solvent and prosperous,⁹³ provided the corporation is not a quasi public one so that the transfer is against public policy.⁹⁴

Whether or not a majority of the stockholders of a corporation have the power to dissolve the corporation with the consent of the state,⁹⁵ or to dispose of all its property, wind up its affairs, and abandon the enterprise, depends upon the circumstances. On this subject the following propositions are established by the weight of authority:

1. If a corporation is a purely private corporation, organized exclusively for pecuniary profit, as in the case of a manufacturing or trading corporation, the state or the public has no interest in the continuance of the enterprise, and there is no reason why it should be compelled to continue after it has become apparent that it cannot do so without loss to the stockholders. Nor is it reasonable in such a case that a minority of the stockholders should be allowed to compel the majority to continue at a loss. It may be regarded as settled, therefore, that a majority of the stockholders of such a corporation may, against the dissent of the minority, abandon the enterprise, sell out the property of the corporation for the purpose of paying debts, and distributing any balance of assets among the stockholders, and thus wind up its business, or dissolve under legislative authority, if the conditions are such that the business can no longer be carried on profitably, if the majority act in good faith and in the interest of all the stockholders, and if the charter does not fix any time during which the enterprise must be continued.⁹⁶ Note, however, that the majority

⁹² See § 1998, *supra*.

⁹³ *Forrester v. Butte & M. Consol. Copper & Silver Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353.

Effect on corporate power of consent of all of stockholders, generally, see § 801, *supra*.

⁹⁴ See § 4012, *infra*.

⁹⁵ Chapter on Dissolution, *infra*.

⁹⁶ See § 1207, *supra*. See also the following cases:

United States. *Hancock v. Holbrook*, 112 U. S. 229, 28 L. Ed. 714, 9 Fed. 353.

Louisiana. *Pringle v. Eltringham Const. Co.*, 49 La. Ann. 301, 21 So. 515; *Trisconi v. Winship*, 43 La. Ann.

must, in making such a sale, act in good faith towards the minority stockholders.⁹⁷ Moreover, this rule applies, it is held in Connecticut, only where the purpose of the sale is the bona fide winding up of the corporate business as distinguished from the continuance of the business in another corporation; and hence, in the latter case, the majority cannot bind the minority even if the corporation is actually insolvent.⁹⁸

2. This only applies, however, where the conditions have become such that the corporation cannot profitably continue the business. If the exigencies of its business are not such as to require a winding up, the general rule is that every stockholder has a right to insist that the enterprise shall continue for the period contemplated when the corporation was created, and a majority of the stockholders cannot arbitrarily abandon the enterprise and sell out the corporate property against the dissent of the minority,⁹⁹ unless authority so to do

45, 26 Am. St. Rep. 175, 9 So. 29; *Hancock v. Holbrook*, 40 La. Ann. 53, 3 So. 351.

Maine. *Inhabitants of Waldoborough v. Knox & L. R. Co.*, 84 Me. 469, 24 Atl. 942.

Mississippi. *Berry v. Broach*, 65 Miss. 450, 4 So. 117.

New Jersey. *Sewell v. East Cape May Beach Co.*, 50 N. J. Eq. 717, 25 Atl. 929.

New York. *Hoag v. Edwards*, 69 Misc. 237, 124 N. Y. Supp. 1035.

Pennsylvania. *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685.

Rhode Island. *Phillips v. Providence Steam Engine Co.*, 21 R. I. 302, 45 L. R. A. 560, 43 Atl. 598; *Peabody v. Westerly Water Works*, 20 R. I. 176, 37 Atl. 807; *Wilson v. Proprietors of Central Bridge*, 9 R. I. 590; *Hodges v. New England Screw Co.*, 1 R. I. 347, 53 Am. Dec. 624.

Wyoming. *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

England. *Wilson v. Miers*, 10 C. B. (N. S.) 348.

See also valuable note in 103 Am. St. Rep. 548.

Since a sale of its property by a

corporation and abandonment of its business is not a dissolution of the corporation, it is not within a statute prohibiting dissolution of a corporation except with the unanimous consent of all the stockholders. And notwithstanding such a statute, therefore, a majority of the stockholders of a corporation may order a sale of all its property when the exigencies of its business require such a step. *Price v. Holcomb*, 89 Iowa 123, 56 N. W. 407.

However, in *Hunt v. American Grocery Co.*, 81 Fed. 532, at the suit of a stockholder, the directors of a corporation were enjoined from selling out the business of the company in pursuance of a resolution at a stockholders' meeting, as the statutes fully provided for winding up the corporation in case its business was unprofitable, or it was obliged to suspend for want of funds.

⁹⁷ *Hayden v. Official Hotel Red-Book & Directory Co.*, 42 Fed. 875.

⁹⁸ *Byrne v. Schuyler Elec. Mfg. Co.*, 65 Conn. 336, 352, 28 L. R. A. 304, 31 Atl. 833.

⁹⁹ See § 1208, *supra*.

See also the following cases:

is conferred by the charter or other statute,¹ although there is some authority, based on persuasive reasoning, to the contrary.² However, minority stockholders may be estopped to complain.³

Judge Noyes, in his work on Intercorporate Relations, draws a line between sales of all the property of a prosperous corporation "as a step towards liquidation," and sales in order to engage in a new enterprise or for purposes of speculation, and states the rule to be that in the former case a majority may sell while in the latter case the consent of all the stockholders is necessary;⁴ but a careful examination of the decisions discloses little warrant for any such distinction, or, in other words, for an exception to the general rule.

§ 4012. — In case of quasi public corporation or of property held in trust. As stated in a former chapter, a quasi public corporation, which is given the power of eminent domain, and which owes special duties to the public, cannot, without legislative authority, dispose of property which is necessary to enable it to perform its duties.⁵ So a

United States. Eldred v. American Palace-Car Co., 96 Fed. 59.

Alabama. Tillis v. Brown, 154 Ala. 403, 45 So. 589.

Delaware. Butler v. Keystone Copper Co., 10 Del. Ch. 371, 93 Atl. 380.

New Hampshire. Dow v. Northern R. R., 67 N. H. 1, 36 Atl. 510.

New York. Hoag v. Edwards, 69 Misc. 237, 124 N. Y. Supp. 1035.

Rule as to real estate and mining companies, see § 1209, *supra*.

Where the charter of a building and loan association expressly provided that it should continue in operation eight years, unless its funds should be sufficient to pay all its debts and redeem all its stock in a shorter time, it was held that a resolution to dissolve the association prior to such time, without the unanimous consent of the shareholders, was void. *Barton v. Enterprise Loan & Building Ass'n*, 114 Ind. 226, 5 Am. St. Rep. 608, 16 N. E. 486.

¹ *Butler v. New Keystone Copper Co.*, 10 Del. Ch. 371, 93 Atl. 380. See also § 1210, *supra*.

² See § 1208, *supra*.

Missouri apparently joins New Hampshire in holding the contrary rule, at least so far as the right of a minority stockholder to enjoin or set aside the sale is concerned. *Tanner v. Lindell R. Co.*, 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155.

³ See § 4019 *et seq.*, *infra*.

⁴ Noyes, *Intercorporate Relations* (2nd Ed.), §§ 110, 114.

The decisions cited by Judge Noyes (§ 110, note 1) are mostly cases where the exigencies of the business required a sale and hence the rule as to a prosperous corporation could not be applied to establish an exception to the general rule.

⁵ See § 1216, *supra*.

On the ground that the state and the public have a direct interest in insurance companies, and that statutes subject them to constant supervision and to many restrictions, it has been held that a mutual insurance company, as distinguished from a private corporation of a strictly business character, cannot convey all its property against the wishes of a minority of the policyholders, even, it seems,

corporation which holds property subject to limitations as to its use, or on a specified trust, cannot so dispose of it as to divert it from such use or trust.⁶ This, however, is a question as to the powers of the corporation, and not as to the power of a majority of the stockholders of a corporation to bind or control the minority.

The rule that a majority may sell all the corporate property where the company is in a failing condition, i. e., where required by the exigencies of the business, has been held to apply to quasi public corporations, such as transportation companies, where the question "does not concern the demands of public policy, but only the contract rights of the individual stockholder."⁷

§ 4013. — Where sale is part of corporate business. However, a company may sell all its property, against the objection of minority stockholders, where such a sale is not contrary to the purposes for which the corporation was formed.⁸ For instance, minority stockholders cannot prevent the sale, where there is no fraud, of all the property of a mining company created to "buy, sell * * * and deal in mines," where such property consists of mines and mining machinery.⁹

§ 4014. — Where sale expressly authorized by statute. If a statute gives a railroad company the right to sell its road, it is held in Maine that a majority may authorize a sale, where it is not otherwise provided by the statute, without in any way referring to the distinction between sales of a prosperous going business and sales required by the exigencies of the business, although in fact it did appear that the railroad company was insolvent.¹⁰ However, statutes often expressly authorize the sale or lease of all the property of a corporation on a vote of a majority or a certain per cent of the stock;¹¹ and a minority

where required by the exigencies of the business. *Price v. St. Louis Mut. Life Ins. Co.*, 3 Mo. App. 262.

⁶ See § 1194, *supra*.

⁷ *Buford v. Keokuk North Line Packet Co.*, 3 Mo. App. 159, *aff'd* 69 Mo. 611, where packet company at time of sale was facing financial ruin and its charter expired in one month.

⁸ *Sewell v. East Cape May Beach Co.*, 50 N. J. Eq. 717, 25 Atl. 929, sale of real estate by land company. *Lange v. Reservation Mining & Smelting Co.*, 48 Wash. 167, 93 Pac. 208; and see § 1209, *supra*.

⁹ *Lange v. Reservation Mining & Smelting Co.*, 48 Wash. 167, 93 Pac. 208.

¹⁰ *Waldoborough v. Knox & L. R. Co.*, 84 Me. 469, 24 Atl. 942.

¹¹ *Wall v. Anaconda Copper Min. Co.*, 216 Fed. 242, Montana statute applicable only to mining companies; *Metcalf v. American School Furniture Co.*, 122 Fed. 115; *Bias v. Atkinson*, 64 W. Va. 486, 63 S. E. 395.

See also § 1210, *supra*.

Statutes as permissive or as limitations, see § 4018, *infra*.

Statutes as authorizing transfers

stockholder cannot attack a sale of all the corporate property, as authorized by statute, when a majority of the stock consents thereto, merely on the ground of inadequacy of price, where there is no fraud or collusion on the part of the majority stockholders.¹²

§ 4015. Power of majority to lease all of corporate property. Starting out with the assumption that it is not *ultra vires* for a purely private corporation to lease all its property with the consent of all the stockholders,¹³ the question arises whether such a lease may be made where one or more stockholders object thereto. Whether a corporation may lease all its property, with the consent of the majority stockholders, but contrary to the wishes of minority stockholders, is not altogether clear. Some decisions seem to flatly deny the existence of such power where some of the stockholders dissent.¹⁴ Other decisions hold that the lease is warranted where required by the exigencies of the business,¹⁵ even against the wishes of minority stock-

for stock in another corporation, see §§ 4016, 4017, *infra*.

¹² *Koehler v. St. Mary's Brewing Co.*, 228 Pa. 648, 139 Am. St. Rep. 1024, 77 Atl. 1016.

¹³ See § 1235, *supra*.

¹⁴ *Copeland v. Citizens' Gas Light Co.*, 61 Barb. (N. Y.) 60. To same effect see *Hennessy v. Muhleman*, 27 N. Y. Misc. 232, 57 N. Y. Supp. 114; *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492, 65 Pac. 765.

Compare, however, dicta in *Waldoborough v. Knox & L. R. Co.*, 84 Me. 469, 24 Atl. 942.

If a statute authorizes a railroad company to lease its road, but is silent as to the consent of stockholders, it is held that a majority cannot lease it against the objection of a minority. *Mills v. Central R. Co.*, 41 N. J. Eq. 1, 2 Atl. 453.

In Minnesota, a distinction seems to be drawn between a transfer for the purpose of winding up the business and distributing the proceeds among the stockholders and a transfer whereby another corporation was to carry on the business and pay over a percentage of the proceeds; and it is held

that a lease of all its property by one company to another for 25 years in consideration of a percentage of the proceeds of the business cannot be made against the objection of minority stockholders, without in any way referring to whether the lessor was in a prosperous condition or otherwise. *Small v. Minneapolis Electro Matrix Co.*, 45 Minn. 264, 47 N. W. 797. However, if this rule be followed, it would result in prohibiting any lease of all the corporate property, at least for any length of time, since a lease, because of its continuing nature and the right of the lessor to the property at the end of the lease, can never be said to be for the purposes of winding up the business.

¹⁵ *Bartholomew v. Derby Rubber Co.*, 69 Conn. 521, 61 Am. St. Rep. 57, 38 Atl. 45; *Plant v. Macon Oil & Ice Co.*, 103 Ga. 666, 30 S. E. 567; *Featherstonhaugh v. Lee Moor Porcelain Clay Co.*, L. R. 1 Eq. 318. See also *Anderson v. Shawnee Compress Co.*, 17 Okla. 231, 15 L. R. A. 846, 87 Pac. 315; *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. Cas. 712, 718.

It seems that it is immaterial that

holders, provided, of course, there is no fraud involved therein.¹⁶

Of course, if the authority to lease is prescribed by statute, then the terms of such statute govern as to the consent of stockholders.¹⁷ And if a statute authorizes a lease on the vote or consent of a certain per cent of the stock, and such per cent vote for or consent to the lease, dissenting stockholders cannot complain unless the lease was fraudulent.¹⁸ However, a statute enacted "after" the creation of a corporation authorizing it to lease its property by a two-thirds vote of the stockholders does not warrant, it has been held, a lease on a two-thirds vote where one or more stockholders dissent.¹⁹ If there is express statutory power to lease all its property, prior to or concurrently with the creation of the corporation, such power, it is held, may be exercised by a majority of the stockholders, on the theory that the exercise of such power was one of the implied conditions under which persons became stockholders.²⁰

Unless authorized by the charter or other statute, a quasi public corporation cannot lease its property where it is necessary to enable it to carry on its business.²¹

§ 4016. Taking stock or bonds of another corporation—In general.

When a corporation has the power to dispose of all its property and abandon its business, and it also has power to take stock of another company, it may dispose of its property to another corporation for stock in the latter to be disposed of for the purpose of paying the stockholders in cash, or to be distributed among its stockholders if all consent.²² Likewise, it seems that a minority stockholder cannot

the lease contains an option to the lessee to purchase the property at a fixed price. *Bartholomew v. Derby Rubber Co.*, 69 Conn. 521, 61 Am. St. Rep. 57, 38 Atl. 45.

¹⁶ *Bartholomew v. Derby Rubber Co.*, 69 Conn. 521, 530, 61 Am. St. Rep. 57, 38 Atl. 45.

Proposed lease of street railroad held not fraudulent, see *Flynn v. Brooklyn City R. Co.*, 9 N. Y. App. Div. 269, 41 N. Y. Supp. 566, aff'd 158 N. Y. 493, 53 N. E. 520.

¹⁷ See *Flynn v. Brooklyn City R. Co.*, 9 N. Y. App. Div. 269, 41 N. Y. Supp. 566, aff'd 158 N. Y. 493, 53 N. E. 520.

¹⁸ *Flynn v. Brooklyn City R. Co.*, 9 N. Y. App. Div. 269, 41 N. Y. Supp.

566, aff'd 158 N. Y. 493, 53 N. E. 520.

¹⁹ *Dow v. Northern R. R.*, 67 N. H. 1, 36 Atl. 510.

²⁰ *Dickinson v. Consolidated Traction Co.*, 114 Fed. 232, aff'd 119 Fed. 871.

²¹ See § 1236 et seq., supra.

²² *United States. Metcalf v. American School Furniture Co.*, 122 Fed. 115; *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787, 31 L. R. A. 415.

Iowa. Sawyer v. Dubuque Printing Co., 77 Iowa 242, 42 N. W. 300.

Massachusetts. Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490.

Pennsylvania. Lauman v. Lebanon

object if he is given an option to take payment of the value of his stock in cash, where a transfer for cash could have been authorized by a majority of the stockholders.²³ But the general rule is that a majority of the stockholders cannot exchange the property of the corporation for stock in another corporation, to be held by the corporation, or to be distributed among the stockholders in payment of their shares, unless all the stockholders consent.²⁴ It cannot compel a dissenting stockholder to accept shares in the other company. If he insists upon it, he is entitled to have the property sold for cash, and to the payment of his share, or else to payment of the value of his interest, and he is entitled to an injunction until his rights are secured,²⁵ or, if the sale has been made, he may sue to set it aside,²⁶ unless he is estopped.²⁷

§ 4017. — Construction of statutes. Statutes authorizing a sale on a vote of a certain per cent of the stock do not authorize an ex-

Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

Rhode Island. *Hodges v. New England Screw Co.*, 1 R. I. 347, 53 Am. Dec. 624.

And see cases cited in § 1211, note 52, *supra*.

²³ In selling the corporate property, there is nothing to prevent stockholders from taking shares in the purchasing company to the amount of their respective interests in the proceeds of the sale, where provision is also made for cash payments to all stockholders who may not desire to take stock in the purchasing corporation. *Slattery v. Greater New Orleans Realty & Development Co.*, 128 La. 871, 55 So. 558.

See also § 4017, *infra*.

²⁴ *Easum v. Buckeye Brewing Co.*, 51 Fed. 156; *Elyton Land Co. v. Dowdell*, 113 Ala. 177, 59 Am. St. Rep. 105, 20 Ala. 981; *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54; *Taylor v. Earle*, 8 Hun (N. Y.) 1; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685. See also cases cited in § 1211, note 51, *supra*.

For authorities to the contrary or

tending to the contrary, see § 1211, note 52, *supra*.

A corporation cannot transfer all its property to a foreign corporation, and take stock of the latter in payment, where any stockholder dissents. *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54; *Taylor v. Earle*, 8 Hun (N. Y.) 1.

In Connecticut the rule is laid down that "an insolvent corporation may take the stock of another corporation only for the purpose of closing up its business, to be divided in kind, or to be converted into money and divided among its creditors and shareholders." *Byrne v. Schuyler Elec. Mfg. Co.*, 65 Conn. 336, 350, 28 L. R. A. 304, 31 Atl. 833.

²⁵ *Luehrmann v. Lincoln Trust & Title Co. (Mo.)*, 192 S. W. 1026; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685.

²⁶ *Elyton Land Co. v. Dowdell*, 113 Ala. 177, 59 Am. St. Rep. 105, 20 So. 981. But see *Tanner v. Lindell R. Co.*, 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155.

²⁷ See § 4019 et seq., *infra*.

change,²⁸ and hence a transfer for stock in another corporation is not authorized by such a statute,²⁹ and a minority stockholder cannot be compelled to take anything but cash or its equivalent for his interest in the purchase price.³⁰ This is so although the statute uses the words "sell, lease, mortgage or otherwise dispose of," since the latter words do not include an exchange.³¹ A fortiori, the words "to otherwise dispose of" do not authorize a transfer of the property to a newly organized company in another state, which has no property, for stock in the new company.³²

If the equivalent for cash is a promise to pay, it must be a promise to pay within a reasonable time, properly secured.³³ It follows that a minority stockholder who does not consent thereto cannot be compelled to accept bonds of the purchasing company running for thirty years and secured only by a mortgage on the brewing plant of the purchaser—the value of which may be swept away by prohibition laws or by the refusal of a license—, and he may enjoin such a transfer unless he is given the option of taking payment for his stock in cash.³⁴

F. Statutes Requiring Consent of Certain Per Cent of Stock

§ 4018. General considerations. There are certain corporate acts as to which statutes require the consent of all or a certain proportion of the stockholders, or of the stock, in order to validate them, at least as against the attack of stockholders.³⁵ These statutes may be classi-

²⁸ *Forrester v. Butte & M. Consol. Copper & Silver Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353.

Statutes authorizing a "sale" of all the corporate property on a vote or consent of a majority of the stock do not authorize a transfer of such property for something else than money or its equivalent, since such a transfer is not a sale. *Koehler v. St. Mary's Brewing Co.*, 228 Pa. 648, 139 Am. St. Rep. 1024, 77 Atl. 1016.

²⁹ *Forrester v. Butte & M. Consol. Copper & Silver Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353.

³⁰ *Koehler v. St. Mary's Brewing Co.*, 228 Pa. 648, 139 Am. St. Rep. 1024, 77 Atl. 1016.

³¹ *Forrester v. Butte & M. Consol.*

Copper & Silver Min. Co., 21 Mont. 544, 55 Pac. 229, 353.

³² *Forrester v. Butte & M. Consol. Copper & Silver Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353.

³³ *Koehler v. St. Mary's Brewing Co.*, 228 Pa. 648, 139 Am. St. Rep. 1024, 77 Atl. 1016.

³⁴ *Koehler v. St. Mary's Brewing Co.*, 228 Pa. 648, 139 Am. St. Rep. 1024, 77 Atl. 1016.

³⁵ See §§ 1301, 1454, 1735, 1736, *supra*.

Consent to mortgage, see §§ 1301, 1736, *supra*.

Consent to issuance of bonds, see § 976, *supra*.

Consent to alienations of property in general, see § 1197, *supra*.

fied as follows: First, it may be assumed that the act as to which consent of a certain per cent of the stock is required is one which, in the absence of a statute, the directors could have performed without the assent of any of the stockholders. Examples of this class of statutes are those requiring the consent of a certain proportion of the stock to a mortgage of corporate property³⁶ or to the issuance of bonds or the increase of bonded indebtedness.³⁷ In this class of statutes, since merely for the better protection of the stockholders, they are the only ones who may complain of an omission to obtain the consent of the required per cent of stockholders.³⁸

Second, it may be assumed that the act is one which formerly was *ultra vires* of the corporation itself,—as, for instance, a sale or lease by a public service corporation of all its property.³⁹ In this class, of course, the statute must confer the power by plain and unambiguous language, and if the required per cent of the stockholders do not consent, the act is *ultra vires* with all the consequences attendant on *ultra vires* acts.⁴⁰

Third, it may be assumed that the act is one which formerly was within the powers of the corporation in case all the stockholders consented, but was one which could not be authorized by a majority of the stockholders.

Connected herewith is a somewhat troublesome question as to whether a statute requiring consent of a certain per cent, in case of a transfer of all the corporate property, is merely a limitation on the power of a majority to transfer the property where required by the exigencies of the business, so as to necessitate the consent of more than a mere majority, or is permissive so as to authorize a transfer on the consent of the required per cent where the transfer is not required by the exigencies of the business.⁴¹ In Montana such a statute has been construed as a mere limitation on the power to transfer all the corporate property where the exigencies of the business require such a transfer, and not as an enabling act authorizing a transfer of all the property on a vote of the per cent fixed by the statute where the corporation is in a prosperous condition.⁴² On the other hand, in California, under a statute providing that “no sale, lease, assignment, transfer, or conveyance” of the property as a whole “of any corpora-

³⁶ See § 1301, *supra*.

³⁷ See § 976, *supra*.

³⁸ See §§ 1301, 1736, *supra*.

³⁹ See §§ 1219, 1236, *supra*.

⁴⁰ See Chap. 37, *supra*, entitled, “*Ultra Vires*.”

⁴¹ For rules relating to this matter, independently of statute, see § 4011 et seq., *supra*.

⁴² *Forrester v. Butte & M. Consol. Copper & Silver Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353.

tion now existing or hereafter to be formed in this state, shall be valid without the consent'' of two-thirds of the stock, and making transfers valid if properly consented to, it is held that the enactment is not a mere negative or prohibitive statute but that it is both affirmative and negative in its terms, and that while on the one hand it prohibits transfers by strictly private corporations on less than a two-thirds vote, whereas formerly they might, under some circumstances, make a valid transfer by a vote of a mere majority, yet on the other hand it confers power, not before existing, on quasi public corporations to transfer all their property upon a two-thirds vote of the stockholders.⁴³ Of course, in this connection, the phraseology of the governing statute largely determines the ruling, according to the probable intent of the legislature.

If the approval of "two-thirds of the stockholders" is required, an approval by one stockholder holding more than two-thirds of the shares of stock is sufficient.⁴⁴ If the required per cent consent to a corporate act, minority stockholders cannot attack it because unsatisfactory to them unless the consent of the majority is fraudulent.⁴⁵

Statutes authorizing, on the vote or consent of a certain per cent of the stock or stockholders, a sale of all the corporate property,⁴⁶ or a lease of all the corporate property,⁴⁷ or a consolidation,⁴⁸ or a voluntary dissolution,⁴⁹ are elsewhere considered, so far as the particular act is concerned.

G. Defenses Against Minority Stockholders

§ 4019. In general. Minority stockholders may be barred from obtaining relief either because of laches or estoppel,⁵⁰ or, in some cases, because not injured,⁵¹ or, in some jurisdictions, because their stock was acquired after the act complained of.⁵²

The general rule is that the motives of the minority stockholder in prosecuting the suit cannot be inquired into.⁵³

§ 4020. Procuring funds for litigation from rival corporation. It has been held that it is no objection that minority stockholders who in

⁴³ South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 93 Pac. 490.

⁴⁴ Fredericks v. Pennsylvania Canal Co., 109 Pa. St. 50, 2 Atl. 48.

⁴⁵ Colby v. Equitable Trust Co., 124 N. Y. App. Div. 262, 271, 108 N. Y. Supp. 978.

⁴⁶ See § 1210, supra.

⁴⁷ See § 1242, supra.

⁴⁸ See chapter on Consolidation, infra.

⁴⁹ See chapter on Dissolution, infra.

⁵⁰ See § 4023, infra.

⁵¹ See § 4021, infra.

⁵² See § 4022, infra.

⁵³ See subd. xxxii, this chapter.

good faith believe it detrimental to establish an additional plant in another state avail themselves of the selfish interest of a rival corporation to procure funds to prosecute the litigation.⁵⁴

§ 4021. Necessity for injury. A minority stockholder may obtain injunctive relief from acts of the majority stockholders which are beyond their powers although not injured thereby, or even if in fact benefited.⁵⁵ Thus, injury need not be shown to authorize a minority stockholder to enjoin an increase in the capital stock, in violation of the charter, since the rule that injury is necessary does not apply where an attempt is being made by the corporation to change the contract made by its charter in a vital and fundamental particular.⁵⁶ Ordinarily, however, where the act complained of is not *ultra vires*, relief cannot be obtained without a showing of injury.⁵⁷

§ 4022. Acquisition of stock after happening of wrong complained of. The prevailing rule in most of the state courts has been clearly stated as follows: "A stockholder who pleads a good cause of action may maintain the same, even though he was not the owner of stock at the time the breach of duty was committed or the cause of action accrued, except in cases where it is shown that he purchased the stock with the intent and for the purpose of bringing suit or where his vendor was for some reason estopped from maintaining the action, and the purchaser has notice of such bar."⁵⁸ However, the federal courts hold that one who acquires stock subsequent to the commission of the wrongs complained of, cannot maintain an action as a minority

⁵⁴ *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

⁵⁵ *Byrne v. Schuyler Elec. Mfg. Co.*, 65 Conn. 336, 28 L. R. A. 304, 31 Atl. 833; *Central Ry. Co. v. Collins*, 40 Ga. 582.

⁵⁶ *Macon Gas Co. v. Richter*, 143 Ga. 397, 85 S. E. 112.

⁵⁷ See subd. XXXII of this chapter, *infra*.

⁵⁸ *Just v. Idaho Canal & Improvement Co.*, 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

Minority stockholders may sue majority stockholders for misappropriation of funds although plaintiffs

became stockholders after such misappropriation. *Harvey v. Meigs*, 17 Cal. App. 353, 119 Pac. 941.

Courts will not interfere with corporate affairs at the suit of minority stockholders who acquired their stock with full knowledge of the conditions of which they complain. *Von Schlemmer v. Keystone Life Ins. Co.*, 121 La. 987, 46 So. 991.

If the wrong is a continuing one, a person who becomes a stockholder after the wrong was in existence may complain thereof and obtain relief. *Hyams v. Old Dominion Co.*, 113 Me. 294, L. R. A. 1915 D 1128, 93 Atl. 747.

stockholder for the redress of such wrongs;⁵⁹ and this is the rule in a few of the state courts.⁶⁰

This question is fully considered in a subsequent subdivision of this chapter.⁶¹

§ 4023. Laches, ratification and estoppel—General rule. If a majority of the stockholders of a corporation do or authorize an act as to which it is not within the power of a majority to bind the minority, but which would be valid if all consent, stockholders who do not take part may ratify the act, or may be estopped by acquiescence; and they will be held to have ratified or acquiesced in the act of the majority if, with knowledge of the same, they unreasonably delay in giving notice of their dissent.⁶²

This applies to the acceptance of alterations or amendments of char-

⁵⁹ This rule was adopted in the federal courts "for the purpose of preventing a transfer of stock to a non-resident in order to enable him to bring the case in the federal court."

Just v. Idaho Canal & Improvement Co., 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

⁶⁰ See subd. XXXII, this chapter, *infra*.

A sale of corporate property cannot be attacked where complainant was not a stockholder at the time of the sale, but acquired his stock thereafter. *Pitcher v. Lone Pine-Surprise Consol. Min. Co.*, 39 Wash. 608, 81 Pac. 1047.

⁶¹ See subd. XXXII, *infra*.

⁶² *Arkansas. Ex parte Booker*, 18 Ark. 346.

Connecticut. Danbury & N. R. Co. v. Wilson, 22 Conn. 435.

Florida. Martin v. Pensacola & G. R. Co., 8 Fla. 370, 73 Am. Dec. 713.

Georgia. Memphis Branch R. Co. v. Sullivan, 57 Ga. 240.

Iowa. Des Moines Gas Co. v. West, 50 Iowa 16.

Missouri. Chouteau v. Allen, 70 Mo. 290.

New Jersey. Gifford v. New Jersey R. & Transp. Co., 10 N. J. Eq. 171.

New York. Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co., 90 N. Y. 607; *Kent v. Quicksilver*

Min. Co., 78 N. Y. 159; *Parsons v. Hayes*, 14 Abb. N. Cas. 419.

Pennsylvania. Bedford R. Co. v. Bowser, 48 Pa. St. 29; *Centre & K. Turnpike Road Co. v. McConaby*, 16 Serg. & R. 142.

Tennessee. Deaderick v. Wilson, 8 Baxt. 108.

Texas. International & G. N. R. Co. v. Bremond, 53 Tex. 96.

Vermont. Vermont & C. R. Co. v. Vermont Cent. R. Co., 34 Vt. 2.

England. Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43.

See also § 1526, *supra*, and see, generally, as to ratification and estoppel, §§ 2177-2210.

Where a majority of the stockholders vote to transfer to a new corporation, and take its stock in payment, and the transfer is made, minority stockholders who have opposed the transfer, but have taken their share of the stock of the new company, and allowed it to conduct the business for eighteen months, although under protest, are estopped to sue for rescission. *Post v. Beacon Vacuum Pump & Electrical Co.*, 84 Fed. 371.

Application of rule to issuance of stock as full paid without receiving its par value in money or in property, see § 3586, *supra*.

Ratification by minority stockhold-

ters. Where the stockholders of a corporation, by regular action in a general meeting, accept an act altering the charter of the corporation, every stockholder who assents is clearly bound. The same is true of a stockholder who fails to express his dissent for an unreasonable time, and it is incumbent upon a stockholder who objects to the alteration to affirmatively show that he did dissent within a reasonable time.⁶³ So where corporations have been consolidated under legislative authority, a stockholder in one of the old companies cannot object to the consolidation after he has surrendered his stock, and accepted stock in the new company, or if he has otherwise ratified or acquiesced in the consolidation.⁶⁴

There is no inflexible rule for determining what length of time will constitute unreasonable delay.⁶⁵ As short a time as two years,⁶⁶ one year,⁶⁷ or six months⁶⁸ has been held fatal in particular cases. This

ers, of a purchase, making it possible to place bonds to complete the purchase, estops them from thereafter suing to set aside the purchase. *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, Ann. Cas. 1912 C 859, 112 Pac. 647.

⁶³ *Martin v. Pensacola & G. R. Co.*, 8 Fla. 370, 73 Am. Dec. 713.

See also in this connection:

Arkansas. *Ex parte Booker*, 18 Ark. 338.

Connecticut. *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435.

Georgia. *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240.

Maine. *Lowell v. Washington County R. Co.*, 90 Me. 80, 37 Atl. 869; *Kennebec & P. R. Co. v. Palmer*, 34 Me. 366.

New Jersey. *Mills v. Central R. Co.*, 41 N. J. Eq. 1, 2 Atl. 453; *Gifford v. New Jersey R. & Transp. Co.*, 10 N. J. Eq. 171.

Pennsylvania. *Bedford R. Co. v. Bowser*, 48 Pa. St. 29.

Vermont. *Vermont & C. R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 2.

Compare *March v. Eastern R. Co.*, 43 N. H. 515; *Proprietors of Union Locks & Canals v. Towne*, 1 N. H. 44, 8 Am. Dec. 32.

⁶⁴ *Rabe v. Dunlap*, 51 N. J. Eq. 40,

25 Atl. 959; *Union Canal Co. v. Young*, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; *Deaderick v. Wilson*, 8 Baxt. (Tenn.) 108; *International & G. N. R. Co. v. Bremond*, 53 Tex. 96.

See also chapter on Consolidation, *infra*.

⁶⁵ *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

⁶⁶ *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, Ann. Cas. 1912 C 859, 112 Pac. 647.

⁶⁷ A delay of nearly a year in suing to set aside a sale of corporate assets, where the rights of innocent bondholders and other creditors had intervened in the meantime, was held in one case such laches as to bar a suit to set aside the transfer. *Marks v. Merrill Paper Co.*, 203 Fed. 16.

⁶⁸ A suit by a minority stockholder to set aside a sale by the corporation of all its property has been held barred by delay of six months where much money has been expended by the purchaser and a large amount of bonds sold on the faith of the purchase. *Wright v. Tacoma Gas & Electric Light Co.*, 53 Wash. 262, 101 Pac. 865, where the court said that the time which would constitute laches "must be determined by the circumstances of each particular case."

question of laches and estoppel is considered more in detail in a subsequent subdivision of this chapter.⁶⁹

§ 4024. — Objections other than those raised at stockholders' meeting. If a stockholder is present at a stockholders' meeting and objects to a sale of the corporate property solely on one ground, it seems that he cannot thereafter attack the sale on another ground.⁷⁰

H. Remedies of Minority Stockholders

§ 4025. In general. A minority stockholder who objects to the action of the majority stockholders or of the board of directors, where he has a right to resort to the courts for relief, has several remedies which are available in ordinary cases. First and foremost is the remedy by injunction to prevent the threatened acts of the majority stockholders or of the board of directors where it is ultra vires or fraudulent. In a proper case majority stockholders may be enjoined from making or entering into a particular contract or pursuing a particular course of conduct,⁷¹ but only in an extreme case will corporate action be enjoined because not assented to and sanctioned by all the stockholders, since the result would be to transfer the management from the majority to the minority stockholders.⁷² In some cases an injunction may be obtained against the majority to prevent the voting of their stock.⁷³

Second, if the transaction has been consummated, minority stockholders ordinarily may have it set aside where the complainant or complainants are not barred by laches or estoppel and the rights of innocent third persons have not intervened.⁷⁴ However, the fact that a suit to set aside a transfer by the company of its assets is barred by the laches of dissenting stockholders does not necessarily bar other remedies.⁷⁵

⁶⁹ See subd. xxxii, *infra*.

⁷⁰ *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

⁷¹ See §§ 3314-3335, *supra*, and especially § 3322.

Ultra vires acts may be enjoined. *Schwab v. E. G. Potter Co.*, 129 N. Y. App. Div. 36, 113 N. Y. Supp. 439.

⁷² *Smith v. Chase & Baker Piano Mfg. Co.*, 197 Fed. 466.

⁷³ See § 4028, *infra*.

⁷⁴ *Metcalf v. American School Furniture Co.*, 122 Fed. 115.

But even if majority stockholders be held to have no power to sell all the property of a prosperous going concern, it has been held in Missouri that the sale will not necessarily be set aside at the suit of minority stockholders, although it may be set aside in some cases, as where there is bad faith. *Tanner v. Lindell R. Co.*, 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155.

⁷⁵ *Marks v. Merrill Paper Co.*, 203 Fed. 16, 19.

Third, an action lies, in a proper case, against corporate officers or majority stockholders, for an accounting.⁷⁶

Fourth, in some cases, the remedy by mandamus is available.⁷⁷

Fifth, the dissenting stockholder or stockholders, in case of a transfer of the corporate property or a consolidation, may, in a proper case, obtain the value of his shares of stock, either by the statutory method of an appraisal as provided for in some of the states, or where there is no such statute or the statute is held to be exclusive, by a suit in equity.⁷⁸

The remedy and procedure to enforce the rights of minority stockholders, including defenses to stockholders' suits, is stated in detail in a subsequent subdivision of this chapter.⁷⁹

§ 4026. Preliminary injunction. Of course, in a proper case, a minority stockholder may obtain a temporary injunction.⁸⁰ However, the courts are reluctant to grant a preliminary injunction in behalf of a minority stockholder, especially where he owns but a small part of the stock and the question relates to management of the corporation.⁸¹

§ 4027. Statutory provisions for compensating dissenting stockholders. In several states, statutes provide that where a corporation transfers all its property, any dissenting stockholder may obtain an appraisal of the value of his stock and recover such value.⁸² Under such a statute, if the sale is fraudulent, a dissenting stockholder has a choice of remedies, i. e., either appraisal or an avoidance of the sale, and an election of the former remedy precludes a subsequent suit to set aside the sale as fraudulent.⁸³

The New York statute⁸⁴ relating to appraisal applies, it has been

⁷⁶ Stockholders may sue corporate officers for an accounting. See § 2681, *supra*.

⁷⁷ See §§ 3277-3313, *supra*.

⁷⁸ See § 4027, *infra*.

⁷⁹ See §§ 4051-4093, subd. XXXII.

⁸⁰ See *Eldred v. American Palace-Car Co. of New Jersey*, 196 Fed. 59. See, generally, § 3317, *supra*.

⁸¹ *Ryan v. Williams*, 100 Fed. 172, and see § 3322, *supra*.

⁸² *Wall v. Anaconda Copper Min. Co.*, 216 Fed. 242, construing Montana statute applicable only to mining com-

panies. See also *Boston & M. R. R. v. Graham*, 179 Mass. 62, 60 N. E. 405, particular statute relating to lease of railroad.

That New Jersey statute relating to lease of street railroads, and paying appraised value of stock to dissenting stockholders, is valid, see *Dickinson v. Consolidated Traction Co.*, 114 Fed. 232.

⁸³ *Wall v. Anaconda Copper Min. Co.*, 216 Fed. 242.

⁸⁴ Stock Corp. Law (N. Y.), § 17. Statute applies to voluntary sale of

held, only to solvent corporations who sell their assets as going concerns.⁸⁵ In New York, the application for an appraisal must be made within 60 days.⁸⁶

In Massachusetts, where the statute gives to stockholders who have voted against the sale of all the corporate property the right to recover the "value of the stock" held by them, the value means not merely the market value, where it is traded in by the public, but its intrinsic value to be determined by an ascertainment of all the assets and liabilities of the corporation; and until a minority stockholder has been paid the value of his shares, determined as provided for by the statute, he still is a stockholder and has a right to pursue in equity his rights as such minority stockholder in behalf of the corporation against the majority stockholders to compel an accounting and restitution by them.⁸⁷ Moreover the right to demand payment and the right to seek relief in equity in aid of the demand are not inconsistent but concurrent, and under such circumstances there is no necessity for an election.⁸⁸

An appraisal is also sometimes expressly provided for by the agreement for turning over the corporate property. The statutory provisions for compensating a dissatisfied stockholder, in case of a consolidation of corporations, are stated in another chapter.⁸⁹

Independently of statute, where minority stockholders do not consent to a sale of all the corporate property by a prosperous going concern, it is held that the minority stockholders are not bound to accept a pro rata share of the proceeds of the sale but are entitled to the market value of their stock at the date of the sale; and that, in a proper case, instead of receiving a pro rata share or the value

independent department of business of stock corporation. In *re Timmis*, 200 N. Y. 177, 93 N. E. 522.

Statute does not apply to sale of property of telephone company under § 104 of the Transportation Corporations Law. In *re Bronson*, 177 N. Y. App. Div. 374, 164 N. Y. Supp. 179.

That statute is not retrospective, see *Logan v. New York Sugar Refining Co.*, 176 N. Y. App. Div. 660, 163 N. Y. Supp. 214.

⁸⁵ *Weingreen v. Michelbacher*, 149 N. Y. Supp. 110.

⁸⁶ *Ennis v. Federal Brewing Co.*, 123 N. Y. App. Div. 691, 108 N. Y. Supp. 230, holding it sufficient that no-

tice of application for the appraisal be served within the 60 days.

An application for an appraisal, under the New York statute, is in time if served within 60 days although the hearing day named was after the 60 days. *Ennis v. Federal Brewing Co.*, 123 N. Y. App. Div. 691, 108 N. Y. Supp. 230.

⁸⁷ *Cole v. Wells*, 224 Mass. 504, 113 N. E. 189.

⁸⁸ *Cole v. Wells*, 224 Mass. 504, 514, 113 N. E. 189.

⁸⁹ Chapter on Consolidation, *infra*. See also *Colby v. Equitable Trust Co.*, 124 N. Y. App. Div. 262, 108 N. Y. Supp. 978.

of the stock, they may follow the property into the hands of the purchaser, and share in the profits arising from its use, in the same ratio that they would have shared if the sale had not been made.⁹⁰ However, in Alabama, it is held that, instead of refusing to set aside a sale of all the property for stock in another corporation, a dissenting stockholder cannot be compelled to accept the value of his stock, since "to do so would be nothing more or less than compelling the shareholder to sell his stock, which a court of equity has not the power to do."⁹¹

§ 4028. Injunction against majority to prevent voting of their stock. A majority stockholder may sometimes be enjoined from voting his stock, especially where the majority stockholder is another corporation.⁹² Thus, where a competing corporation owns the majority of the stock of another corporation, and has elected a majority of the directors from its own directors and through them mismanaged the company in its own interests, minority stockholders of the controlled company may, it has been held, enjoin the controlling company from voting its stock in the election of directors.⁹³ So if a purchase of the majority of the stock of another company for the purpose of controlling it and stifling competition is ultra vires, equity will, on the application of minority stockholders of the controlled company, enjoin the controlling company from voting such stock.⁹⁴ As said by the circuit judge in a late Michigan decision which was affirmed by the Supreme Court, in a case where one corporation had obtained control of the majority of the stock of another and elected as directors of the latter persons who were directors of the former, who were managing the controlled corporation for the benefit of the controlling corporation, "when the control has been acquired, solely in order to benefit the dominant corporation, and such intent and purpose has been made manifest, then the law will not permit the dominant corporation to propose, and accept, make and carry out, contracts between such corporations, and will prevent by injunction the further election of the directors of the dominant corporation to preside over the destinies of the servient corporation;" but in that case, while the

⁹⁰ *Tanner v. Lindell R. Co.*, 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155.

⁹¹ *Morris v. Elyton Land Co.*, 125 Ala. 263, 28 So. 513.

⁹² See § 1672, *supra*.

⁹³ *George v. Central Railroad & Banking Co.*, 101 Ala. 607, 14 So. 752;

Memphis & C. R. Co. v. Woods, 88 Ala. 630, 7 L. R. A. 605, 16 Am. St. Rep. 81, 7 So. 108; *Milbank v. New York, L. E. & W. R. Co.*, 64 How. Pr. (N. Y.) 20.

⁹⁴ *Dunbar v. American Telephone & Telegraph Co.*, 224 Ill. 9, 115 Am. St. Rep. 132, 8 Ann. Cas. 57, 79 N. E. 423.

court enjoined the dominant corporation from voting for persons as directors who were its own directors, it refused to enjoin the right to vote generally, including the right to vote for its own stockholders as directors until the situation arose.⁹⁵

However, while majority owners of stock may, in a proper case, be enjoined from voting their stock, it has been well said that "to deprive stockholders holding a majority of the stock from voting it, and to turn over the control of a corporation to the minority stockholders, is relief to be given only under imperative necessity."⁹⁶

XXX. DEALINGS BETWEEN CORPORATION AND ITS STOCKHOLDERS AND
DEALINGS OF STOCKHOLDERS WITH CORPORATE PROPERTY

§ 4029. Introductory. In a preceding volume,⁹⁷ the validity and effect of personal dealings of a corporate officer with the corporation or with corporate property has been stated at considerable length. Much of the law stated therein has no application to dealings between a stockholder not a corporate officer, and the corporation, while on the other hand certain conditions often arise where a stockholder or stockholders dealing with the company, although not corporate officers, are trustees the same as corporate officers, so that the contract is governed by the same rules as if it had been made by the corporation with a corporate officer. For instance, a majority stockholder or a combination of stockholders to form a majority, where they actually control the corporation solely for their own benefit, occupy the position of trustees,⁹⁸ and if they contract with the corporation no reason is apparent why the same rules should not govern as in a case of dealings between a corporation and one of its officers. In such a case the acting officer or officers of the corporation are in reality dummies and they are so considered by the courts and the contract deemed one by and between the majority stockholders or stockholders as representing the corporation on the one side and as representing themselves, individually or collectively, and as individuals or a firm or a corporation, on the other side. Especially are the rules relating to dealings with officers applicable where there are no corporate officers and the majority stockholders are themselves managing the corporation.

⁹⁵ *Turner v. Calumet & Hecla Min. Co.*, 187 Mich. 238, 153 N. W. 718.

⁹⁶ *Davidson v. American Blower Co.*, 243 Fed. 167.

⁹⁷ See §§ 2330-2403, *supra*.

⁹⁸ See § 3973, *supra*.

§ 4030. Validity of contracts between corporation and stockholder—General rule. The general and well-settled rule is that contracts and dealings between a corporation and its stockholders are valid, (1) if the stockholders do not also act as the agents of the corporation in the matter, and (2) if no fraud is committed against other stockholders or creditors. As shown in a former chapter,⁹⁹ there is nothing in the relation between a corporation and its stockholders which per se prevents dealings between them. A stockholder may deal with the corporation through its duly-authorized officers and agents, making loans or advances to it, and taking a mortgage or pledge to secure the same, selling it property, purchasing property from it, or making any other contract with it which a stranger might make, and the transaction is just as valid as if it were between the corporation and a stranger,¹ and this is so even where the stockholder

⁹⁹ See § 50, supra.

1 United States. Hanchett v. Blair, 100 Fed. 817; Ryan v. Williams, 100 Fed. 172; Rogers v. Nashville, C. & St. L. Ry. Co., 91 Fed. 299.

Alabama. Pope v. Brandon, 2 Stew. 401, 20 Am. Dec. 49.

California. Fox v. Mackey, 125 Cal. 57, 57 Pac. 670; Wills v. Porter, 6 Cal. Unrep. Cas. 492, 61 Pac. 1109.

Georgia. Carter v. Neal, 24 Ga. 346, 71 Am. Dec. 136.

Idaho. Frantz v. Idaho Artesian Well & Drilling Co., 5 Idaho 71, 46 Pac. 1026.

Illinois. Reichwald v. Commercial Hotel Co., 106 Ill. 439; Merrick v. Peru Coal Co., 61 Ill. 472.

Iowa. Louisa County Nat. Bank v. Traer, 16 N. W. 120.

Kentucky. Ecker v. Kentucky Refining Co., 144 Ky. 264, 138 S. W. 264; Lexington Life, Fire & Marine Ins. Co. v. Page, 17 B. Mon. 412, 66 Am. Dec. 165.

Massachusetts. Sargent v. Webster, 13 Mete. 497, 46 Am. Dec. 743; Pierce v. Partridge, 3 Mete. 44.

Michigan. International Wrecking & Transportation Co. v. McMorran, 73 Mich. 467, 41 N. W. 510.

Minnesota. Bjorngaard v. Goodhue County Bank, 49 Minn. 483, 52 N. W. 48.

Mississippi. McNamee v. Relf, 52 Miss. 426.

Missouri. Kingman & Co. v. Cornell-Tebbetts Machine & Buggy Co., 150 Mo. 282, 51 S. W. 727.

Nebraska. Forrest v. Nebraska Hardware Co., 91 Neb. 735, 137 N. W. 839.

New Jersey. Kane v. Lodor, 56 N. J. Eq. 268, 38 Atl. 966; Stratton v. Allen, 16 N. J. Eq. 229.

New York. Skinner v. Smith, 134 N. Y. 240, 31 N. E. 911, aff'g 56 Hun 437, 10 N. Y. Supp. 81; Rettenhouse v. Winch, 133 N. Y. 678, 31 N. E. 623, aff'g 57 Hun 587, 11 N. Y. Supp. 122; Gamble v. Queens County Water Co., 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201; Gillet v. Moody, 5 Barb. 185.

North Carolina. Langston v. Greenville Land & Improvement Co., 120 N. C. 132, 26 S. E. 644; Miller v. Moore, 56 N. C. 431.

Pennsylvania. Russell v. Rock Run Fuel-Gas Co., 184 Pa. St. 102, 39 Atl. 21; Gordon v. Preston, 1 Watts 385, 26 Am. Dec. 75.

West Virginia. Richardson v. Graham, 45 W. Va. 134, 30 S. E. 92.

Wisconsin. Wausau Boon Co. v. Plumer, 35 Wis. 274.

England. North-West Transp. Co. v. Beatty, 12 App. Cas. 589.

owns a majority of the stock,² provided he is not also acting as an officer or agent of the corporation in the transaction,³ and provided he does not take advantage of his position and influence to perpetrate a fraud upon other stockholders,⁴ or upon creditors of the corporation. Such contracts, however, are subject to statutory provisions that directors shall not divide, withdraw, or pay to the stockholders any part of the capital stock.⁵

A stockholder, unlike an officer, is not precluded, by the fact that he is personally interested, from voting for a contract or other measure at a corporate meeting.⁶

Stockholders who do not control its directors owe no duty to disclose the fact that they are interested in another corporation, with which the directors are about to contract, and the validity of the contract is not affected by concealment of the fact.⁷

A corporation may enter into an agreement with its stockholders to do or to refrain from doing something when such action or abstention is not contrary to statute or public policy.⁸

To entitle a stockholder to sue to recover money paid by the corporation to another stockholder under a contract, the corporation must return the consideration received by it; and it has been held, therefore, that where a corporation has paid money to a stockholder in consideration of his guaranty of its notes, another stockholder cannot sue to compel repayment of the money without a release of the guaranty.⁹

The principles governing contracts and other dealings between a corporation and its directors or other officers are considered in another volume,¹⁰ as are the principles governing dealings between a corporation and its promoters.¹¹

² A corporation may contract with its bondholders who own all the stock. *Memphis & L. R. Co. v. Dow*, 19 Fed. 388.

³ See §§ 2338-2344, *supra*, and see § 4034, *infra*.

If stockholders undertake to discharge the functions of directors and conduct the affairs of the corporation, they become subject to the same trust relation, which precludes directors from contracting with themselves. *Crichton v. Webb Press Co.*, 113 La. 167, 67 L. R. A. 76, 104 Am. St. Rep. 500, 36 So. 926.

⁴ See § 4035, *infra*.

⁵ *Stewart v. Stewart Hotel Co.*, 33 Cal. App. 167, 164 Pac. 620.

⁶ See § 1662, *supra*.

⁷ *Box v. Mackay*, 125 Cal. 57, 57 Pac. 670.

⁸ *Lun v. American Wheel & Vehicle Co.*, 165 Cal. 657, Ann. Cas. 1915 A 816, 133 Pac. 303.

⁹ *Wills v. Porter*, 6 Cal. Unrep. Cas. 492, 61 Pac. 1109.

¹⁰ See §§ 2330-2403, *supra*.

¹¹ See §§ 132-166, *supra*.

§ 4031. — Loans to corporation. A stockholder may lend money to, or make advances for, the corporation, and take a mortgage or pledge to secure the same, and, in the absence of fraud, he has the same rights under his contract as a stranger would have, both as against the corporation, the other stockholders, and creditors of the corporation.¹² If a stockholder loans money to his corporation, the corporation is his debtor to the same extent as if he had loaned money to a third person.¹³ However, loans to stockholders are sometimes prohibited by statute.¹⁴

§ 4032. — Purchase, sale or lease. A stockholder may sell or lease property to the corporation without being accountable to it for profits made by him in the transaction,¹⁵ or may purchase property or take a lease from it,¹⁶ if there is no fraud or unfair dealing.¹⁷ In some cases, however, on the theory that the majority stockholder or

12 United States. In re North Carolina Car Co., 127 Fed. 178; Hanchett v. Blair, 100 Fed. 817; Ryan v. Williams, 100 Fed. 172.

Illinois. Merrick v. Peru Coal Co., 61 Ill. 472.

New Jersey. Kane v. Lodor, 56 N. J. Eq. 268, 38 Atl. 966.

New York. Skinner v. Smith, 134 N. Y. 240, 31 N. E. 911; Duncomb v. New York, H. & N. R. Co., 84 N. Y. 190.

Pennsylvania. Gordon v. Preston, 1 Watts 385, 26 Am. Dec. 75.

Utah. Busby v. Century Gold Min. Co., 27 Utah 231, 75 Pac. 725.

A stockholder may furnish money to carry on the legitimate business of the corporation, so as to create a valid debt. St. Louis Iron & Machine Works v. Kimball, 53 Ill. App. 636.

13 Demple v. Carroll, 21 Wyo. 447, 125 Pac. 117, 133 Pac. 137.

14 See § 949, *supra*.

15 New York. Gamble v. Queens County Water Co., 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201.

Oregon. Martin v. Eagle Development Co., 41 Ore. 448, 69 Pac. 216.

Pennsylvania. Wolf v. Pennsylvania R. Co., 195 Pa. St. 91, 45 Atl. 936; Russell v. Rock Run Fuel-Gas

Co., 184 Pa. St. 102, 39 Atl. 21; Densmore Oil Co. v. Densmore, 64 Pa. St. 43; Simons v. Vulcan Oil & Mining Co., 61 Pa. St. 202, 100 Am. Dec. 628.

Virginia. Central Land Co. v. Obenchain, 92 Va. 130, 22 S. E. 876.

Washington. Baker v. Seattle-Tacoma Power Co., 61 Wash. 578, Ann. Cas. 1912 C 859, 112 Pac. 649.

West Virginia. Richardson v. Graham, 45 W. Va. 134, 30 S. E. 92.

Wisconsin. Milwaukee Cold Storage Co. v. Dexter, 99 Wis. 214, 40 L. R. A. 837, 74 N. W. 976.

England. Ladywell Min. Co. v. Brookes, 34 Ch. Div. 398.

16 Ryan v. Williams, 100 Fed. 172; Robinson v. Muir, 151 Cal. 118, 90 Pac. 521; Forrest v. Nebraska Hardware Co., 91 Neb. 735, 137 N. W. 839; Davis v. Nueces Valley Irrigation Co., 103 Tex. 243, 126 S. W. 4.

Compare Chicago Hansom Cab Co. v. Yerkes, 141 Ill. 320, 33 Am. St. Rep. 315, 30 N. E. 667.

A corporation may sell and convey all its corporate property to a stockholder. Werle v. Northwestern Flint & Sandpaper Co., 125 Wis. 534, 104 N. W. 743.

17 See § 4035, *infra*.

stockholders represent both sides of the contract, it is held that, because the same person cannot be both buyer and seller in the same transaction, the majority stockholder or stockholders cannot authorize by his or their vote a sale to himself or themselves, even though, it seems, the price is a fair one and there is no actual fraud;¹⁸ and the same rule has been applied to a lease.¹⁹ Thus, where one company obtained a majority of the stock of another company for the purpose of control, and then obtains a lease of the property of the controlled company, it was held in Colorado that since the lessee company was in law and in fact both parties to the lease, it was void without regard to whether the lessee was guilty of any actual fraud in obtaining the lease.²⁰ A fortiori, such a lease may be set aside where actually a fraud upon minority stockholders.²¹ In Maryland, however, it is held that a minority stockholder cannot enjoin the leasing of the property of another corporation by his corporation, although the majority stockholders of the two companies are identical, merely because the lease will be most advantageous to the lessor company, where there is no proof of fraud or illegality.²²

If a stockholder, or a combination of stockholders, purchases at a public sale, all the property of the corporation, where the sale is authorized by the stockholders as a whole, a stockholder cannot object to the purchase where not shown to be oppressive or in bad faith, where the property appears to have sold for all it was worth.²³ However, conditions may be such, where a majority combine to control a corporation and purchase the property for themselves, that minority stockholders may participate in the benefits of the purchase.²⁴

A corporation may sell personal property to a stockholder to be paid for in part out of future dividends on his stock; and the stockholder cannot be held liable on an implied contract where the corporation became insolvent and never paid any dividends.²⁵

¹⁸ *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 33 Am. St. Rep. 315, 30 N. E. 667; *Robertson v. H. E. Bucklen & Co.*, 107 Ill. App. 369; *Goodin v. Cincinnati & W. Canal Co.*, 18 Ohio St. 169, 98 Am. Dec. 95, where, however, the sale was far below the actual value of the property; *Reilly v. Oglebay*, 25 W. Va. 36.

¹⁹ *Glengary Consol. Min. Co. v. Boehmer*, 28 Colo. 1, 62 Pac. 839.

²⁰ *Glengary Consol. Min. Co. v. Boehmer*, 28 Colo. 1, 62 Pac. 839.

²¹ *Meeker v. Winthrop Iron Co.*, 17 Fed. 48.

²² *Shaw v. Davis*, 78 Md. 308, 23 L. R. A. 294, 28 Atl. 619.

²³ *Hayden v. Official Hotel Red-Book & Directory Co.*, 42 Fed. 875.

²⁴ *Ervin v. Oregon Ry. & Nav. Co.*, 27 Fed. 625.

²⁵ *Hathaway v. Vaughan*, 162 Mich. 269, 127 N. W. 337.

§ 4033. — Guaranty of corporate debts. A stockholder may guarantee the notes of the corporation, and take a mortgage or pledge to secure or indemnify him,²⁶ or the corporation may pay a debt due him before maturity in consideration of his guaranty.²⁷

§ 4034. — Where stockholder represents both parties to contract. There are some decisions holding that where the majority stockholders, in fact, represent both parties to a contract, i. e., both the corporation and themselves, the contract is "void."²⁸ This rule, however, is opposed to the weight of authority as governing contracts between corporate "officers" personally and their corporation, where they act for the corporation in entering into the contract,²⁹ and the majority rule governing contracts of officers doubtlessly is applicable to contracts by stockholders so that the contracts are at most voidable rather than void.³⁰

A majority stockholder may, in effect, contract with himself, by voting to ratify a contract made between the corporation, as represented by its directors, and himself, where there is no fraud or bad faith. For instance, in England, where a director contracted with his colleagues to sell to the company a certain vessel, and the contract, while a fair one, was deemed voidable because of the relationship of the parties, it was held that the contract might be ratified by the vote of the vendor director as the majority stockholder at a stockholders' meeting.³¹

§ 4035. — Frauds upon other stockholders. While a stockholder may deal with the corporation, the dealing must be fair and free from

²⁶ *Kingman & Co. v. Cornell-Tebbetts Machine & Buggy Co.*, 150 Mo. 282, 51 S. W. 727.

²⁷ *Wills v. Porter*, 6 Cal. Unrep. Cas. 492, 61 Pac. 1109.

²⁸ See *Banks v. Judah*, 8 Conn. 145.

In *Colorado* a lease by the majority to itself was said to be void (*Glengary Consol. Min. Co. v. Boehmer*, 28 Colo. 1, 62 Pac. 839), but what was undoubtedly meant was that it was voidable without regard to fraud.

²⁹ See § 2333, *supra*.

³⁰ See *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 33 Am. St. Rep. 315, 30 N. E. 667; *Rossing v. State Bank of Bode*, — Iowa —, 165 N. W.

254; *Goodin v. Cincinnati & W. Canal Co.*, 18 Ohio St. 169, 98 Am. Dec. 95; *Wilson v. Proprietors of Central Bridge*, 9 R. I. 590; *Reilly v. Oglebay*, 25 W. Va. 36.

A contract between a corporation and one of its stockholders, entered into through directors to whom such stockholder has assigned part of his stock in nominal amounts in order to make them eligible as directors, is, in effect, a contract by the stockholder with himself, and, if designed to produce a profit for the stockholder, is a fraud on the corporation. *Jones v. Green*, 129 Mich. 203, 95 Am. St. Rep. 433, 88 N. W. 1047.

³¹ *North-West Transp. Co. v. Beat-*

actual fraud. If the owners of a majority of the stock of a corporation take advantage of their position and of their influence over the directors or other officers, to obtain an inequitable contract with or conveyance or lease from the corporation, they perpetrate a fraud upon the minority, and the contract, lease or conveyance will be set aside in equity at the suit of dissenting stockholders.³² For instance, the majority, where unable to obtain a renewal of a lease, cannot, after purchasing stock control of the lessor corporation, obtain a lease at a fixed royalty unfair to the minority stockholders.³³ Moreover, a person who, although not an officer or agent of a corporation, by his position as a large stockholder, exercised a controlling influence on the company, must show that transactions between the company and himself, by which he has profited, were fair.³⁴ However, there is no presumption of fraud in a contract between a corporation and a majority stockholder, merely because of the relationship of the parties.³⁵

While a majority may lawfully contract with their corporation, yet such a contract "will be scrutinized with much greater care than if made with a third party,"³⁶ and "unless it appears that it was made honestly and for an adequate consideration a court of equity

ty, L. R. 12 App. Cas. 589, and see § 4030, *supra*.

32 United States. *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299; *Earle v. Seattle, L. S. & E. Ry. Co.*, 56 Fed. 909; *Davis v. Memphis City Ry. Co.*, 22 Fed. 883; *Meeker v. Winthrop Iron Co.*, 17 Fed. 48; *Sellers v. Phoenix Iron Co.*, 13 Fed. 20.

Alabama. *George v. Central Railroad & Banking Co.*, 101 Ala. 607, 14 So. 752.

Illinois. *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 33 Am. St. Rep. 315, 30 N. E. 667.

New Hampshire. *Pearson v. Concord R. Corporation*, 62 N. H. 537, 13 Am. St. Rep. 590.

New Jersey. *Cook v. Anderson Food Co.*, 69 N. J. Eq. 660, 61 Atl. 449.

New York. *Currier v. New York, W. S. & B. R. Co.*, 35 Hun 355.

Pennsylvania. *Russell v. Rock Run Fuel-Gas Co.*, 184 Pa. St. 102, 39 Atl. 21.

33 Meeker v. Winthrop Iron Co., 17 Fed. 48.

34 Russell v. Rock Run Fuel-Gas Co., 184 Pa. St. 102, 39 Atl. 21.

The burden of proving that the amount received for the property was its full value is on the majority stockholders where they transfer all the corporate property to a new company in which they become stockholders and the owners of a controlling interest, where the transfer is attacked by minority stockholders who are frozen out and the majority set up the defense that the consideration was adequate. *Stebbins v. Michigan Wheelbarrow & Truck Co.*, 212 Fed. 19, *rev'g* on other grounds 191 Fed. 238.

35 Rothchild v. Memphis & C. R. Co., 113 Fed. 476, applying rule to purchase by majority stockholder of all the corporate property.

36 Mumford v. Ecuador Development Co., 111 Fed. 639.

will interpose to prevent such contract from being used oppressively and in violation of the rights of the minority. It matters not in what form these rights are invaded; it is the business of equity to penetrate through subterfuges and discover the actual transaction stripped of its disguises."³⁷ In other words, transactions between a majority stockholder and the corporation, while not void, "will be viewed by the courts with jealousy and set aside on slight grounds."³⁸ In another case, it was said that a stockholder, contracting with his corporation, "is properly held to a larger measure of candor and good faith than if he were not a stockholder."³⁹

A sale of the corporate property to majority stockholders for a wholly inadequate consideration is voidable at the suit of minority stockholders,⁴⁰ whether the sale be directly to themselves or to a corporation organized by them or to another corporation in which they are stockholders.⁴¹ So it is a fraud for a majority stockholder to sell all the property of the corporation to himself, although for its fair value, where he knows that the corporation can obtain a much larger sum for the property.⁴² Such a sale, although fraudulent, is voidable and not void.⁴³ So it is a fraud for majority stockholders to authorize the purchase of their stock, or the stock of certain stockholders, by a transfer of nearly all of the corporate assets, since thereby favoring a part of the stockholders.⁴⁴ The fraud on the part of majority stockholders may also take the form of voting themselves, as officers or otherwise, exorbitant or unreasonable salaries.⁴⁵

³⁷ *Mumford v. Ecuador Development Co.*, 111 Fed. 639.

³⁸ *Rothchild v. Memphis & C. R. Co.*, 113 Fed. 476, 481.

³⁹ *Twin-Lick Oil Co. of West Virginia v. Marbury*, 91 U. S. 587, 590, 23 L. Ed. 328; *Atwater v. American Exch. Nat. Bank of Chicago*, 152 Ill. 605, 615, 38 N. E. 1017, rev'g 40 Ill. App. 501.

⁴⁰ *Jones v. Missouri-Edison Elec. Co.*, 144 Fed. 765; *Mumford v. Ecuador Development Co.*, 111 Fed. 639; *Andrews v. Sumter Commercial & Real Estate Co.*, 87 S. C. 301, 69 S. E. 604, holding that minority may enjoin such a transfer. See also *Wilson v. Proprietors of Central Bridge*, 9 R. I. 590, 600.

The majority stockholders, on dissolving a corporation, cannot sell the

corporate property to themselves at an unfair appraisal. *Hayden v. Official Hotel Red-Book & Directory Co.*, 42 Fed. 875; *Ervin v. Oregon Ry. & Nav. Co.*, 20 Fed. 577.

⁴¹ *Hinds v. Fishkill & M. Equitable Gas Co.*, 96 N. Y. App. Div. 14, 88 N. Y. Supp. 954.

⁴² *Wheeler v. Abilene Nat. Bank Bldg. Co.*, 159 Fed. 391, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917.

⁴³ *Wheeler v. Abilene Nat. Bank Bldg. Co.*, 159 Fed. 391, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917.

⁴⁴ *Lowe v. Pioneer Threshing Co.*, 70 Fed. 646.

⁴⁵ *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393; *Hampton v. Buchanan*, 51 Wash. 155, 98 Pac. 374.

If the majority stockholders, as directors, vote themselves salaries, the

So the majority have no right, against the minority, to pay gratuities to one of their number.⁴⁶

On the other hand, it is not fraudulent for a majority of the stockholders to purchase property needed by the corporation, at a time when it had no money to make the purchase, and thereafter, on fully disclosing all the facts, to sell it to the corporation at a large profit although at its fair value.⁴⁷ So it is not a fraud for a stockholder to vote in favor of a contract between the corporation and himself or a firm or company in which he is financially interested; and this is true although the stockholder or stockholders contracting with the corporation, and voting as stockholders in favor of such contract, own a majority of the stock, unless such action is "so detrimental to the interests of the corporation itself, as to lead to the necessary inference that the interests of the majority of the stockholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or fraudulent destruction of the rights of such minority."⁴⁸ If a stockholder sells property owned by him to the company, there is no fraud, in any event, because he obtains a fair profit in the transaction, where the price is not in excess of "the fair value of the property to the company considering its proposed use by it, and the general purpose for which the company is organized."⁴⁹

§ 4036. — Operation and effect. Where a stockholder makes a contract with his corporation, such contracts must be construed and

reasonableness of such salaries will be inquired into on the application of minority stockholders. *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393. See generally § 2755, *supra*.

So relief may be granted where the chief stockholder of a corporation, who is also president, induces the directors, who are under his influence and control, to vote him a large salary. *Davis v. Memphis City Ry. Co.*, 22 Fed. 883. See also *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218.

So there is fraud where a majority of the stock is held by one family, and they cause the profits to be voted away in salaries to themselves. *Sellers v. Phoenix Iron Co.*, 13 Fed. 20.

It does not lie within the power of a majority stockholder to establish for himself a salary which constitutes a virtual appropriation of the corporate assets. *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254.

⁴⁶ *G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 125 Ark. 65, 187 S. W. 1068.

⁴⁷ *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, Ann. Cas. 1912 C 859, 112 Pac. 647.

⁴⁸ *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201, and see § 3997, *supra*.

⁴⁹ *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 103, 9 L. R. A. 527, 25 N. E. 201.

carried into effect in the same manner as contracts between other parties; and the votes and acts of the corporation can have no effect to deprive the stockholder, of rights which he claims, not as a stockholder, but as a contractor with the corporation.⁵⁰ A contract between a corporation and a stockholder, under which he agrees to serve as an officer and assign to the company all his future inventions, is not terminated by his voluntary resignation as such officer.⁵¹

§ 4037. Dealings between corporations where one owns majority of stock of another. If a corporation owns a majority of stock of another corporation, and actually controls it by the election of a majority of the board of directors, there is no question but that the controlling corporation stands in the position of a trustee.⁵² Under some authorities, it would undoubtedly be held that any dealings between the two corporations are voidable because in effect it is a case of the same parties on both sides of the contract,⁵³ but ordinarily the view taken is that contracts between the two corporations are valid if there is no bad faith, oppression or fraud, but that such contracts will be closely scrutinized to see that they are fair, and are subject to attack by minority stockholders if unfair to them.⁵⁴

§ 4038. Dealings between corporation and another company controlled by majority stockholders of first company. What has been said about close scrutiny of contracts between majority stockholders and the corporation⁵⁵ applies with particular force to contracts between majority stockholders, as representing the corporation on one side, and on the other side another corporation which they control or are largely interested in.⁵⁶ The most usual illustration is a sale of all the corporate property effected by the majority stockholders to a corporation in which they are large stockholders⁵⁷ Now such a

⁵⁰ *Revere v. Boston Copper Co.*, 15 Pick. (Mass.) 351, 363.

⁵¹ *Bates v. Bates Mach. Co.*, 120 Ill. App. 563.

⁵² See § 3973, *supra*.

⁵³ See § 4034, *supra*.

⁵⁴ *Farmers' Loan & Trust Co. v. New York & N. R. Co.*, 150 N. Y. 410, 34 L. R. A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043, and see § 4035, *supra*.

⁵⁵ See § 4030, *supra*.

⁵⁶ If two corporations are controlled by the same stockholders, they may

nevertheless deal with each other; but such transactions will be closely scrutinized where attacked by minority stockholders who claim fraud on the part of the majority and controlling stockholders. *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

Leases, see § 4032, *supra*.

⁵⁷ The governing rule is that majority stockholders, if they authorize a transfer of corporate property to themselves or to another corporation in which they are interested, will not be

contract, unless it be deemed voidable merely because the majority stockholders represent both sides to the contract,⁵⁸ is not presumptively fraudulent but is valid unless it is unfair to the minority.⁵⁹ However, when attacked by minority stockholders, the courts are diligent to protect them against any fraud or unfairness whereby one company is benefited at the expense of the other; and the burden of proving such contracts fair is on the majority stockholders, at least where it is sought by minority stockholders to enjoin the completion of the contract.⁶⁰

§ 4039. Right of stockholder, as agent of third person, to sell to corporation. A sale by an agent to a corporation in which he is a stockholder, without disclosing to his principal the fact that he is a stockholder and receiving the consent of his principal to such sale,

permitted to hold the property or will be held liable for the breach of trust, provided the transfer is inequitable or for less than the real value, on the theory that the majority stockholders are trustees and the minority stockholders are the cestuis que trustent, and trustees will not be permitted, to the detriment of their cestuis que trustent, to purchase and hold the trust property. *Stebbins v. Michigan Wheelbarrow & Truck Co.*, 212 Fed. 19, rev'g on other grounds 191 Fed. 238.

Where majority stockholders authorize and effect a transfer of all the corporate property to a new corporation in which they become interested, as stockholders, for a sum less than the full value of the property, without giving any interest in the new company to the minority stockholders, the latter may recover their proportionate share of the value of the corporate property in excess of the value at which it was taken over, from the new company and the majority stockholders of the old company who became stockholders in the new company. *Stebbins v. Michigan Wheelbarrow & Truck Co.*, 212 Fed. 19, rev'g 191 Fed. 238, but holding not liable stockholders who voted with the ma-

jority but did not become stockholders in the new company.

A sale of corporate property by the majority to himself or themselves, directly or indirectly, is voidable although the fair market value is paid therefor, where a higher price could have been obtained from another. *Wheeler v. Abilene Nat. Bank Bldg. Co.*, 159 Fed. 391, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917.

⁵⁸ See § 4034, *supra*.

⁵⁹ Corporations controlled by the same stockholders may contract with each other and such contracts will not be interfered with by the courts unless the contracts are dishonest or fraudulently oppressive to the minority. *Smith v. Chase & Baker Piano Mfg. Co.*, 197 Fed. 466.

Majority stockholders may sell the corporate assets to another corporation in which they are interested where the price paid is fair, the sale was necessary because of financial embarrassment, and the minority stockholders refused to join in a reasonable plan to save the investment and avoid a sale. *Marks v. Merrill Paper Co.*, 203 Fed. 16, 188 Fed. 850.

⁶⁰ *Geddes v. Anaconda Copper Min. Co.*, 197 Fed. 860.

is valid against the principal unless the latter shows that some prejudice or injury resulted to him from the fact that his agent was thus related to the purchasing corporation.⁶¹

§ 4040. Recovery on implied contract—In general. In a proper case, an implied contract to pay a stockholder arises in his favor against the corporation. If a contract with a stockholder is declared void by the courts, because in effect a contract with himself, it seems that he should be reimbursed for all money expended by him in good faith and pursuant to the contract.⁶²

§ 4041. — For personal services. It is well settled that when a stockholder, who is not a director or other officer, renders a service to the corporation by proper request or authority, a contract is implied to pay the reasonable value of his services, unless the circumstances negative such implication, as by showing that the services were to be gratuitous.⁶³ So far as the relationship of a stockholder is concerned, its only importance is evidentiary upon the question whether any implied promise ever existed to pay for the services.⁶⁴

Implied contracts to pay for services of corporate officers have been considered in a preceding volume.⁶⁵

§ 4042. Individual profits. If stockholders may deal with the corporation, it follows that their profits made in such deals belong to them personally and the other stockholders have no interest therein. Majority stockholders may deal with the corporation, where they act in good faith and after a full disclosure, and cannot be compelled to account to the other stockholders for profits made in the deal.⁶⁶ Thus, a sale by majority stockholders to the corporation is valid, where the price is a fair one, notwithstanding the vendors make a large profit from the sale.⁶⁷

On the other hand, a stockholder who joins with the others in selling all the corporate property, cannot, by a secret agreement,

⁶¹ Wann v. Scullin, 210 Mo. 429, 109 S. W. 688.

⁶² Jones v. Green, 129 Mich. 203, 95 Am. St. Rep. 433, 88 N. W. 1047.

⁶³ Spence's Adm'r v. Whitaker, 3 Port. (Ala.) 297; Barker v. Cairo & F. R. Co., 3 Thomp. & C. (N. Y.) 328; Goodin v. Dixie-Portland Cement Co., 79 W. Va. 83, 90 S. E. 544; Hjorth Oil Co. v. Curtis, — Wyo. —, 163 Pac. 362. See also Tell City Furniture

Co. v. Nees, 63 Ind. 245. Compare Sidway v. Missouri Land & Live Stock Co., 187 Mo. 649, 86 S. W. 150.

⁶⁴ Allen v. Central Counties Land Co., 21 Cal. App. 163, 131 Pac. 78.

⁶⁵ See §§ 2738-2742, supra.

⁶⁶ Barr v. Pittsburgh Plate-Glass Co., 57 Fed. 86.

⁶⁷ See Baker v. Seattle-Tacoma Power Co., 61 Wash. 578, Ann. Cas. 1912 C 859, 112 Pac. 647.

retain for his own benefit an additional sum but must account therefor to the other stockholders.⁶⁸ Moreover, if a majority stockholder acts as a trustee in dealing with the corporate property, profits made by him belong to the corporation the same as if he was an officer acting as such.⁶⁹

§ 4043. Knowledge of corporate affairs as imputable to stockholders dealing with corporation. Stockholders or members of a corporation are presumed to know the provisions of the by-laws of the corporation.⁷⁰ However, as said by Judge Cooley, "a corporator is not charged with constructive notice of corporate acts, and may deal with the corporation as a stranger may, where his personal connection with corporate action is not such as to notify him of reasons to the contrary."⁷¹ In other words a stockholder, because of his status, ordinarily is not chargeable, as a matter of law, with knowledge of the internal affairs of the corporation,⁷² especially if he holds his stock as a mere pledgee.⁷³ A stockholder is not bound to the strict rule as to knowledge of the affairs of a corporation that applies to directors and officers.⁷⁴

§ 4044. Purchase of corporate property at forced sale or of claims against the corporation. That a stockholder, regardless of the amount of stock he holds, may purchase adverse claims against the corporation and enforce them, where there is no fraud, is undoubted,⁷⁵ although a different question arises where the stockholder is also an officer of the corporation.⁷⁶ So it seems that a stockholder may pur-

⁶⁸ *Synnott v. Cummings*, 116 Fed. 40.

⁶⁹ See §§ 2303-2324, *supra*.

⁷⁰ See § 500, *supra*.

⁷¹ *Rice v. Peninsular Club*, 52 Mich. 87, 17 N. W. 87.

⁷² *Tarbox v. Gorman*, 31 Minn. 62, 16 N. W. 466; *Pearsall v. Western U. Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662, 26 N. E. 534, *aff'g* 44 Hun 532; *Union Canal Co. v. Loyd*, 4 Watts & S. (Pa.) 393.

⁷³ *Baker v. Woolston*, 27 Kan. 185.

⁷⁴ *Appeal of Bldg. Ass'n*, 23 Pitts. Leg. J. O. S. (Pa.) 324.

⁷⁵ See *Ellis v. Chicago & N. W. Ry. Co.*, — Wis. —, 167 N. W. 1048.

A stockholder may purchase bonds of his corporation. *Farmers' Loan &*

Trust Co. v. New York & N. R. Co., 78 Hun (N. Y.) 213, 28 N. Y. Supp. 933, and see § 1003, *supra*.

However, majority stockholders cannot obtain the benefit of outstanding notes of the corporation purchased by them at a discount where the offer to sell was originally made to the corporation which was able to make the purchase, but was changed to a personal offer at the request of the purchasing stockholders. *Young v. Columbia Land & Investment Co.*, 53 Ore. 438, 133 Am. St. Rep. 844, 101 Pac. 212, 99 Pac. 936.

Rights in case of insolvency, see chapter on Insolvency.

⁷⁶ See §§ 2288-2290, *supra*.

chase corporate property at a judicial, execution or tax sale,⁷⁷ at least where he is not a majority stockholder actually in control of the corporation,⁷⁸ although there is some conflict of opinion where the stockholder is also an officer of the corporation.⁷⁹ Thus, a stockholder, even though he owns a majority of the stock, may purchase at a foreclosure sale under a mortgage of corporate property.⁸⁰

§ 4045. Stockholders as creditors—Right to become creditors. A stockholder may become a creditor of the corporation,⁸¹ and when he does become a creditor he stands on the same footing as other creditors.

§ 4046. — Rights as creditor. A stockholder who becomes a creditor of the corporation has the same rights as any other creditor.⁸² He may take security⁸³ such as a mortgage,⁸⁴ or attach the corporate property,⁸⁵ or take any other measure that another creditor could.⁸⁶ He may take an absolute conveyance of corporate land in payment of a debt owing by the company, at least where the company is solvent.⁸⁷

⁷⁷ A stockholder may purchase the property of the corporation at a sheriff's sale, and, in the absence of fraud, cannot be called upon to account to the other stockholders, although he may have purchased at a low price. *Mickles v. Rochester City Bank*, 11 Paige (N. Y.) 118, 42 Am. Dec. 103.

A stockholder may purchase the corporate property from one who had purchased it at a tax sale. See *Meyer v. Wright*, 24 Colo. App. 53, 131 Pac. 787.

⁷⁸ "If he [the majority stockholder] is not in control of the property, and does not mismanage it to the prejudice of the minority stockholders, he may purchase, if there is no actual fraud, the property of the corporation at a judicial sale for his own benefit, and he is not accountable to any other stockholder for the property so purchased." *Rothchild v. Memphis & C. R. Co.*, 113 Fed. 476.

⁷⁹ See §§ 2291-2302, *supra*.

⁸⁰ See § 1396, *supra*.

⁸¹ *Schrader v. Heinzelman Bros.*, 51 Ill. App. 31, *aff'd* 150 Ill. 227, 37 N.

E. 235; *S. M. Jones Co. v. Home Oil & Development Co.*, 124 La. 148, 49 So. 1009.

⁸² *La Salle St. Trust & Savings Bank of Chicago v. Topeka Milling Co.*, 101 Kan. 446, 167 Pac. 1036; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Blalock v. Kernersville Mfg. Co.*, 110 N. C. 99, 14 S. E. 501; *Huston's Appeal*, 127 Pa. St. 620, 18 Atl. 419.

⁸³ *Sargent v. Webster*, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

Application of rule to corporate officers, see § 2326, *supra*.

⁸⁴ A mortgage by a solvent corporation to one of its stockholders to secure a loan made by him is valid. *Hanchett v. Blair*, 100 Fed. 817; *Villere v. New Orleans Pure Milk Co.*, 122 La. 717, 48 So. 162.

⁸⁵ *Peirce v. Partridge*, 3 Metc. (Mass.) 44.

⁸⁶ *Sargent v. Webster*, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

⁸⁷ *Swentzel v. Franklin Inv. Co.*, 168 Mo. 272, 67 S. W. 596.

So where a creditor has the right to be subrogated to the rights of a corporation to claim unpaid balances due on shares, it is immaterial that he is also a stockholder.⁸⁸

§ 4047. — Preferences after insolvency. This matter is treated of in another chapter.⁸⁹

§ 4048. Dealings with corporate property. That a stockholder, even if he owns all the stock of a corporation, cannot deal with the corporate property as if it belonged to him, is the holding of most of the courts.⁹⁰ Corporate property is owned by the corporation and not by the stockholders,⁹¹ and cannot be transferred by the owner of all or a large majority of the stock.⁹²

§ 4049. Set-off by stockholders. When a stockholder is indebted to the corporation, otherwise than for his stock, and the corporation is indebted to him, he has the same right as any other debtor to set off the debt due him on the insolvency of the corporation.⁹³ But, by the great weight of authority, this does not apply to indebtedness of stockholders on account of their stock,⁹⁴ nor, in some jurisdictions, to his statutory liability.⁹⁵

Claims of stockholders cannot be set off in an action against the corporation.⁹⁶

XXXI. ACTIONS BY STOCKHOLDERS TO ENFORCE INDIVIDUAL RIGHTS, OR REDRESS OR PREVENT INDIVIDUAL INJURIES

§ 4050. In general. Since a corporation is a legal entity distinct from its members, the rule that a person cannot sue himself does not apply to an action between a corporation and its members. It is well settled, therefore, that a member or stockholder of a corporation may sue the corporation either at law or in equity.⁹⁷ For the same reason

⁸⁸ *Richardson v. Chicago Packing & Provision Co.*, 131 Cal. xviii, 63 Pac. 74.

⁸⁹ See chapter on Insolvency.

⁹⁰ See §§ 21 and 1728, *supra*.

⁹¹ See § 25, *supra*.

⁹² See § 26, *supra*.

⁹³ Chapter on Insolvency, *infra*.

⁹⁴ See § 661, *supra*, and chapter on Insolvency, *infra*.

⁹⁵ See subd. xxxiv, *infra*, this chapter.

⁹⁶ See § 35, *supra*.

⁹⁷ **United States.** *Samuel v. Holladay*, Woolw. 400, Fed. Cas. No. 12,288; *Culbertson v. Wabash Nav. Co.*, 4 McLean 544, Fed. Cas. No. 3,464.

California. *Barnstead v. Empire Min. Co.*, 5 Cal. 299.

Colorado. *Lamar Land & Canal Co. v. Belknap Sav. Bank*, 28 Colo. 344, 64 Pac. 210.

Iowa. See *Kennedy v. Citizens'*

a stockholder may sue the officers or agents of the corporation to enjoin or redress any injury to himself in his individual capacity.⁹⁸ A stockholder, however, has no right of action against the corporation because of a depreciation in the value of his stock in common with the rest of the stock, but must show some injury and damage peculiar to himself, as otherwise the right of action is in the corporation.⁹⁹ Conversely, individual rights of stockholders and injuries against stockholders individually cannot be enforced or redressed in an action by the corporation, but the action must be by the stockholders individually. Thus, a corporation cannot maintain a suit in equity to enjoin the collection of an illegal tax upon the shares of its stock in the hands of individual stockholders, except when the corporation is required by statute to pay the tax.¹

If a stockholder or other person has in his hands money accruing from a sale of corporate property, another stockholder cannot recover any part of it in an action for money had and received, without the consent of the corporation, for it belongs to the corporation and not to the stockholders individually. But if the corporation has directed or consented that the money shall be distributed among the stockholders, it then belongs to the stockholders individually, and any stockholder may maintain such an action to recover his proportion.² A stockholder cannot recover statutory damages given by the Sher-

Nat. Bank, 128 Iowa 561, 104 N. W. 1021.

Massachusetts. Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; Peirce v. Partridge, 3 Mete. 44.

New Jersey. Campbell v. Perth Amboy Mut. Loan, Homestead & Building Ass'n, 67 N. J. L. 71, 50 Atl. 444.

New York. Leonard v. Spencer, 108 N. Y. 338, 15 N. E. 397; Cary v. Schoharie Valley Mach. Co., 2 Hun 110.

South Carolina. Waring v. Catawba Co., 2 Bay 109.

Texas. Henderson v. San Antonio & M. Gulf R. Co., 17 Tex. 560, 67 Am. Dec. 675.

Vermont. Rogers v. Danby Universalist Society, 19 Vt. 187; Sawyer v. Royalton M. E. Society, 18 Vt. 405.

Wisconsin. Burke v. Sidra Bay Co., 116 Wis. 137, 92 N. W. 568; Wausau Boom Co. v. Plumer, 35 Wis. 274,

Wyoming. Wilson v. First Nat. Bank of Cheyenne, 1 Wyo. 108.

As to the juristic person of a corporation and its internal relation to the members, see Chap. 1, supra.

⁹⁸ As to what are individual causes of action and what are corporate, see next succeeding section.

⁹⁹ Oliphant v. Woodburn Coal & Mining Co., 63 Iowa 332, 19 N. W. 212; Dudley v. Armenia Ins. Co., 115 N. Y. App. Div. 380, 100 N. Y. Supp. 818; Niles v. New York Cent. & H. River R. Co., 35 N. Y. Misc. 69, 71 N. Y. Supp. 271. And see next succeeding section and notes thereunder.

¹ Waseca County Bank v. McKenna, 32 Minn. 468, 21 N. W. 556. See also the chapter on Taxation, infra.

² Drinkwater v. Portland Marine Ry. Co., 18 Me. 35; Hodsdon v. Copeland, 16 Me. 314.

man Anti-trust Act where the injury is to his corporation³ though he may sue if the violation is specially injurious to him.⁴ Stockholders as such cannot sue the corporation on rights not incident to their stock but to some collateral contract,⁵ but where membership or stock carries a contract right as an incident thereof, the stockholder or member may sue to protect his contract rights.⁶

The fact that the stock was acquired after the acts were done, which produced the injury, or that they were assented to by all of the stockholders at the time, is not necessarily a bar.⁷ If the validity

³ Injury under Sherman Anti-trust Act alleged to lie in controlling plaintiff's corporation for the interest of another and suppressing competition, is to the corporation and not to plaintiff as an individual. *Ames v. American Telephone & Telegraph Co.*, 166 Fed. 820. And see § 3401, supra.

⁴ It seems that a stockholder may sue for himself where a combination offensive to the Sherman Act injures him. *Bigelow v. Calumet & H. Min. Co.*, 155 Fed. 869; and see *Burrows v. Interborough Metropolitan Co.*, 156 Fed. 389.

In such a case an officer and stockholder has a special interest warranting an injunction against violation of the law. *Bigelow v. Calumet & H. Min. Co.*, 155 Fed. 869.

⁵ The contract rights of stockholders to telephone service in their corporation rather than their stockholders' rights are affected by changing the plan so that they are assessed for service on transferring their individual lines to the corporation instead of keeping up their own lines and getting free service. *McCallister v. Shannondale Co-operative Tel. Co.*, 47 Ind. App. 517, 94 N. E. 910.

⁶ An equitable action for indemnity will lie where plaintiff, stockholder in a savings and loan association, has no legal remedy because of the illegal acts of defendant directors by which a deceptive prospectus was issued and the assets sold on long time so that the corporation had no

funds and so that it was problematical if or when plaintiff would realize anything on his shares. Complaint held sufficient to state such a cause of action. *Squiers v. Thompson*, 73 N. Y. App. Div. 552, 76 N. Y. Supp. 734, aff'd 172 N. Y. 652, 65 N. E. 1122.

Equity has jurisdiction under a bill wherein complainant, a member and contract holder, alleges conspiracy to transact an unlawful business in violation of the corporate charter; that the corporation induced complainant to pay money to it by fraudulent representations; that when complainant found out the fraudulent conduct of the corporation and that its contract was ultra vires he refused to longer make payments as he had agreed; that the corporation is insolvent; and the prayer of the bill is one for discovery and a decree for the amount complainant has paid in. *Tontine diamond selling scheme. Bale v. Michigan Tontine Inv. Co.*, 132 Mich. 479, 93 N. W. 1071. Such suits, as the two foregoing, are more nearly analogous to creditors' suits or to suits by third persons to enforce contract rights. It is more accurate to distinguish those remedial rights which inhere in the holding of stock from those which arise from contracts which are incidental thereto or to membership.

⁷ In *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838, the court indicates that a stockholder may

of plaintiff's stock is disputed, he may nevertheless have protection by injunction pendente lite until its validity is determined.⁸

The nature and grounds of individual actions are as diverse and manifold as the rights and duties which subsist between the stockholder on the one hand, and the corporation or its officers and agents on the other hand. Most of these rights and duties, in fact all of the more frequently asserted ones, are distinctively treated in other parts of this work, and the remedies pertaining to them are treated in connection with them. It will suffice here to refer the reader to those pages and places. There must, of course, be an actionable injury damnatory of plaintiff's rights.⁹ Thus, a stockholder may sue the corporation or its officers to recover a dividend after it has been declared, for he then has a right to the money in his individual capacity.¹⁰ A stockholder or member of a corporation may also proceed against a corporation, or its officers in a proper case, by an action at law for damages, or by a suit in equity, or by mandamus, according to the circumstances, where he is wrongfully refused a certificate of stock;¹¹ where he is wrongfully expelled and denied the rights of membership;¹² where his shares are wrongfully forfeited or sold for nonpayment of assessments;¹³ where the corporation or

sue the corporation in his own behalf for injuries he has personally received where stock has been issued, prior to the time he became a member, by consent of all of the then stockholders.

⁸ Denial of right to vote on proposed bond issue on ground that plaintiff's stock taken two for one in payment of loan was fictitious and illegal. Injunction pendente lite allowed. *Granite Brick Co. v. Titus*, 203 Fed. 659.

⁹ He cannot complain of a modification of his status if it does not prejudice him and really increases the likelihood of his receiving dividends. *Willcox v. Trenton Potteries Co.*, 64 N. J. Eq. 173, 53 Atl. 474.

A stockholder will not be heard to complain of acts of directors which have not injured him nor the corporation. *Rosenbaum v. Rice*, 86 N. Y. App. Div. 617, 83 N. Y. Supp. 494.

¹⁰ See § 3687, *supra*.

Suit may be maintained by a stockholder against trustees who are unlawfully withholding dividends set apart to him. *Janeway v. Burn*, 91 N. Y. App. Div. 165, 86 N. Y. Supp. 628.

¹¹ See this chapter, subd. II, Certificates of Stock.

¹² See this chapter, subd. XXVIII, Membership in Corporation.

Courts will not interfere in internal policy and discipline of a membership corporation or association unless legal right of members has been invaded, or until internal remedies have been sought. *Local Union No. 1006 v. Brotherhood of Painters, Decorators & Paperhangers of America*, 149 N. Y. Supp. 1025.

¹³ See Chap. 17, *supra*, as to assessments or calls on subscriptions.

See this chapter, subd. XXXV, *infra*, as to assessments after full payment.

Upon a levy of an unauthorized assessment coupled with threat to sell

its officers wrongfully refuse to recognize a valid transfer of stock;¹⁴ where they recognize an unauthorized or forged transfer and issue a certificate, thereby depriving him of his stock;¹⁵ where they wrongfully refuse to allow him to inspect the books and papers of the corporation,¹⁶ or to vote at corporate meetings;¹⁷ where he was induced to purchase his stock by fraud for which the corporation or its officers are responsible;¹⁸ where there is a fraudulent and unequal disposition of unissued stock in violation of his rights to a proportionate share;¹⁹ or where he is wrongfully denied the right to subscribe for or purchase a proportionate share of increased stock²⁰ or is deprived of the advantage of a majority control.²¹ So, also, for such wrongs as the mutilation of his certificate or the circulation of false reports casting doubt upon the validity of existing shares of stock, the stockholder may maintain action.²² A stockholder cannot sue to have declared null and void certain by-laws of the corporation, on the ground that, through their influence on persons sustaining business relations with him, they may cause him trouble and loss.²³ He may sue the corporation for money advanced to its use, where the law implies a promise to repay.²⁴ A stockholder may sue the corpora-

stock as delinquent, action may be maintained against directors by the stockholders. *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248.

¹⁴ See § 3817 et seq., supra.

¹⁵ See this chapter, subd. xxiv, supra.

¹⁶ See Chap. 46, supra.

¹⁷ See this chapter, 'subd. xxii, supra, and see Chap. 40, supra, Meetings and Elections.

¹⁸ See Chap. 17, supra, as to fraud in subscription.

See Chap. 42, as to general torts of directors and officers.

¹⁹ *Reese v. Bank of Montgomery County*, 31 Pa. St. 78, 72 Am. Dec. 726; and see § 3462, supra.

²⁰ *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156; and see § 3462, et seq., supra.

²¹ May individually sue for restoration to control by majority of stock of which he was deprived by a fraudulent increase. *Witherbee v. Bowles*,

201 N. Y. 427, 95 N. E. 27, rev'g 142 N. Y. App. Div. 407, 126 N. Y. Supp. 954.

On the theory that it is a breach of trust, equity will relieve against an issue of treasury stock contrary to the vote of stockholders and the by-laws, the wrongdoers being a controlling majority of officers and the scheme being to oust plaintiff of control. *Trask v. Chase*, 107 Me. 137, 77 Atl. 698.

²² *Wells v. Dane*, 101 Me. 67, 63 Atl. 324.

²³ *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45, 8 L. R. A. 175, 24 N. E. 24.

As to by-laws in general, see Chap. 16, supra.

²⁴ A stockholder who, to prevent loss, advanced money to redeem property from involuntary sale may sue the corporation as for money paid at its request. *Duquesne Gold Min. Co. v. Glaser*, 46 Colo. 186, 103 Pac. 299,

tion to abate a nuisance maintained by it, where he has not co-operated in or encouraged its erection,²⁵ or to recover damages for the maintenance of a nuisance.²⁶ A stockholder cannot sue on a contract made for the corporation by himself in anticipation of forming it,²⁷ though he benefits from it,²⁸ but a promise to the corporation for the benefit of the several stockholders may be sued on by each of them.²⁹ Other stockholders or members can be sued for acts which deprive plaintiff of rights as such,³⁰ and may be enjoined from claiming such conflicting rights pending determination of the suit.³¹ In some of the states statutory remedies are given to the stockholders enabling them to sue directly for injuries that otherwise would be actionable by the corporation alone.³²

Parties, pleading, and all matters of practice and procedural law in individual suits depend very much on the nature and object of the action, and no general statements can be laid down which are not statements of the general law on those distinct topics.³³ Individual

²⁵ *Leonard v. Spencer*, 108 N. Y. 538, 15 N. E. 397.

²⁶ *Burbank v. West Walker River Ditch Co.*, 13 Nev. 431.

²⁷ A contract to buy property and to extend credit to the seller and thereafter by novation to a corporation to be formed inures to the corporation, and a breach of the agreement to extend credit cannot be sued on by the original promisee as a stockholder. *White v. First Nat. Bank of Pittsburgh*, 252 Pa. 205, 97 Atl. 403.

²⁸ Cannot sue on his corporation's cause of action merely because as employee his contract entitles him to share in its proceeds. *Gilman v. German Lithographic Stone Co.*, 152 Ky. 606, 153 S. W. 996.

²⁹ A contract to buy corporate property on considerations, part of which were to pay corporate debts and par value of stock to each holder of it, is a promise for the benefit of the stockholders. *Garrison v. Reed*, 77 N. J. L. 569, 72 Atl. 301; *Fleming v. Reed*, 77 N. J. L. 563, 72 Atl. 299.

³⁰ Such as the right to vote. See Chap. 39, *supra*, Meetings and Elections.

As to exclusion from a church building, see *Barna v. Kirczow*, 71 N. J. Eq. 196, 63 Atl. 611, where, however, the suit was by persons claiming to be trustees against those alleged to be claiming to be such and doing the wrong.

Usually the wrong is by officers and agents of the corporation. See references under preceding notes.

³¹ Persons claiming to be stockholders may be enjoined from acting as such pending proceedings to determine the real stockholders at the instance of certain admitted stockholders. Such suit is within the jurisdiction of a court of equity. *State v. Kennan*, 35 Wash. 52, 76 Pac. 516.

Where a suit was brought against the corporation, and certain stockholders intervened and made motion to dissolve the injunction and the court issued an injunction against such stockholders, jurisdiction over the persons of such stockholders was had by the court. *State v. Kennan*, 35 Wash. 52, 76 Pac. 516.

³² See § 4054, *infra*.

³³ The portions of this work devoted to dividend suits, suits to rescind

causes of action may pertain to more than one stockholder, and one such stockholder may maintain a representative action on behalf of all similarly situated and who will come into the suit with him.³⁴ The stockholder may intervene as an individual under the codes where he has an interest to be protected in the suit,³⁵ but a cross-complaint in intervention by one stockholder in a suit begun by another must be germane to it.³⁶

The complaint or bill must plead an individual injury,³⁷ accom-

subscriptions, to compel exhibition of books, and the like, all discussed in other parts of this treatise should be consulted.

The corporation and the officers may be joined as defendants if both are chargeable. *Mack v. Latta*, 178 N. Y. 525, 67 L. R. A. 126, 71 N. E. 97, rev'g 83 N. Y. App. Div. 242, 82 N. Y. Supp. 130; *Cawthra v. Stewart*, 59 N. Y. Misc. 38, 109 N. Y. Supp. 770.

The fraudulent seller of stock to plaintiff is not a necessary party to an individual action to restrain prosecution of a suit on a note which the seller once held but has since transferred to defendant. *Clark v. Marks*, 111 Me. 218, 88 Atl. 718.

In an action for conspiracy to injure and fraudulently acquire his stock, a corporation which was to purchase, some of the property of plaintiff's corporation and to exchange its stock for his, is not a proper party where the conspiracy is not laid to it. *Caffall v. Bandera Tel. Co.*, — Tex. Civ. App. —, 136 S. W. 105.

Where the relief sought is cancellation and surrender of a fraudulent increase of stock by reason of which plaintiff's control was overcome it is not necessary to join directors or stockholders not involved in the controversy. *Witherbee v. Bowles*, 201 N. Y. 427, 95 N. E. 27, rev'g 142 N. Y. App. Div. 407, 126 N. Y. Supp. 954.

³⁴Joining other stockholders does not make it a derivative action.

Brock v. Poor, 167 N. Y. App. Div. 784, 153 N. Y. Supp. 332.

³⁵May intervene to oppose a compromise which will expose him to liability. *Hosmer v. Darrah*, 85 N. Y. App. Div. 485, 83 N. Y. Supp. 413.

³⁶One stockholder cannot intervene and cross-complain on a cause of action for deceit by defendants in a suit to impress a trust on funds derived from treasury stock and to divide them among shareholders entitled. *Hechelman v. Geyer*, 252 Pa. 123, 97 Atl. 193.

³⁷A complaint by minority against majority holders for injunction against sale of control must plead facts to show an individual injury distinct from that accruing to the corporation and indirectly to all holders. *Delavan v. New York, N. H. & H. R. Co.*, 154 N. Y. App. Div. 8, 139 N. Y. Supp. 17, rev'g 137 N. Y. Supp. 207.

Complaint for relief against fraudulent increase of stock to destroy plaintiff's control, criticized but sustained against demurrer. *Witherbee v. Bowles*, 201 N. Y. 427, 95 N. E. 27, rev'g 142 N. Y. App. Div. 407, 126 N. Y. Supp. 954.

On a bill for individual relief against a suit on the corporation's note, which it is alleged the holder is estopped to assert, the representations raising the estoppel should be pleaded. *Clark v. Marks*, 111 Me. 218, 88 Atl. 718.

If the injury well pleaded is one to the corporation, a general allega-

plished or threatened,³⁸ and a valid claim or right in plaintiff³⁹ and that he is a stockholder.⁴⁰ No offer of repayment is required in a cancellation suit where the money or value came to the corporation and not to plaintiff from the defendant.⁴¹ When the suit is equitable and a long time has elapsed, the bill is demurrable if the delay appears to be laches.⁴²

Neither by state laws⁴³ nor under the federal rules need there be any request to the corporation to sue or any refusal by it to act

tion of injury to plaintiff will not save his complaint from demurrer. *Ames v. American Telephone & Telegraph Co.*, 166 Fed. 820.

Where action is brought by minority stockholders against directors and officers for misappropriation of corporate funds, and the allegations are such that the action will be deemed in behalf of plaintiffs only, an averment that it is brought for others as well as themselves does not impair its sufficiency as an action in behalf of plaintiffs. *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

Dominion, control or appropriation of property should be pleaded from the facts and not as a bare conclusion. *Caffall v. Bandera Tel. Co.*, — Tex. Civ. App. —, 136 S. W. 105.

Consult also the other portions of this work referred to in preceding notes under this section.

As to what are regarded as actions based on individual right and what on corporate rights, see the succeeding section.

³⁸ Until the rights of a stockholder have been denied, right of action against the corporation to compel recognition does not accrue. *Morey v. Fish Bros. Wagon Co.*, 108 Wis. 520, 84 N. W. 862.

The possibility that a stockholder in a national bank will be assessed if any assets are wasted, does not make the action individual rather than derivative where there is no allegation that he was or will be so assessed.

Moss v. Goodhart, 47 Mont. 257, 131 Pac. 1071.

An ineffectual conspiracy to defraud is not actionable. *Caffall v. Bandera Tel. Co.*, — Tex. Civ. App. —, 136 S. W. 105.

³⁹ Action will not lie for breach of an agreement to employ plaintiff as an officer for a term and to divide all profits in a way regardless of stockholders, such agreement being on its face opposed to public policy. *Abbott v. Harbeson Textile Co.*, 162 N. Y. App. Div. 405, 147 N. Y. Supp. 1031.

⁴⁰ A general statement that plaintiff in 1857 "became, ever since has been, and now is a stockholder" of defendants pleads a fact and not a conclusion. *Foss v. People's Gas Light & Coke Co.*, 241 Ill. 238, 89 N. E. 351.

⁴¹ Complainant need not offer to repay on suing to cancel illegal stock, if none of the money came to complainant. Defendant's rights, if any, should be adjusted between him and the corporation on the hearing. *Trask v. Chase*, 107 Me. 137, 77 Atl. 698.

⁴² A bill alleging that "before the commencement of this suit" plaintiff demanded an accounting of defendant corporation, being taken against the pleader shows laches where the stock was acquired 48 years before and there is nothing to rebut the inference of a demand then made. *Foss v. People's Gas Light & Coke Co.*, 241 Ill. 238, 89 N. E. 351.

⁴³ The requirements of demand do

'before he can sue in his own right; those principles have no application to such suits.⁴⁴

Costs and allowances go by the usual rules.⁴⁵

**XXXII. REMEDIES OF STOCKHOLDERS FOR INJURIES TO CORPORATION;
RIGHTS OF ACTION AND PROCEDURE**

§ 4051. In general; corporate and individual injuries distinguished.

In the preceding sections, we have considered the rights of a stockholder or member of a corporation to maintain actions at law and suits in equity against the corporation and its officers or agents to enforce rights which belong to him individually, or to prevent or redress injuries to him individually. We are now to deal with the remedies of stockholders to enforce rights belonging to all the stockholders collectively,—or to the corporation, as distinguished from the individual stockholders,—and to enjoin or redress injuries to the

not apply in cases where a stockholder sues as a creditor. *Jennett v. People's Transp. Co.*, 172 N. C. 35, 89 S. E. 787.

Demand not necessary where suit is an individual one to restrain sale of stock to satisfy illegal assessment and for an accounting for misappropriated funds. *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

If the rule requiring previous demand (to cancel illegal stock) applies at all in an individual suit, it is dispensed with where useless or futile because of defendants' hostility. *Trask v. Chase*, 107 Me. 137, 77 Atl. 698.

In *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048, rev'g 66 Ill. App. 427, it was held that a stockholder injured by it might sue to cancel stock issued to a county for bonds unlawfully issued by the county, without having made a demand on the corporation to sue, as the corporation could not sue to cancel its own stock. This is placed by the court on the ground that a stockholder may

without request sue for relief from ultra vires acts.

⁴⁴ No demand by a stockholder on the officers of the corporation to bring suit against another stockholder is necessary under Equity Rule 94, before suing in his own name, when the right of action is one which the corporation could not enforce in its entirety. *Westerlund v. Black Bear Min. Co.*, 203 Fed. 599; *Barcus v. Gates*, 89 Fed. 783. See also *Briggs v. Traders' Co.*, 145 Fed. 254.

⁴⁵ Costs were allowed but allowance for counsel fees denied in a successful individual action to restrain doing of ultra vires acts. *Alexander v. Atlanta & W. P. R. Co.*, 113 Ga. 193, 54 L. R. A. 305, 38 S. E. 772.

Counsel fees may be allowed out of a trust fund recovered by one stockholder suing for all alike interested, and it is no objection that some of defendants, entitled as stockholders, will thus bear the cost, they not having been sued as stockholders but in another capacity. *Hechelman v. Geyer*, 252 Pa. 123, 97 Atl. 193.

As to costs in derivative suits, see § 4093, *infra*.

corporation. This distinction between the individual and the collective rights of stockholders is of the greatest importance.

As was shown in a former chapter, a corporation, unlike a mere partnership, is an artificial person or legal entity distinct from its stockholders.⁴⁶ As a distinct legal entity, it takes and holds the title to its property, manages its business through its agents, makes its contracts and conveys its property. If it makes a contract, the rights accruing under the contract are the rights of the corporation and not the rights of the stockholders individually. Even when all the stock of a corporation is owned by one person, the rights under a contract by the corporation are its rights and not the rights of the individual. Except as hereafter explained, such rights, therefore, must be enforced, not by the stockholders individually, but by the corporation.⁴⁷ While an injury to the corporation resulting from

⁴⁶ See Chap. 1, *supra*.

⁴⁷ See §§ 4061-4070, *infra*.

The corporation must sue on contracts accruing to it. *Farrer v. Pillsbury*, 217 Mass. 330, 104 N. E. 737.

Action to enforce a restrictive trade agreement in a contract for sale of stock, inures to the corporation benefited by such restriction and not to the purchaser of the stock, the restriction being severable from the sale. *Olson v. Ostby*, 178 Ill. App. 165.

Even though he made the contract himself, a stockholder cannot sue on it if the corporation was intended to be the party to it. *White v. First Nat. Bank of Pittsburgh*, 252 Pa. 205, 97 Atl. 403. But he can sue on one made by it for his benefit. See *Garrison v. Reed*, 77 N. J. L. 569, 72 Atl. 301; *Fleming v. Reed*, 77 N. J. L. 563, 72 Atl. 299.

Breach of agreement to form a water corporation and contribute to cost of making and repairing its ditches accrues to it; hence stockholders who made repairs cannot enforce contribution under the contract. *Deschamps v. Loiselle*, 50 Mont. 565, 148 Pac. 335.

Where plaintiff's rights arise out of a contract of employment with

his corporation and not from his stock ownership, he must look to it, and he cannot sue for fraud in a contract between his corporation and another to which he was not a party though he was to share therein. Neither can he sue as a stockholder if his corporation has not refused to do so. *Gilman v. German Lithographic Stone Co.*, 152 Ky. 606, 153 S. W. 996.

The sole or controlling stockholder can only sue in the corporate right to redress corporate injuries. *Van Cleave v. Demorest*, 174 N. Y. App. Div. 928, 160 N. Y. Supp. 923.

A sole stockholder may not sue either in his own or in the corporate name for a breach of contract accruing to the corporation. *Mioton v. Del Corral*, 132 La. 730, 61 So. 771.

The sole, or substantially sole, stockholder, even when granted plenary powers by resolution, is not the sole owner of the corporation. *Buffalo Electro-Plating Co. v. Day*, 151 N. Y. App. Div. 237, 135 N. Y. Supp. 1054.

The sale of all the stock of a corporation by one who owns it is not a sale of all the property and franchises of the corporation by itself. *Eppley v. Kennedy*, 131 N. Y. App. Div. 1, 115 N. Y. Supp. 360, *rev'd*

wrongdoing, fraud or negligence of corporate officers operates, indirectly, as an injury to stockholders, the injury to stockholders is secondary and the injury to the corporation primary. It is for the corporation, therefore, to institute action for wrongs inflicted upon it by corporate officers⁴⁸ or to set aside a contract made in fraud upon corporate rights.⁴⁹ Hence a stockholder has no primary right to institute an action for the recovery of damage resulting to the corporation from a refusal of business by the officers as a result of a conspiracy of the majority stockholders, in order to wreck the corporation, resulting in a foreclosure of the corporate property, as the damage in the eyes of the law results to the corporation, rather than a stockholder. Such action could have been maintained, however, upon a proper demand upon and refusal by the governing board to institute the action, or it could have been maintained by a receiver, if one had been appointed.⁵⁰ Illustrating the general principle

198 N. Y. 348, 91 N. E. 797, on other grounds. See § 22, *supra*.

Corporation does not lose its litigable right by an agreement of its sole stockholders selling their stock and reserving to themselves the claim in action and what should be recovered on it, *Puritan Coal Min. Co. v. Pennsylvania R. Co.*, 237 Pa. 420, *Ann. Cas.* 1914 B 37, 85 *Atl.* 426.

⁴⁸ See § 2680 *et seq.*, *supra*. See also *Converse v. United Shoe Mach. Co.*, 185 Mass. 422, 70 N. E. 444; *McCloskey v. Snowden*, 212 Pa. 249, 108 *Am. St. Rep.* 867, 61 *Atl.* 796; *Shoun v. Armstrong* (*Tenn. Ch. App.*), 59 S. W. 790.

A stockholder cannot sue individually for injury to him wrought only through sacrificing corporate interests in the interest of another corporation. *Converse v. United Shoe Mach. Co.*, 209 Mass. 539, 95 N. E. 929.

Depreciation of stock values due to defrauding the corporation and to directors' negligence belongs to the corporation alone. *Bartlett v. New York, N. H. & H. R. Co.*, 221 Mass. 530, 109 N. E. 452. See also §§ 4052, 4063, *infra*.

⁴⁹ *Oliver v. Oliver*, 118 Ga. 362,

45 S. E. 232; *Continental Ins. Co. v. New York & H. R. Co.*, 187 N. Y. 225, 79 N. E. 1026, *aff'g* 103 N. Y. App. Div. 282, 93 N. Y. Supp. 27; *Niles v. New York Cent. & H. River R. Co.*, 69 N. Y. App. Div. 144, 74 N. Y. Supp. 617; *Polhemus v. Polhemus*, 43 N. Y. Misc. 141, 88 N. Y. Supp. 273.

Where an officer of a corporation has withdrawn corporate funds without authority, a stockholder cannot maintain an action for the purpose of securing payment to the stockholder of a proportion of the fund so withdrawn equivalent to the proportion of stock held by such stockholder. *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17, *modifying* 99 Ill. App. 509.

⁵⁰ In discussing the matter the court said: "True, the plaintiff has suffered a depreciation in the value of his stock as a result of the wrong, and in this respect the injury was personal to the holders of the stock. But every stockholder has suffered from the same wrong, and if the plaintiff can maintain an action for the recovery of the damages sustained by him, every stockholder must be accorded the same right.

further, action cannot be maintained by a stockholder for the recovery to himself personally of moneys misappropriated by the corporate officers for the payment of their salaries, inasmuch as such money, when recovered, is the property of the corporation.⁵¹

If the property of a corporation is converted by a stranger, or if a trespass is committed thereon, or if an injury to its property is caused by the negligence of another, or if an injury is threatened, the injury is to the corporation, not to the stockholders individually, and it is for the corporation, and not for the stockholders as individuals, to take proper steps, by action or otherwise, to prevent or redress the injury.⁵² It seems that if the stockholder can by his own action, without resort to courts, work out his protection, he may do so and then have his rights adjusted with the corporation, as where he redeemed its property from execution sale.⁵³

The action is derivative, i. e., in the corporate right, if the gravamen of the complaint is of injury to the corporation,⁵⁴ or to the

The injury, however, resulting from the wrong was, as we have seen, to the corporation. The depreciation in the value of the plaintiff's stock, and that of the other stockholders, was in consequence of the waste and destruction of the property and franchise of the corporation." *Niles v. New York Cent. & H. River R. Co.*, 176 N. Y. 119, 68 N. E. 142.

⁵¹ *Rafferty v. Donnelly*, 197 Pa. 423, 47 Atl. 202.

⁵² Where stock belonging to a corporation is converted by a private individual to his own use, the right of action for the conversion lies in the corporation, not in a stockholder by whom the stock was transferred to the corporation. *Crosby v. Stratton*, 17 Colo. App. 212, 68 Pac. 130. See also §§ 4052, 4066, *infra*.

⁵³ A stockholder may redeem property from a judgment sale by paying the debt under the same circumstances that he could sue for redemption on its behalf. *Duquesne Gold Min. Co. v. Glaser*, 46 Colo. 186, 103 Pac. 299.

⁵⁴ *Holt v. California Development Co.*, 161 Fed. 3.

A bill to annul a contract between a railroad company and a land and irrigation company, whereby the former was to aid the latter by advancing money to stop the inflow of the Colorado River into Salton Sea to the injury of both, was on behalf of the corporation where it was alleged that the scheme was a fraud to impose debts on the land company and eventually to absorb it. *Holt v. California Development Co.*, 161 Fed. 3.

Negligence of directors in failing to enforce leases is a corporate cause of action. *Kelly v. Dolan*, 233 Fed. 635.

Failing to enforce a lease and suffering a mortgage to be defaulted is a corporate wrong. *Moran v. Vreeland*, 81 N. Y. Misc. 664, 143 N. Y. Supp. 522.

Appropriation of cash and treasury stock and alienation of property belonging to corporation states a corporate cause of action. *Elmergreen v. Weimer*, 138 Wis. 112, 119 N. W. 836.

Sale of majority stock to competing road is injury to corporation, if at all, not to minority as individuals.

whole body of its stock or property without any severance or distribution among individual holders⁵⁵ or seeks to recover assets for it⁵⁶ or prevent dissipation of them.⁵⁷ On the other hand, if the essential injury is to the plaintiff as a stockholder, the action being

Delavan v. New York, N. H. & H. R. Co., 154 N. Y. App. Div. 8, 139 N. Y. Supp. 17, rev'g 137 N. Y. Supp. 207, three judges dissenting.

Right to sue for the loss of the use of money which would have been earned had leases been renewed is in the corporation and not in the stockholder deprived of dividends. *Singers-Bigger v. Young*, 166 Fed. 82.

⁵⁵ *Kelly v. Mississippi River Coal- ing Co.*, 175 Fed. 482; *Oliphant v. Woodburn Coal & Mining Co.*, 63 Iowa 332; *Drinkwater v. Portland Marine Ry.*, 18 Me. 35; *Hodsdon v. Copeland*, 16 Me. 314.

Stock depreciation is actionable if due to fraud, ultra vires acts or negligence of officers; but the corporation should sue, and not the stockholder, unless it refuses. *Caffall v. Bandera Tel. Co.*, — Tex. Civ. App. —, 136 S. W. 105.

Where the wrongful acts complained of consisted in the falsification and mutilation of the corporate records, the court said: "These acts were an invasion of the corporate rights. The wrong was done primarily to the whole corporation, and the plaintiff was affected and injured in the value of his shares only through his interest in the corporation and the injury done to its property. Redress for such a wrong must be obtained by the corporation itself through its regularly constituted agents. The plaintiff was not the corporation notwithstanding he owned and controlled a majority of its stock. He did not own or control its property or make or cancel its contracts with the defendant. * * * He was injured the same as every

other shareholder because of and through the injury to the corporation property and rights. There was no special injury to the plaintiff different from that to all other shareholders, nor were his individual rights injured outside of the injury suffered by the collective entity, the corporation." *Wells v. Dane*, 101 Me. 67, 63 Atl. 324.

⁵⁶ An action cannot be treated as individual to recover a share in property where part of the relief sought is the turning back to the corporation of assets held by officers. *Broek v. Poor*, 216 N. Y. 387, 111 N. E. 229, rev'g 167 N. Y. App. Div. 784, 798, 800, 153 N. Y. Supp. 332.

Accounting of stock inequitably issued to defendants and of dividends paid and interest thereon sounds in right of the corporation and not of the stockholder. *Continental Securities Co. v. Belmont*, 75 N. Y. Misc. 234, 133 N. Y. Supp. 560, aff'd 150 N. Y. App. Div. 298, 134 N. Y. Supp. 635, which is aff'd by 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138.

Injunction and accounting suit for use of property and contract of corporation for personal profit is derivative. *Dillon v. Pan-American Theatrical Co.*, 96 N. Y. Misc. 501, 160 N. Y. Supp. 549.

Both at common law and by direct enactment in Missouri the right to recover misappropriated assets from an officer is in the corporation, whence it passes to a trustee in bankruptcy. *In re Swofford Bros. Dry Goods Co.*, 180 Fed. 549.

⁵⁷ *Baum v. Sporborg*, 146 N. Y. App. Div. 537, 131 N. Y. Supp. 267.

based on a contract to which he is a party⁵⁸ or a right belonging severally to him⁵⁹ or on fraud affecting him directly⁶⁰ it is an individual action.

A wrong may be actionable by both the stockholder and the corporation.⁶¹ A suit by stockholders against a managing committee on an agreement by which the corporate management was given to it is on its face an individual suit.⁶² The caption and prayer may aid in determining which is the true character of the action,⁶³ but the

⁵⁸ A stockholder who is a party to a trust agreement by which stock was deposited and certain promises made by the trustees may sue thereon for himself and all stockholders similarly situated, but it is not a derivative suit in right of the corporation. *Brock v. Poor*, 167 N. Y. App. Div. 784, 153 N. Y. Supp. 332.

⁵⁹ Where individual water rights are sought to be quieted, the action is individual, although plaintiff is a stockholder in a mutual water corporation and alleges that it recognizes the other defendant's priority of claim. *Larimer & Weld Reservoir Co. v. Ft. Collins Milling & Elevator Co.*, 60 Colo. 241, 152 Pac. 1160.

⁶⁰ Deceit practiced on a stockholder to induce him to join in a dissolution proceeding is an individual wrong and not a corporate one. *Vogt v. Vogt*, 119 N. Y. App. Div. 518, 104 N. Y. Supp. 164.

Deceit in representing stock to be treasury stock whereas it was issued stock is a tort to the buyer and not to the corporation. *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

Where the majority holder seeks protection against increase of stock to oust him of control, the action is individual and not derivative. *Witherbee v. Bowles*, 201 N. Y. 427, 95 N. E. 27, rev'g 142 N. Y. App. Div. 407, 126 N. Y. Supp. 954. The same is true of an action for depriving him of the right to buy his share in a rightful issue. *Waters v. Horace Water & Co.*, 201 N. Y. 184, 94 N.

E. 602, aff'g 130 N. Y. App. Div. 678, 115 N. Y. Supp. 432.

⁶¹ If deceit and mismanagement induce the plaintiff to sell his stock, the cause of action may be individual, though injury was also done to the corporation. *Von Au v. Magenheimer*, 196 N. Y. 510, 89 N. E. 1114, aff'g 126 N. Y. App. Div. 257, 110 N. Y. Supp. 629.

⁶² Action for accounting by a stockholder against a creditors' committee managing corporate affairs to secure or pay its debts is representative of stockholders and not an action on behalf of corporation unless the complaint sufficiently pleads some right in it. *Brock v. Poor*, 167 N. Y. App. Div. 784, 153 N. Y. Supp. 332.

⁶³ The title and the substance of the allegations may be considered to show that the suit is derivative. *Brewster v. F. G. Brewster & Co.*, 138 N. Y. App. Div. 139, 122 N. Y. Supp. 1019.

A prayer for individual relief may mark allegations as setting up an individual cause (recovery of stock held under an agreement and for an accounting). *Brock v. Poor*, 216 N. Y. 387, 111 N. E. 229, rev'g 167 N. Y. App. Div. 784, 798, 800, 153 N. Y. Supp. 332.

An addition to a complaint, to set aside a stock sale as injurious individually, of a prayer to set aside acts of directors increasing capital stock in furtherance of the conspiracy does not make the action derivative or introduce an additional cause of action.

complaint does not make a suit individual or derivative by calling it one or the other.⁶⁴ Not only is a single stockholder without power to institute action in behalf of the corporation, but action may not be maintained by the holders of stock in severalty.⁶⁵

So far is the action or suit one in representation of a corporate right, that an executor suing as a stockholder does not in the full sense, it would seem, represent his testator for the purposes of the suit,⁶⁶ and transferees of stock, when they sue as plaintiffs, may be but are not necessarily subject to the equities of their predecessors.⁶⁷

The suit is not technically a stockholders' suit unless it is based on a right derived from the status of a stockholder;⁶⁸ thus the

Witherbee v. Bowles, 201 N. Y. 427, 95 N. E. 27, rev'g 142 N. Y. App. Div. 407, 126 N. Y. Supp. 954.

Allegations of fraudulent alienation of corporate property and a prayer for annulment of transfers, for accounting and ascertainment of plaintiff's due proportion of what defendants wrongfully received, and for judgment in plaintiff's favor, sounds in an individual right. Hearst v. Putnam Min. Co., 28 Utah 184, 67 L. R. A. 784, 107 Am. St. Rep. 698, 77 Pac. 753.

An accounting for payments on statute-barred notes and for payment of excessive interest on a loan, seeking to recover such sums for the corporation, is derivative. Nevins v. Brooklyn Citizen (N. Y. Misc.), 157 N. Y. Supp. 96.

⁶⁴ A bill to invalidate an agreement between a manufacturing and a selling company, alike controlled by defendants, whereby both the output and the prices were restricted to the detriment of the former, and for an accounting, is one in the corporate right, notwithstanding an allegation that it is an individual suit. The 94th Equity Rule applies. Smith v. Chase & Baker Piano Mfg. Co., 197 Fed. 466.

⁶⁵ Hackett v. Northern Pac. R. Co., 140 Fed. 717. In this case plaintiffs contended, further, that as the par-

ties were before the court, the action might be severed and the defendant required to answer. The court declined to grant the request, however, on the ground that there was no unity of interest in the subject-matter involved. See, to the same effect, Loewenstein v. Diamond Soda Water Mfg. Co., 94 N. Y. App. Div. 383, 88 N. Y. Supp. 313.

⁶⁶ Thus an executor's suit raised the question whether he stood as the representative of the decedent, so that declarations of decedent as to transactions with the individual defendants were excluded under the statute. The court declined to decide the question because error could be predicated on another ground, but considered the question to be debatable. Godley v. Crandall & Godley Co., 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 813, modifying 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236.

⁶⁷ It will be seen hereafter that the doctrine of laches and estoppel is not imputed to the successor in title to the stock, unless some element of notice or participation or the like was present; so that an equity exists against the successor which brings into play those defenses that were good as against his predecessor. See § 4072, *infra*.

⁶⁸ A suit by complainants based on

stockholder may be a creditor of the corporation, and if he sues in that right and capacity his suit is not truly a stockholder's suit but a creditor's suit. Such suits are treated in another portion of this work.⁶⁹

§ 4052. Right to sue at law. Since the rights arising out of the contracts of a corporation belong to it, and not to the stockholders individually, and injuries to the property of the corporation caused by the wrongful acts or negligence of others are injuries to the corporation itself, it necessarily follows that any action at law to enforce such a contract, or recover damages for its breach, or to obtain redress for such injuries, must be brought by the corporation in the corporate name, and through its managing officers. Neither a single stockholder nor all the stockholders, as individuals, can maintain an action at law in their own names upon a contract made by the corporation, or for injuries committed against the property of the corporation, as trespass, trover for the conversion of property, an action on the case for injuries caused by the acts or negligence of another, or an action of replevin or ejectment to recover corporate property. All such actions must be brought in the corporate name, and cannot be maintained by stockholders in their own names, either on their own behalf because of their equitable interest in the property of the corporation, or on behalf of the corporation. This principle applies, whether the wrongs complained of are the acts or negligence of strangers, or the fraudulent or wrongful acts or negligence of the directors or managing officers of the corporation.⁷⁰ A statutory

a contractual trust in their favor antedating the corporation formed pursuant to the contract is not a stockholder's suit; and the practice of such suits does not apply. Complainants need not be stockholders in such suit. *Rogers v. Penobscot Min. Co.*, 154 Fed. 606.

⁶⁹ See chapters on Insolvency and Bankruptcy and Receivers, *infra*.

In a New Jersey case the court said: "Now, the slightest reflection upon the nature of a creditor's suit against a corporation and a stockholder's suit against a corporation will show how radically different those two things are. When we have either a creditor or a stockholder qualified to appear as the actor, to set in motion the ma-

chinery of the court for the accomplishment of justice, for securing this important remedy on behalf of the public for the prevention of fraud, certainly there is a very strong indication that what the statute is aimed to secure is the redress or the prevention of a public wrong rather than the enforcement of a private right—a private right either of a stockholder qua stockholder, or of a creditor qua creditor." *Gallagher v. Asphalt Co. of America*, 67 N. J. Eq. 441, 58 Atl. 403.

⁷⁰ **California.** *Gorhan v. Gilson*, 28 Cal. 479;

Connecticut. *Allen v. Curtis*, 26 Conn. 456.

Georgia. *McAfee v. Zettler*, 103

cause of action for damages is within this rule if it accrues to the corporation.⁷¹ The fact that one person owns all the stock of a corporation does not enable him to sue in his own name for an injury to the corporation, for the corporation is none the less a separate and distinct person in the law.⁷²

As stated above, it makes no difference in the application of this rule that the injury is caused by the officers of the corporation in their management of its affairs. Misfeasance or negligence on the part of the managing officers of a corporation, resulting in loss of its assets, is an injury to the corporation, for which it must sue. A stockholder cannot sue for damages because his stock is rendered worthless.⁷³

At law there is no exception to this rule, even when the corporation refuses to sue. In such a case, however, as we shall see in the following sections, the stockholders have their remedy in equity.

§ 4053. Right to sue in equity or equitable action. In ordinary circumstances, when redress or preventive relief is sought for a wrong

Ga. 579, 30 S. E. 268; *Steele Lumber Co. v. Laurens Lumber Co.*, 98 Ga. 329, 24 S. E. 755; *Bethune v. Wells*, 94 Ga. 486, 21 S. E. 230.

Indiana. *Tomlinson v. Bricklayers Union*, No. 1, 87 Ind. 308; *Cutshaw v. Fargo*, 8 Ind. App. 691, 36 N. E. 650, 34 N. E. 376.

Louisiana. *Faurie v. Millaudon*, 3 Mart. (N. S.) 476.

Maine. *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 54 Me. 173; *Smith v. Poor*, 40 Me. 415, 63 Am. Dec. 672; *Drinkwater v. Portland Marine Ry. Co.*, 18 Me. 35; *Hodsdon v. Copeland*, 16 Me. 314.

Massachusetts. *Bartlett v. Brickett*, 14 Allen 62; *Smith v. Hurd*, 12 Mete. 371, 46 Am. Dec. 690.

Michigan. *Randall v. Dudley*, 111 Mich. 437, 69 N. W. 729; *Talbot v. Scripps*, 31 Mich. 268; *People v. State Treasurer*, 24 Mich. 468.

New York. *Moran v. Vreeland*, 81 Misc. 664, 143 N. Y. Supp. 522; *Miles v. New York Cent. & H. River R. Co.*, 35 Misc. 69, 71 N. Y. Supp. 271; *Thompson v. Stanley*, 20 N. Y. Supp.

317; *Bennett v. American Art Union*, 5 Sandf. 614.

Wisconsin. *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131, 20 N. W. 667.

See also § 2679 et seq. as to suits by stockholders against officers.

⁷¹ He cannot sue at law in its right to recover treble damages given by the Sherman Anti-trust Act, § 7, but must go into equity. *United Copper Securities Co. v. Amalgamated Copper Co.*, 223 Fed. 421. And see § 3400, supra.

As to actions under Sherman Anti-trust Act where the stockholder himself is damaged, see supra, preceding section and note and § 3400 et seq., supra.

⁷² *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131, 20 N. W. 667, where it was held that the owner of all the stock of a corporation could not maintain an action of replevin to recover property belonging to the corporation. See also *Randall v. Dudley*, 111 Mich. 437, 69 N. W. 729, and Chap. 1, supra.

⁷³ *Smith v. Hurd*, 12 Mete. (Mass.)

committed or threatened against a corporation, whether by strangers or by its officers, or where it is sought to enforce contracts or other rights of a corporation, the same principle applies to suits in equity as to actions at law. Except as hereafter shown, the suit must be brought by the corporation itself in the corporate name, and cannot be brought by a stockholder on his own behalf, or on behalf of himself and others.⁷⁴ In equity, however, the rule is not inflexible, as it is at law. In a proper case, a court of equity will look beyond the corporate body as a legal entity distinct from its members,⁷⁵ and, disregarding the fiction, will recognize the fact that a corporation is in reality an association of individuals for the purpose of private gain, like an ordinary partnership,⁷⁶ and that, while they have not the legal title to the assets of the corporation, they are nevertheless the beneficial or equitable owners. And if an injury is committed or threatened against the corporation which will constitute a violation of the equitable rights of stockholders, and for any reason a dis-

371, 46 Am. Dec. 690; *Niles v. New York Cent. & H. River R. Co.*, 35 N. Y. Misc. 69, 71 N. Y. Supp. 271, and other cases cited, § 4053, *supra*. See also § 2679 *et seq.*, *supra*.

A stockholder cannot sue to recover damages for foreclosure of a mortgage in fraud of minority stockholders, for the right of action is in the corporation. *Niles v. New York Cent. & H. River R. Co.*, 35 N. Y. Misc. 69, 71 N. Y. Supp. 271.

⁷⁴ *United States*. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827.

California. *Bacon v. Irvine*, 70 Cal. 221, 11 Pac. 646.

Maine. *Smith v. Poor*, 40 Me. 415, 63 Am. Dec. 672; *Hersey v. Veazie*, 24 Me. 9, 41 Am. Dec. 364.

Maryland. *Booth v. Robinson*, 55 Md. 419.

Massachusetts. *Dunphy v. Traveller Newspaper Ass'n*, 146 Mass. 495, 16 N. E. 426.

Missouri. *Slattery v. St. Louis & N. O. Transp. Co.*, 91 Mo. 217, 60 Am. Rep. 245, 4 S. W. 79.

New Jersey. *Brown v. Vandyke*, 8 N. J. Eq. 795, 55 Am. Dec. 250.

Rhode Island. *Hazard v. Durant*, 11 R. I. 195.

Tennessee. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

Texas. *Cates v. Sparkman*, 73 Tex. 619, 15 Am. St. Rep. 806, 11 S. W. 846.

West Virginia. *Rathbone v. Parkersburg Gas Co.*, 31 W. Va. 798, 8 S. E. 570.

Wisconsin. *Cunningham v. Wechselsberg*, 105 Wis. 359, 81 N. W. 414.

England. *Macdougall v. Gardiner*, 1 Ch. Div. 13; *Foss v. Harbottle*, 2 Hare 461; *Russell v. Wakefield Waterworks Co.*, L. R. 20 Eq. 474.

See also many other cases hereafter cited and § 2679 *et seq.*, *supra*.

The principle announced in the text is so well established that in most of the recent cases where the same or similar language is found, it is apparent that the court is merely uttering a preamble for discussion of the real point, to wit, whether there is such equity as allows the stockholders to sue for the corporation. See cases cited in notes to § 4061 *et seq.*, *infra*.

⁷⁵ See Chap. 1, *supra*.

⁷⁶ See Chap. 1, *supra*.

sending stockholder cannot obtain redress or relief through the corporation, a court of equity will grant appropriate relief in a suit brought by him in his own behalf, or in behalf of himself and other stockholders who may come in and be made parties, according to the circumstances. Such a suit is generally brought and sustained because the corporation is in the control of the persons who have committed or threatened to commit the wrongs complained of.⁷⁷

77 United States. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938; *Chicago City Ry. Co. v. Allerton*, 18 Wall. 233, 21 L. Ed. 902; *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 How. 381, 16 L. Ed. 488; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Ogden v. Gilt Edge Consol. Mines Co.*, 225 Fed. 723; *Kelly v. Dolan*, 218 Fed. 966; *Hardon v. Newton*, 14 Blatchf. 376, Fed. Cas. No. 6,054.

Alabama. *Parsons v. Joseph*, 92 Ala. 403, 8 So. 788; *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747.

Arkansas. *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340.

California. *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Cogswell v. Bull*, 39 Cal. 320.

Colorado. *Holmes v. Jewett*, 55 Colo. 187, 134 Pac. 665.

Connecticut. *Pratt v. Pratt, Read & Co.*, 33 Conn. 446; *Allen v. Curtis*, 26 Conn. 456.

Illinois. *Harding v. American Glucose Co.*, 182 Ill. 551, 64 L. R. A. 738, 74 Am. St. Rep. 189, 55 N. E. 577, writ of error dismissed 187 U. S. 651, 47 L. Ed. 349.

Indiana. *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487. It is permitted in exceptional cases only: (1) Action or threatened action by directors exceeding their power, (2) fraud by managers completed or contemplated and injurious to the corporation or stockholders, (3) action by directors or a majority of them in their own interest, and in a way injurious to corporation or other

stockholders, (4) where majority acts oppressively in the corporate name in violation of minority rights, and can only be restrained by equity. *Marcovich v. O'Brien*, — Ind. App. —, 114 N. E. 100; *Tevis v. Hammer-smith*, 31 Ind. App. 281, 282, 66 N. E. 79.

Kansas. *Burnes v. Atchison*, 48 Kan. 507, 29 Pac. 579.

Kentucky. *Reinecke v. Bailey*, 33 Ky. L. Rep. 977, 112 S. W. 569.

Louisiana. *In re Belton*, 47 La. Ann. 1614, 30 L. R. A. 648, 18 So. 642.

Maryland. *Booth v. Robinson*, 55 Md. 419.

Massachusetts. *Corey v. Independent Ice Co.*, 115 N. E. 488; *Brewer v. Boston Theatre*, 104 Mass. 378; *Peabody v. Flint*, 6 Allen 52.

Michigan. *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218.

Minnesota. *Rothwell v. Robinson*, 39 Minn. 1, 12 Am. St. Rep. 608, 38 N. W. 772.

Missouri. *Exter v. Sawyer*, 146 Mo. 302, 47 S. W. 951.

New Hampshire. *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732.

New York. *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138, aff'g 150 App. Div. 298, 134 N. Y. Supp. 635, 75 Misc. 234, 133 N. Y. Supp. 560; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Greaves v. Gouge*, 69 N. Y. 154; *People v. Equitable Life Assur. Soc. of United States*, 124 App. Div. 714, 109 N. Y. Supp. 453, rev'g 51 Misc. 339, 101 N.

In a leading case in the Supreme Court of the United States, the circumstances necessary to entitle a stockholder to sue in his own name were summed up by Mr. Justice Miller as follows:

"We understand the doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

"1. Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

"2. Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

"3. Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"4. Or where the majority of shareholders are oppressing and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

Y. Supp. 354; *Robinson v. Smith*, 3 Paige 222, 24 Am. Dec. 212.

North Carolina. *Mitchell v. Aulander Realty Co.*, 169 N. C. 516, 86 S. E. 358.

Rhode Island. *Hazard v. Durant*, 11 R. I. 195; *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624.

South Carolina. *Kickbusch v. Rugles*, 105 S. C. 525, 90 S. E. 163.

Tennessee. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; *Black v. Huggins*, 2 Tenn. Ch. 780.

Texas. *Cates v. Sparkman*, 73 Tex. 619, 15 Am. St. Rep. 806, 11 S. W. 646; *Mussina v. Goldthwaite*, 34 Tex. 125, 7 Am. Rep. 281.

Vermont. *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545.

Wisconsin. *Eschweiler v. Stowell*,

78 Wis. 316, 23 Am. St. Rep. 411, 47 N. W. 361.

England. *Menier v. Hooper's Tel. Works*, 9 Ch. App. 350; *Mason v. Harris*, 11 Ch. Div. 97; *Foss v. Harbottle*, 2 Hare 461; *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. Cas. 712, 6 Jur. (N. S.) 985; *Russell v. Wakefield Waterworks Co.*, L. R. 20 Eq. 474; *Atwool v. Merryweather*, L. R. 5 Eq. 464, note.

And see many other cases more specifically cited under the sections following.

Since the stockholder may sue in a proper case, his allegations of wrongdoing in a complaint are pertinent and privileged, and the filing of such a complaint is not libelous to defendants. *Gosewisch v. Doran*, 161 Cal. 511, Ann. Cas. 1913 D 442, 119 Pac. 656.

"5. Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

"6. But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it." ⁷⁸

In a Massachusetts case it was said by Judge Knowlton: "Courts of equity are swift to protect helpless minorities of stockholders of corporations from the oppression and fraud of majorities. But the legal relations into which the members of a corporation enter require them to seek redress for supposed wrongs done them as stockholders from its officers, and from the corporation itself, before applying elsewhere. Misconduct in dealing with a corporation, or in the management of its affairs, can affect its members only through the corporation itself. The wrong in such a case is done primarily to the corporation. It is the duty of its directors or other managing officers to protect it from those who would do it injustice, and to seek compensation for any injury which it receives. Stockholders in a corporation impliedly agree, when they join it, to act in the corporate business through officers chosen to represent them, and by vote at meetings of the members regularly called. And so, if they deem themselves aggrieved as shareholders by the dealings of others with it, by the acts of its managers, they are bound to seek their remedy through corporate channels, first, by application to the officers in charge, and, failing there, secondly, to the corporation itself, at a meeting of its members. If they can obtain justice at the hands of neither, the courts are open for their relief." ⁷⁹

⁷⁸ *Hawes v. Oakland*, 104 U. S. of action was shown, see § 4061 et 450, 26 L. Ed. 827. seq., *infra*.

For cases deciding whether a cause ⁷⁹ *Dunphy v. Traveller Newspaper*

In addition it should be said: A stockholder cannot sue where the act complained of consists in an exercise of the discretion reposed in the directors or other governing and administrative officers of the corporation or in its stockholders acting as such through the power of the majority; for such an exercise of discretion cannot constitute an actionable wrong to the corporation, even if injurious to it, unless there is fraud, excess or abuse,⁸⁰ and this rule includes discretion, where it exists, to sue or not to sue.⁸¹ Neither can a stockholder sue if he is without equity, as where he has unduly delayed or has ratified or acquiesced in the acts or omissions complained of.⁸²

A suit may be maintained in equity, although the corporation might have maintained an action at law on the same cause⁸³ and the suit will not be regarded as one at law under the code practice merely because the relief sought is in damages.⁸⁴ Such suits cannot be multiplied by each and every stockholder bringing an action or suit as he may feel aggrieved. The one suit is for all, as is elsewhere pointed out.⁸⁵

§ 4054. Statutory remedies and rights of action. The right to sue on behalf of the corporation is, in some states, regulated or conferred by positive statutes.⁸⁶ In Michigan a statutory right of action is given against "directors, managers, trustees, and other officers

Ass'n, 146 Mass. 495, 16 N. E. 426.

⁸⁰ See §§ 4061-4065, 4078, *infra*.

⁸¹ The rule implies that the corporate inaction must have been wrongful, hence the corollary that if suing or not suing was a fair question for the discretion of the corporate authorities, their refusal is binding on the stockholder. It is only where they have no discretion but to sue or have abused their discretion that the stockholder may do so. As to their discretion in this matter, see § 4065, *infra*.

⁸² See §§ 4071, 4072, 4077, *infra*.

⁸³ Thus he may sue in equity though corporation could have sued at law for malfeasance. *Moran v. Vreeland*, 81 N. Y. Misc. 664, 143 N. Y. Supp. 522.

⁸⁴ A proceeding to reach donations to directors and make them account and pay to corporation the loss sus-

tained is in equity. *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721, modifying 150 N. Y. App. Div. 715, 135 N. Y. Supp. 789.

⁸⁵ Other stockholders must come in under the one already begun. *Goodbody v. Delaney*, 80 N. J. Eq. 417, 83 Atl. 988. See §§ 4071, 4080, 4089, 4090, 4092, *infra*.

⁸⁶ In Georgia the Civil Code, § 2224, enacts substantially the general law as to a stockholder's right to sue, but it expressly requires resort to stockholders, as well as to directors, before suing. See the statute quoted in *Macon Gas Co. v. Richter*, 143 Ga. 397, 85 S. E. 112.

In New Jersey the statute of 1904 (P. L. 1904, p. 275) has restricted the right of the corporation to recover from directors for dividends paid out of capital. It can now recover only in case of wilful or negligent viola-

* * * and over any persons who may have held such offices." This statute expressly empowers stockholders, as well as directors and others named, to maintain such a suit, which is to be begun "as in ordinary cases on bill, or petition, as the case may require." The general objects of such a suit are to compel an accounting and repayment, to suspend or remove officers for abuse of trust or gross misconduct, to direct new elections or to supply officers if there are none, and to set aside or prevent improper alienations of property by the officers.⁸⁷ Such a suit does not lie where the stockholder has an adequate remedy at law.⁸⁸ The corporation is a necessary party under this statute, if its rights are to be adjudicated.⁸⁹ And while ordinarily a demand on it to sue is a prerequisite to action, a futile demand is not required.⁹⁰

Another well known class of statutes, designed to protect the corporations of the statute. The right is now given to the stockholders "to the full amount of any loss sustained" by them, or to the corporation or its receiver in case of insolvency "to the full amount of any loss sustained by the corporation." *Fleisher v. West Jersey Securities Co.*, 84 N. J. Eq. 55, 92 Atl. 575.

In each state the statutes must be consulted.

⁸⁷ See 3 Comp. Laws, §§ 9757-9759 (5 Howell's Mich. Ann. Stat., 2nd Ed., §§ 13530-13532).

Facts held not to show such an exceeding of discretion or such misconduct as amounted to construction or actual fraud, and so not within 3 Comp. Laws, §§ 9757-9759. *McMillan v. Miller*, 177 Mich. 511, 143 N. W. 631, holding that if the bill had charged fraud it would have been good.

Corporate insolvency due to nonpayment for stock is no ground for such action. *Fuller v. McCormick*, 156 Mich. 518, 521, 121 N. W. 280.

Bill held not to be an invocation of the statutory remedy but of the general equity power of chancery to wind up the corporation. *Town v. Duplex-Power Car Co.*, 172 Mich. 519, 138 N. W. 338.

⁸⁸ For depreciation of stock value by reason of a breach of a promise of individual defendants that if plaintiffs purchased the stock, salaries would not be paid, there is an adequate individual remedy. *McMillan v. Miller*, 177 Mich. 511, 143 N. W. 631.

"Grievances arising out of the conduct of defendants in inducing him to embark in the corporate undertaking * * * must be separated from his grievances as a stockholder." *Fuller v. McCormick*, 156 Mich. 518, 121 N. W. 280 (in statement of facts).

Introductory allegations of a grievance of a personal nature does not show adequate remedy at law where the bill as a whole comes under the statute. *Robinson v. DeLuxe Motor Car Co. of New Jersey*, 170 Mich. 163, 135 N. W. 897.

⁸⁹ Bill to set aside corporate mortgage is demurrable if it is not party. *Coxe v. Hart*, 53 Mich. 557, 19 N. W. 183.

Where, after leave to join the corporation, it was not done, the bill was properly dismissed. *McMillan v. Miller*, 177 Mich. 511, 143 N. W. 631.

⁹⁰ *Robinson v. DeLuxe Motor Car Co. of New Jersey*, 170 Mich. 163, 135 N. W. 897.

poration against mismanagement by its officers, empowers the attorney general or a director or other officer to sue the wrongdoing directors and officers for prevention or redress, including, in at least one state, the removal of the delinquents from office. This is not truly a statutory remedy of stockholders, though if a director has the power to sue, it may serve that purpose through his willingness to sue at the instance of the minority, or because he is a minority stockholder as well as a director.⁹¹

By some statutes a dissenting stockholder is entitled to withdraw and have his stock appraised and its ascertained value paid to him by the corporation, whereupon his stock vests in the corporation or is extinguished, if against his consent it proposes to sell its property or franchises.⁹² It is stated that this legislation was adopted to relieve the majority from an onerous disability to dispose of corporate property and at the same time to prevent extortionate stockholders' suits by a minority holder seeking to compel purchase of his stock at his own price.⁹³ Not every sale is within these statutes,⁹⁴ but they apply when a disintegration of the corporate business or franchises is effected in part by the sale.⁹⁵

⁹¹ See § 1821 and § 2610 et seq., supra, and see New York Code Civ. Proc. § 1781 et seq., now re-enacted as General Corporation Law, §§ 90, 91. See § 2617, supra.

These statutes (Code Civ. Proc. §§ 1781, 1782) created no new rights of action, except to remove officers, and merely authorized the designated persons to sue for the corporation. *People v. Equitable Life Assur. Soc. of United States*, 124 N. Y. App. Div. 714, 109 N. Y. Supp. 453, rev'g 51 N. Y. Misc. 339, 101 N. Y. Supp. 354.

A similar statute exists in Wisconsin, said to be modeled after the New York statute. *State v. Milwaukee Elec. Railroad & Light Co.*, 136 Wis. 179, 18 L. R. A. (N. S.) 672, 116 N. W. 900.

⁹² See N. Y. Consol. Laws 1909, c. 61 (Stock Corporation Law) § 17, which, in case of sale of property or franchises, allows a nonconsenting stockholder who did not vote in favor of it to institute a judicial proceeding to appraise his stock, and which pro-

vides that on payment of such appraised value his interest ceases and the corporation may hold or dispose of his stock. As to procedure thereunder see *Ennis v. Federal Brewing Co.*, 123 N. Y. App. Div. 691, 108 N. Y. Supp. 230, aff'd 192 N. Y. 570, 85 N. E. 1109, holding that the hearing need not be completed within the sixty days for beginning such proceeding.

Similar provision is contained in Mass. St. 1903, c. 437, § 44, cited in *Cole v. Wells*, 224 Mass. 504, 113 N. E. 189.

⁹³ Per Vann, J., in *In re Timmis*, 200 N. Y. 177, 93 N. E. 522, aff'g 139 N. Y. App. Div. 936, 124 N. Y. Supp. 1132.

⁹⁴ Ordinary sales by the corporation in due course are not contemplated by the act. In *re Timmis*, 200 N. Y. 177, 93 N. E. 522, aff'g 139 N. Y. App. Div. 936, 124 N. Y. Supp. 1132.

⁹⁵ A sale of a department of the corporation (calendar department of

Where there is an exclusive statutory remedy, it must be resorted to.⁹⁶ The remedy by appraisal is concurrent, and election to proceed under the statute does not bar the right to bring a stockholders' suit until the stock is paid for as appraised and the stockholder thereby divested.⁹⁷ Neither does a demand for an appraisal debar him if there was undiscovered fraud in the transfer affecting his rights,⁹⁸ but the failure of a stockholder to resort to an appraisal may impair his equities to maintain a stockholders' suit,⁹⁹ and it has been held that resort to a stockholders' suit will bar a statutory proceeding for an appraisal.¹

A controversy between the members of a corporation is not within a statute giving equity jurisdiction in controversies between partners, joint tenants and tenants in common, for stockholders do not stand in either of these relations.²

The codes give the right of intervention, which, in proper cases, may be availed of by the stockholder, and there was at one time a statute in Massachusetts allowing a stockholder to make defense in an action against the corporation.³

§ 4055. Right of stockholder to defend, intervene or cross-complain in suit by another against the corporation. When an action at law or suit in equity is brought against a corporation, it is for the corporation to defend, and the defense and management of the suit, like other matters relating to the affairs of the corporation, is within the discretion of the directors, and ordinarily stockholders cannot interfere except by electing a new board of directors. Except as

a lithographing and printing company) involving its withdrawal from that line of business is such a sale that the statute applies. In *re Timmis*, 200 N. Y. 177, 93 N. E. 522, aff'g 139 N. Y. App. Div. 936, 124 N. Y. Supp. 1132.

⁹⁶ By statute proceedings may be authorized by the attorney general where a corporation is about to issue capital stock without complying with the statutory requirements, and such remedy may be exclusive, barring out suit by stockholders to accomplish this end. *Yetter v. Delaware Valley R. Co.*, 206 Pa. 485, 56 Atl. 57.

⁹⁷ *Cole v. Wells*, 224 Mass. 504, 113 N. E. 189.

⁹⁸ *Cole v. Wells*, 224 Mass. 504, 113 N. E. 189.

⁹⁹ *Treadwell v. United Verde Copper Co.*, 134 N. Y. App. Div. 394, 119 N. Y. Supp. 112.

¹ One cannot sue to cancel a sale for fraud and also have a statutory right to have his stock purchased as that of a dissenting holder after an appraisal as on a dissolution. *Wall v. Anaconda Copper Min. Co.*, 216 Fed. 242.

² *Russell v. McLellan*, 14 Pick. (Mass.) 63; *Pratt v. Bacon*, 10 Pick. (Mass.) 123. And see Chap. 1, *supra*.

³ See *infra*, section next following.

hereafter stated, the stockholders cannot appear and answer or defend, either for the corporation or on their own behalf,⁴ even though the stockholder owns all the stock of the corporation.⁵ A stockholder wishing to defend the corporation against an action by the majority, should wait and make defense in the action or frame a bill for an injunction or other equitable relief and sue affirmatively in praesenti.⁶ A statute admitting stockholders to defend where they would be ultimately liable does not entitle them to assume the defense of an action in which the corporation defaults; and independently of statute they have no such right.⁷ An appeal by the corporation can-

4 United States. General Elec. Co. v. West Asheville Improvement Co., 73 Fed. 386; Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. Ry. Co., 67 Fed. 49.

Colorado. Miller v. Murray, 17 Colo. 408, 30 Pac. 46.

Georgia. Henry v. Elder, 63 Ga. 347.

Kansas. Home Min. Co. v. McKibben, 60 Kan. 387, 56 Pac. 756.

Massachusetts. Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co., 183 Mass. 557, 67 N. E. 870.

Michigan. Stradley v. Pailthorp, 96 Mich. 287, 55 N. W. 807.

Pennsylvania. South-West Natural Gas Co. v. Fayette Fuel-Gas Co., 145 Pa. St. 13, 23 Atl. 224.

West Virginia. Park v. New York & K. Oil Co., 26 W. Va. 486; Park v. Ulster & K. Petroleum Co., 25 W. Va. 108.

England. Macdougall v. Gardiner, 1 Ch. Div. 13.

A stockholder is not entitled to ask for a dismissal of an action against the corporation on the ground of the plaintiff's insolvency, and his assignee's refusal to continue the prosecution of the action. Hobbs v. Dane Mfg. Co., 5 Allen (Mass.) 581.

Where a corporation fails to interpose the statute of limitations as a bar against claims of creditors, individual stockholders cannot do so. Davis v. Gemmell, 73 Md. 530, 21 Atl. 712.

5 Park v. Ulster & K. Petroleum Co., 25 W. Va. 108.

6 A receiver will not be appointed in an individual suit merely to defend against threatened litigation, but when the suit is begun the minority may defend or the present bill may be framed to state a present cause of action. Blake v. Blake & Knowles Steam Pipe Works, 84 N. J. Eq. 363, 94 Atl. 419.

7 Under the Massachusetts statute of 1851 (c. 315), allowing a stockholder to be summoned in, in an action against an insolvent corporation, and his personal liability to respond to the judgment recovered therein to be determined, and providing that, if it should appear that the stockholder was not liable, judgment should be entered in his favor, and at the same time judgment should be entered against the corporation, a stockholder summoned in an action against the corporation could defend against personal liability only. He did not become a party to the action, so as to be entitled to defend the cause of action against the corporation, or remove the action from the superior to the supreme judicial court. Byers v. Franklin Coal Co., 14 Allen (Mass.) 470; Farnum v. Ballard Vale Mach. Shop, 12 Cush. (Mass.) 507; Robbins v. Justices & Clerk of Superior Court, 12 Gray (Mass.) 225. Held not to apply retroactively to accrued causes of action. Farnum v. Ballard Vale

not be dismissed by stockholders nor can they take an appeal for it from a judgment or decree against it.⁸

The foregoing principles do not apply, however, when suit is brought against a corporation by one who holds a majority of the stock, or otherwise controls the directors, and the suit is conducted fraudulently in his own interest, and against the interest of the corporation and the minority stockholders, or in any other case in which a corporation or its directors abuse their discretion in refusing to defend, or fail to prosecute the defense in good faith; and the stockholders cannot obtain relief within the corporation. In such cases, a stockholder, if the action is at law, may obtain relief by suing in equity, or if the suit is in equity, or under the code, a stockholder may intervene, and set up any defense which should properly be made by the corporation,⁹ and this is distinct from an intervention founded

Mach. Shop, 12 Cush. (Mass.) 507. This was in part repealed. See **Byers v. Franklin Coal Co.**, 14 Allen (Mass.) 470.

⁸ **Denver & R. G. Ry. Co. v. Alling**, 99 U. S. 463, 25 L. Ed. 438; *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49; **Chicago & S. S. Rapid Transit R. Co. v. Northern Trust Co.**, 90 Ill. App. 460, aff'd 195 Ill. 288, 63 N. E. 136; **Silk Mfg. Co. v. Campbell**, 27 N. J. L. 539.

⁹ **United States**. **Bronson v. La Crosse & M. R. Co.**, 2 Wall. 283, 17 L. Ed. 725; **Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. Ry Co.**, 67 Fed. 49.

California. **Waymire v. San Francisco & S. M. Ry. Co.**, 112 Cal. 646, 44 Pac. 1086.

Colorado. **Majors v. Taussig**, 20 Colo. 44, 36 Pac. 816; **Henry v. Traveler's Ins. Co.**, 16 Colo. 179, 26 Pac. 318.

Kansas. **Fitzwater v. National Bank of Seneca**, 62 Kan. 163, 61 Pac. 684.

Kentucky. **Louisville & O. Turnpike Road Co. v. Ballard**, 2 Metc. 165.

Minnesota. **Morrill v. Little Falls Mfg. Co.**, 46 Minn. 260, 48 N. W. 1124.

Nebraska. **State v. Holmes**, 60 Neb. 39, 82 N. W. 109.

New York. **Wilkinson v. Chemical Fire Ins. Co. of New Jersey**, 2 N. Y. City Ct. 43.

Compare Meyer v. Bristol Hotel Co., 163 Mo. 59, 63 S. W. 96.

New Federal Equity Rule 37 reads, "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

As to practice on equitable petitions to intervene, see **Whitehouse, Eq. Pr. § 211**; **Fletcher, Eq. Pl. & Pr. § 55**, page 80.

As to practice in intervention under the codes, see the statutes and decisions of the particular state.

In Georgia it was held that no statutory authority permits interposition of an answer for the corporation; and stockholders are relegated to an original suit. **Blackman v. Central Railroad & Banking Co.**, 58 Ga. 189. Later it was allowed to prevent a dissolution suit going by default. **Hannah v. Union Consol. Warehouse Co.**, 144 Ga. 291, 86 S. E. 1085.

on his individual rights.¹⁰ A stockholder is frequently allowed to protect the rights of the corporation in foreclosure suits or insolvency proceedings,¹¹ or in a bankruptcy proceeding against the corporation,¹² and under statutes a stockholder has been let in to attack a dismissal or judgment suffered by the corporation without proper defense or objection by it¹³ or to vacate a judgment void for want

¹⁰ See § 4050, *supra*. This is an ordinary intervention in the proper right of the intervener.

¹¹ *Pennsylvania Steel Co. v. New York City Ry. Co.*, 160 Fed. 222; *Thomasson v. Guaranty Trust Co. of New York*, 159 Fed. 126; *Central Trust Co. of New York v. Washington County R. Co.*, 124 Fed. 813, citing *Gregory v. Pike*, 67 Fed. 837, 845; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 672, 36 L. R. A. 826; *Guarantee Trust & Safe-Deposit Co. v. Duluth & W. R. Co.*, 70 Fed. 803; *Bayliss v. Lafayette, M. & B. Ry. Co.*, 8 Biss. (U. S.) 193, Fed. Cas. No. 1,140; *Investors' Syndicate v. North America Coal & Mining Co.*, 31 N. D. 259, 153 N. W. 472.

Intervention to resist foreclosure held unwarranted. *Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co.*, 200 Fed. 600.

Other foreclosure cases where the question was rather the propriety of allowing the application than the propriety of intervening in foreclosure suits will be found cited in other notes under this section.

¹² Stockholders may intervene in bankruptcy proceedings to oppose the petition and adjudication, and a petition to revise rather than an appeal is the proper mode of taking up a denial of leave. *Ogden v. Gilt Edge Consol. Mines Co.*, 225 Fed. 723.

¹³ May intervene to set aside a conclusive stipulation and dismissal of an action by the corporation to reinstate the action and to prosecute the same. *National Power & Paper Co. v. Rossman*, 122 Minn. 355, 532, Ann. Cas.

1914 D 830, 142 N. W. 818. In its opinion the court says this is a substitution of parties rather than intervention.

Under the Ohio statute (Rev. St. § 5114), which empowers the trial court, before or after judgment, in furtherance of justice, to amend any pleading, process or proceeding, "by adding or striking out the name of any party," or "by inserting other allegations material to the cause," the court, after judgment against a corporation, but at the same term, may in furtherance of justice permit a stockholder to intervene and answer to the merits. *Henry v. Jeans*, 48 Ohio St. 443, 28 N. E. 672.

In New York it is expressly provided that, if an action is brought against a corporation by procurement of its directors to enforce any claim to which it has a valid defense, and the corporation, by their connivance, makes default, any member may apply to the supreme court, on an affidavit stating such facts, for a stay of proceedings. Laws 1892, c. 687, § 28.

Under this provision, a stockholder showing such facts can have a default opened and defend in behalf of the company. *In re Virgil*, 26 N. Y. Misc. 320, 57 N. Y. Supp. 58.

Laws of New York, 1892, c. 688, § 48, forbidding an insolvent corporation to suffer a judgment to be obtained with intent to prefer any particular creditor, does not allow a stockholder to apply to set aside such a judgment. *In re Gardiner*, 86 Hun (N. Y.) 30, 33 N. Y. Supp. 326.

If the statutes did not allow this,

of jurisdiction over the corporation.¹⁴ Though granted with hesitancy and caution,¹⁵ the petitioner should not be relegated to the circuitry and expense of an independent action to accomplish the same relief.¹⁶

The application is usually allowed where a committee or group of stockholders, substantially large in the interest represented, makes it in the case of receivership or foreclosure proceedings. Individuals with the same interests as many others, are not usually allowed to intervene,¹⁷ a second petitioner¹⁸ or committee will not be allowed to, merely because the policy of the committees differs and without a showing that the first interveners are not efficiently representing the corporation, or because in the "view" of the first committee it does not represent all stockholders.¹⁹ One cannot intervene to oppose the suit under the plaintiff's invitation to all similar stockholders, nor even as a general defendant, unless on a case of fraud and collusion.²⁰ In the case of a state owned railroad, the state may, of its own motion, become a party to a stockholders' suit to enjoin a stock

a bill in equity or an equitable action for relief against the judgment would lie. See § 4064, *infra*.

¹⁴A stockholder may intervene to expunge from the records or set aside a judgment entered against his corporation after dissolution; and whether forfeited by nonpayment of franchise tax or by decree is immaterial. *Newhall v. Western Zinc Min. Co.*, 164 Cal. 380, 128 Pac. 1040; *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335. As to judgment founded on defective service, see also *Seattle & N. R. Co. v. Bowman*, 53 Wash. 416, 102 Pac. 27.

¹⁵*Bronson v. La Crosse & M. R. Co.*, 2 Wall. (U. S.) 283, 17 L. Ed. 725.

¹⁶Especially where by that procedure he would lose the benefit of evidence and progress made in the case. *National Power & Paper Co. v. Rossman*, 122 Minn. 355, Ann. Cas. 1914 D 830, 142 N. W. 818.

¹⁷*Pennsylvania Steel Co. v. New York City Ry. Co.*, 160 Fed. 222; *Thomasson v. Guaranty Trust Co. of New York*, 159 Fed. 126.

¹⁸Individual could not intervene

where another had been allowed to do so and represented the majority, and on his appeal had had his intervention sustained and the later applicant declined to join therein. *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 535.

The first petitioner whose rights were uncomplicated with those of a creditor was allowed to intervene, reserving the right to a separate hearing to each dissentient or conflicting group. *Fowler v. Jarvis-Conklin Mortgage Trust Co.*, 64 Fed. 279.

¹⁹*Pennsylvania Steel Co. v. New York City Ry. Co.*, 181 Fed. 285.

Where the corporation has appeared and a "protective committee" has intervened by leave, other stockholders will not be allowed to intervene without a showing impeaching the conduct of the parties who already represent them. *Thomasson v. Guaranty Trust Co. of New York*, 159 Fed. 126.

²⁰*Forbes v. Memphis, E. P. & P. R. Co.*, 2 Woods (U. S.) 323, Fed. Cas. No. 4,926.

sale of publicly owned stock for the alleged purpose of making an unlawful combination of roads.²¹ A majority stockholder cannot, on his own motion, come in as defendant, if no relief against him is sought.²² Where a receiver is in charge and the court can protect all interests²³ or when a receiver is defending an action against the corporation, a stockholder having no further interest than that arising out of his ownership of stock will not be permitted to intervene.²⁴ Intervention will not be allowed to protect a pending stockholders' suit which can proceed unembarrassed.²⁵

Just as in a suit by him, the petitioning stockholder should first resort to the corporate authorities,²⁶ but if this has not been done and a meritorious defense appears, leave to first make such application may be given before dismissing the petition.²⁷ Such demand is dispensed with if, by the intervener's pleading or by the answer to it, it appears that demand would have been futile.²⁸

²¹ Central Ry. Co. v. Collins, 40 Ga. 582.

²² Hay v. Brookfield, 160 N. Y. App. Div. 277, 145 N. Y. Supp. 543.

²³ Land Title & Trust Co. v. Asphalt Co. of America, 127 Fed. 1; Forbes v. Memphis, E. P. & P. R. Co., 2 Woods (U. S.) 323, Fed. Cas. No. 4,926.

Denied where there was a receiver and no showing of fraud or refusal on receiver's part to act. Marcovich v. O'Brien, — Ind. App. —, 114 N. E. 100.

Stockholder may, in discretion of court, be allowed to intervene in receivership proceeding, or may come in, where all stockholders have been given notice according to statute before appointing receiver. Marcovich v. O'Brien, — Ind. App. —, 114 N. E. 100.

²⁴ Hosmer v. Standard Shoe Machinery Co., 39 N. Y. Misc. 204, 79 N. Y. Supp. 390.

²⁵ That petitioner has a stockholders' suit pending to cancel a transaction will not enable him to intervene in a suit to enforce against its property a debt so created, the two suits not being calculated to hinder each

other. Coffin v. Chattanooga Water & Power Co., 44 Fed. 533.

²⁶ To intervene for protection of the corporation he must show such a case as would support a suit in right of the corporation. Hence he must show effort to procure action by the corporation unless that is useless and he is excused thereby. Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co., 200 Fed. 600.

Request must first be made to directors, if they retain their powers, before petitioning. General Elec. Co. v. West Asheville Improvement Co., 73 Fed. 386.

²⁷ Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. Ry. Co., 67 Fed. 49.

²⁸ Where a stockholder intervened in a suit against the corporation, alleging that the suit was brought for the use of the president and two directors, who were a majority of the board, and the answer admitted the plaintiff's cause of action, it was held that the intervener was entitled to defend the suit without alleging a request to do so upon the officers. Schively v. Eureka Tellurium Gold-Min. Co., 129 Cal. 293, 61 Pac. 939.

A petition or application for leave to intervene should set forth specifically and not in general terms the misdoing or fraud on which petitioner grounds his claim to come in and make defense on the corporate behalf²⁹ and show that he is a stockholder,³⁰ and a copy of the proposed answer or other pleading to be filed by the intervener should accompany and be tendered with the petition.³¹ The order granting leave is merely an order in the case and not a final decree.³²

The complaint or answer in intervention should be in the name of the intervener³³ and it should be essentially of a defensive character³⁴ affirmatively alleging the facts of the defense³⁵ and a de-

²⁹ Cannot intervene in foreclosure suit on general allegations of a fraudulent purpose to suffer a foreclosure without applying available assets to the debt. *Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co.*, 200 Fed. 600.

Where action is brought by a corporation against one of its officers to recover for misappropriation of the corporate funds, and thereafter such officer acquires a controlling interest in the corporation and takes steps to have the action dismissed, it is essential for minority stockholders who wish to intervene to prevent such dismissal to show such facts as would have given them standing in the court to have instituted the action originally. It is not sufficient that the minority stockholders allege that the officer has obtained control of the corporation and that the other officers are acting in collusion with him to defraud the corporation in the dismissal of the suit to the injury of the interveners and others. *Ainsworth v. Evans (Ariz.)*, 80 Pac. 344.

³⁰ A person will not be permitted to defend an action against a corporation on the ground that the plaintiff is endeavoring to secure judgment against the corporation with a view to its enforcement against the person so asking permission to defend, all other admitted stockholders being insolvent

and the person wishing to defend being solvent, where such person wishing to defend denies in his petition that he is a stockholder and subject to liability. Such party would have no standing in court until it was made to appear that he was a member of the corporation. *Meyer v. Bristol Hotel Co.*, 163 Mo. 59, 63 S. W. 96.

³¹ *Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co.*, 200 Fed. 600.

³² The petition is a motion in the case and the order allowing intervention is not a final decree. *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826.

³³ *Hannah v. Union Consol. Warehouse Co.*, 144 Ga. 291, 86 S. E. 1085.

The answers should not be in the name of the corporation, and if they are, the corporation is an unreal and fictitious defendant. *Bronson v. La Crosse & M. R. Co.*, 2 Wall. (U. S.) 283, 17 L. Ed. 725.

³⁴ The intervener's pleading should be defensive in its general form and substance, but where no prejudice resulted from putting it in the form of a complaint, it was treated on appeal as an answer. *Investors' Syndicate v. North America Coal & Mining Co.*, 31 N. D. 259, 153 N. W. 472.

³⁵ Where it is sought to vacate a judgment for defective service, allegations negating the authority of the person served as an ostensible offi-

mand on the corporation to make it and the corporation's refusal,³⁶ and fraud or some wrong doing to the corporation must be alleged as in case of a suit by stockholders.³⁷ The intervening defendant may set up only such defenses as the corporation might have set up.³⁸

§ 4056. Right as affected by insolvency, receivership or bankruptcy. The general effect of insolvency or receivership proceedings and the appointment of a receiver therein upon actions either pending or about to be brought is not to disable the corporation to sue or to defend, unless special provision of the receivership or the requirement of some statute has that effect.³⁹

When the receiver is given such power as to take away the free agency of the corporation, a request to sue should be made to him and his refusal established before the stockholder can sue,⁴⁰ and the

cer should be made. *Seattle & N. R. Co. v. Bowman*, 53 Wash. 416, 102 Pac. 27.

³⁶ *Seattle & N. R. Co. v. Bowman*, 53 Wash. 416, 102 Pac. 27.

³⁷ *Central Trust Co. of New York v. Marietta & N. G. R. Co.*, 48 Fed. 14.

General allegations of fraud and collusion in a foreclosure suit are insufficient. *Rospigliosi v. New Orleans, M. & C. R. Co.*, 237 Fed. 341.

³⁸ *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. Ed. 423; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. Ed. 98; *Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co.*, 127 Fed. 625; *Land Title & Trust Co. v. Asphalt Co. of America*, 114 Fed. 484; *Forbes v. Memphis, E. P. & P. R. Co.*, 2 Woods (U. S.) 323, Fed. Cas. No. 4,926; *Cumberland Lumber Co. v. Clinton Hill Lumber & Manufacturing Co.*, 64 N. J. Eq. 517, 54 Atl. 450.

Improper to set up in a foreclosure suit the invalidity of the purpose for which mortgagee corporation was organized. *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. Ed. 423.

Cannot set aside action of corporation in submitting to the jurisdiction. *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. Ed. 98.

If a defense is barred by a decree or judgment against the corporation, the stockholder cannot make it in a separate action without special equities relieving him of the bar. *Clark v. Marks*, 111 Me. 218, 88 Atl. 718.

³⁹ See chapter on Receivers, *infra*, and also Chap. 47, *Actions By and Against Corporations*, *supra*.

As to statutory receivers, it must always be remembered that they sometimes have very extensive powers, and the local statutes must invariably be consulted if corporate receiverships are at all regulated thereby. Generally a receiver in, or ancillary to, a dissolution proceeding has broader powers than a receiver appointed at the instance of creditors. See chapter on Forfeiture, Dissolution and Winding Up, *infra*.

⁴⁰ So in a suit to cancel stock fraudulently issued. *Bimber v. Calivada Colonization Co.*, 110 Fed. 58.

So in an action for misappropriation of funds by directors. *Cunningham v. Wechselsberg*, 105 Wis. 359, 81 N. W. 414.

The ordinary prerequisites of resort to corporate authorities and refusal by them are required more strongly in case of insolvent corporations in receivership. Ordinarily

rule requiring the demand to be on the corporation does not apply.⁴¹ When the receiver is a wrongdoer himself, so that demand on him would be futile, it is dispensed with.⁴² A receivership that carries with it full power to redress corporate wrongs, disentitles the stockholder to sue at all, unless on leave given to do so.⁴³ As to a chancery receiver, unlike a statutory one, his power and control are coextensive with that of his court, and the stockholder in a foreign jurisdiction is not prevented from suing⁴⁴ and may sue in equity

the receiver should sue for protection of all stockholders as well as creditors, and a stockholder could not sue unless the receiver refused or was acting fraudulently. *Marcovich v. O'Brien*, — Ind. App. —, 114 N. E. 100.

Where an insolvent corporation has gone into the hands of a receiver, it is necessary that a stockholder who wishes to institute action against the directors for fraudulent mismanagement first apply to the receiver to bring such action. If upon proper demand the receiver refuses so to do, the fact of such demand and refusal should appear in the stockholder's pleadings. *Coble v. Beall*, 130 N. C. 533, 41 S. E. 793.

With respect to right of a stockholder to bring action against directors in behalf of himself and all other stockholders, where receivers have refused to bring the action, see *Craig v. James*, 71 N. Y. App. Div. 238, 75 N. Y. Supp. 813.

⁴¹ *Kelly v. Dolan*, 233 Fed. 635.

⁴² Where there is a receiver and he is charged with wrongdoing and made a defendant, no demand was necessary, since it would be futile as to the directors because of the receivership and useless as to him. *Sigwald v. City Bank*, 82 S. C. 382, 64 S. E. 398.

Need not apply to trustee before suing where he is a conspirator. *North v. Union Savings & Loan Ass'n*, 59 Ore. 483, 117 Pac. 822.

Demand on receiver is not required

where his appointment is part of the fraudulent plan. *Reed v. Hollingsworth*, 157 Iowa 94, 135 N. W. 37. Especially is this true where he is appointed by a foreign court. *Id.*

⁴³ While ordinarily the corporation should sue, yet, said the court, "where, however, the wrong done to the corporation is followed by a second wrong to the stockholders, wrought by means of a mala fide refusal to redress the first wrong, there the stockholders may themselves seek redress. The right of the stockholders, however, is based, not on the first wrong, but the second. When, again, the power to redress the first wrong has passed from the hands of the corporation into the hands of a court [its receiver], the possibility even of such second wrong cannot be supposed. The right of the stockholders which rests upon it has therefore lost its entire support." *Kelly v. Dolan*, 218 Fed. 966.

Where corporate officers are faithless to their trust the right to call them to account is primarily in the corporation, but when a receiver is in charge it passes to him, unless he, having been one of the delinquents, the stockholders may sue on leave given. *Weslosky v. Quartermann*, 123 Ga. 312, 51 S. E. 426.

⁴⁴ A statutory receiver with title to the property may sue anywhere, hence neither corporation nor stockholder may sue without leave of court. *Kelly v. Dolan*, 218 Fed. 966.

in a foreign court for benefit of the corporation and the receiver.⁴⁵ A special rule applies to national bank corporations, which are insolvent.⁴⁶ Demand need not be made on the liquidating committee of a national bank in voluntary liquidation.⁴⁷ That the corporation becomes bankrupt after a stockholder has instituted his action does not bar relief.⁴⁸

The proper practice where the court, through its receiver, is in full control is to move that the court give the receiver appropriate directions to bring the suit⁴⁹ or to apply to the court for leave to sue,⁵⁰ especially if property is to be recovered from the receiver,⁵¹ and this should be done seasonably.⁵² Such leave may be limited to the court in which the receiver is serving.⁵³

In addition to the leave to sue, it will be necessary for the court

⁴⁵ Kelly v. Dolan, 218 Fed. 966.

⁴⁶ In case of a national bank, it must be made either on directors, the receiver or the comptroller of currency. Moss v. Goodhart, 47 Mont. 257, 131 Pac. 1071. That it should be on the comptroller, see Brinckerhoff v. Bostwick, 23 Hun (N. Y.) 237.

⁴⁷ Since such committee does not displace the directors it should be made on them or on the corporation. Planten v. National Nassau Bank of New York, 174 N. Y. App. Div. 254, 160 N. Y. Supp. 297, aff'g 93 N. Y. Misc. 344, 157 N. Y. Supp. 31.

⁴⁸ Meyer v. Page, 112 N. Y. App. Div. 625, 98 N. Y. Supp. 739.

⁴⁹ Ames v. American Telephone & Telegraph Co., 166 Fed. 820.

After a receiver, with power to sue, has been appointed under a statute for the purpose of winding up a corporation, a stockholder cannot maintain a separate suit against the directors for misappropriation of corporate funds by them. His remedy is by petition to the receiver or to the court for the institution of an action. Cunningham v. Wechselberg, 105 Wis. 359, 81 N. W. 414.

⁵⁰ Kelly v. Dolan, 218 Fed. 966.

It is not necessary to seek leave in a foreign court to sue where the re-

ceiver, because he was not a necessary party, could not require that he be joined. Reed v. Hollingsworth, 157 Iowa 94, 135 N. W. 37.

⁵¹ Leave to sue receiver in an action to augment assets is only formally necessary, if necessary at all, and is not jurisdictional. Sigwald v. City Bank, 82 S. C. 382, 64 S. E. 398.

⁵² An insolvent corporation had been in the hands of a receiver for twenty-six months. Petition was then brought by minority stockholders to obtain leave to institute proceedings against the corporate directors, of whom the receiver was one, to call them to account for alleged wrongful conduct of the corporate business. It was held that the action was not made premature by the fact that the corporate affairs were not wound up and the extent of the liabilities of the directors determined. Neither could laches be attributed to the petitioning stockholders for not presenting their petition earlier. Weslosky v. Quarterman, 123 Ga. 312, 51 S. E. 426.

⁵³ Where leave is granted stockholders to sue a receiver, the right of suit may be confined to the court in which the receivership proceedings are pending. Harper v. Printing-Telegraph News Co., 128 Fed. 979.

to order that legal title necessary to the maintenance of the action pass from the receiver to the plaintiff stockholder, if the receivership is such as vests that title in the receiver.⁵⁴

When a corporation makes a general assignment of all its assets for the benefit of creditors, the assignee represents the corporation as well as its creditors, and unless he refuses to do so, he alone is authorized to bring a suit against the late directors of the corporation for negligence or mismanagement of its affairs, or to redress other injuries against, or enforce other rights of, the corporation. But if he wrongfully refuses to sue for redress, a stockholder may sue on behalf of himself and the other stockholders, as he could have done before the assignment if the corporation had refused to sue.⁵⁵

By virtue of the power of the court to protect its own proceedings, a federal court in bankruptcy can entertain a supplemental or ancillary bill to restrain stockholders' suits in the state courts not only because they would interfere and embarrass the due administration of the bankrupt's estate, but also on the general ground that equity can protect and effectuate its own decrees.⁵⁶

§ 4057. Right as affected by dissolution, incompleteness or suspension of corporation. When the corporation has ceased to exist by dissolution, all actions by or against it are abated, and by parity of reason the stockholders' right to sue on its behalf would also be abated. The right of action remaining to them would ordinarily be an individual right founded on their distributive rights in the corporate assets, if any remained.⁵⁷ The stockholders are, in equity, entitled to its assets, in proportion to their stock, after payment of its debts, and as there is no longer any corporation, they may in-

⁵⁴ Leave to sue, without order vesting an action for negligence in the stockholder and divesting the receiver, gives the stockholder no legal right on which to found an action for negligence by directors towards the corporation. *Kelly v. Dolan*, 233 Fed. 635.

⁵⁵ *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448. And see *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582; *Williams v. Halliard*, 38 N. J.

Eq. 376; *Ackerman v. Halsey*, 37 N. J. Eq. 356; *Brinckerhoff v. Bostwick*, 88 N. Y. 52.

⁵⁶ The right to recover misappropriated assets being in the corporation passes to its trustee in bankruptcy, and while a stockholder might ordinarily sue on refusal of the corporation, he cannot do so to oust or interfere with the trustee's title to recover and administer assets for creditors. In *re Swofford Bros. Dry Goods Co.*, 180 Fed. 549.

⁵⁷ See chapter on Forfeiture, Dissolution and Winding Up, *infra*.

dividually sue in equity to protect or enforce their rights, both as between themselves and as against third persons.⁵⁸

Statutes commonly provide for winding up through the agency of a receiver or liquidator, or else, or in addition thereto, provide that the directors shall continue after dissolution to represent the corporation. In such case request to sue should be made through them, and their refusal established before suing as a stockholder.⁵⁹ Under other statutes the right of a stockholder to sue after dissolution of the corporation may not exist where there is a provision continuing its existence for the purpose of suing and winding up its affairs, and vesting its assets in trustees for such purpose, with the power to maintain suits, etc.⁶⁰ Persons who fraudulently represent that the entire stock of a corporation belongs to them, and thereby procure a dissolution of the corporation and possession of its assets, will be held as trustees *ex maleficio* at the suit of other stockholders.⁶¹ A dissolution after the cause of action accrued does not affect the need

⁵⁸ *Putnam v. Ruch*, 56 Fed. 416, 54 Fed. 216; *Chouteau v. Allen*, 70 Mo. 290. And see *Crumlish's Adm'r v. Shenandoah Valley R. Co.*, 28 W. Va. 623. See also chapter on Forfeiture, Dissolution and Winding Up, *infra*.

In that situation the stock represents an equity in assets. *Aalwyn's Law Institute v. Martin*, 173 Cal. 21, 159 Pac. 158.

A stockholder of a dissolved corporation has such an interest as entitles him to sue, under La. Code art. 606, to annul a judgment against the corporation, which is void because rendered after its dissolution, where he is individually liable under the charter for the debts of the corporation to the extent of his shares. *Musson v. Richardson*, 11 Rob. (La.) 37.

After failure to pay franchise tax the corporation forfeits all right to sue or defend, and stockholder need not demand it. *Canadian Country Club v. Johnson*, — Tex. Civ. App. —, 176 S. W. 835.

⁵⁹ Where the power of directors continues after dissolution, request to them to act is essential before stockholders may petition to intervene.

General Elec. Co. v. West Asheville Improvement Co., 73 Fed. 386.

Corporation though alleged to be moribund and kept alive in form to protect defendants, was held to be alive for purpose of request to sue. *Brock v. Poor*, 216 N. Y. 387, 111 N. E. 229, *rev'g* 167 N. Y. App. Div. 784, 798, 800, 153 N. Y. Supp. 332, 342, 343.

That the receiver should be appealed to, see *Cunningham v. Wechselsberg*, 105 Wis. 359, 81 N. W. 414.

See § 4056, *supra*, and see also the chapter on Forfeiture, Dissolution and Winding Up, *infra*.

⁶⁰ *Taylor v. Holmes*, 127 U. S. 489, 32 L. Ed. 179.

If the existence continues after dissolution for purpose of suits, demand on it is prerequisite to suit. *Elmergreen v. Weimer*, 138 Wis. 112, 119 N. W. 836.

Pleading that plaintiff was stockholder in dissolved corporation at time of injury, see *Elmergreen v. Weimer*, 138 Wis. 112, 119 N. W. 836.

⁶¹ *In re Bailey's Appeal*, 96 Pa. St. 253.

of having applied to the corporation for action, it is said in one case.⁶²

If instead of having lost its corporate existence, the corporation has not yet acquired a complete and active existence, no suit in its right can be maintained.⁶³

Mere suspension of active business or meetings does not dispense with necessity of resort to the corporate authorities.⁶⁴

§ 4058. Who are regarded as stockholders entitled to sue—In general. In order that a person may maintain a suit as a stockholder to set aside or enjoin an ultra vires transaction, or to redress or prevent other injuries to the corporation, he must be a stockholder in fact when the suit is brought. If he has not yet become a stockholder by reason of nonperformance of his contract of subscription or contract for the purchase of shares, or by reason of the fact that his subscription is upon a condition precedent which has not yet been performed by the corporation, or if he has ceased to be a stockholder by reason of a transfer or forfeiture of his shares, he has no standing to complain.⁶⁵ A citizen is not a stockholder who may join as plaintiff in a suit affecting a corporation in which the public owns stock.⁶⁶ Necessarily there must have been an issue of stock and the acquisition of a

⁶² *Dillon v. Lee*, 110 Iowa 156, 81 N. W. 245, but this might well be questioned unless the interval was significant of laches.

⁶³ There must have been an issue of stock in a complete corporation to qualify a stockholder, or he must at least have become entitled to receive the stock in it. *Berger v. National Architects' Bronze Co.*, 173 N. Y. App. Div. 680, 160 N. Y. Supp. 331.

⁶⁴ Right to sue without demand where corporation has ceased to do business and has no officers acting, see § 4070, *infra*.

⁶⁵ *District of Columbia. Scanlan v. Snow*, 2 App. Cas. 137.

Florida. Continental Nat. Building & Loan Ass'n v. Miller, 44 Fla. 757, 33 So. 404.

Maryland. Busey v. Hooper, 35 Md. 15, 6 Am. Rep. 350.

New Jersey. Schultze v. Van Doren, 64 N. J. Eq. 465, 53 Atl. 815.

New Mexico. Rankin v. Southwest-

ern Brewery & Ice Co., 12 N. M. 54, 73 Pac. 614.

New York. Wormser v. Metropolitan St. R. Co., 98 App. Div. 29, 90 N. Y. Supp. 714; *Fitchett v. Murphy*, 46 App. Div. 181, 61 N. Y. Supp. 182, *rev'g* 26 Misc. 544, 56 N. Y. Supp. 322; *Thompson v. Stanley*, 73 Hun 248, 25 N. Y. Supp. 890.

Pennsylvania. Rafferty v. Donnelly, 197 Pa. 423, 47 Atl. 202.

Washington. Ninneman v. Fox, 43 Wash. 43, 86 Pac. 213.

England. Doyle v. Munz, 5 Hare 509.

Forfeiture of stock by mutual consent induced by fraud, and where the rights of the former holder were not treated as extinct or the stock sold, does not deprive him of the right to sue. *Ekberg v. Swedish-American Pub. Co.*, 114 Minn. 196, 130 N. W. 1029.

⁶⁶ *Central Ry. Co. v. Collins*, 40 Ga. 582.

right thereto⁶⁷ and the stock of the very corporation must be held.⁶⁸ A "contract holder" in a tontine diamond selling corporation cannot be regarded as a stockholder by reason of the fact that no certificates of stock other than such contracts have been issued.⁶⁹ Being a director is not equivalent to being a stockholder, for it is not always required that one own stock to be a director.⁷⁰ It has been held that a mere equitable right to shares is not enough to give one a standing to sue;⁷¹ but since the suit is in equity, there is no reason why an equitable right cannot be protected, as well as a legal right,⁷² and the possession of a certificate is not indispensable.⁷³

A stockholder is not precluded from suing as such by the fact that the transfer of the stock to him is not registered on the books of the corporation, particularly where he has applied to have it registered and the corporation has refused,⁷⁴ or by the fact that he is

⁶⁷ *Berger v. National Architects' Bronze Co.*, 173 N. Y. App. Div. 680, 160 N. Y. Supp. 331.

⁶⁸ A minority holder in a holding company is not a stockholder in the subsidiary whose stock the other holds. He is merely a shareholder in a corporate stockholder. The companies are not capable of being regarded as identical. *Sabre v. United Traction & Electric Co.*, 225 Fed. 601.

⁶⁹ *Mann v. German-American Inv. Co.*, 70 Neb. 454, 97 N. W. 600.

⁷⁰ A director cannot sue unless he is a stockholder. *Wright v. Floyd*, 43 Ind. App. 546, 86 N. E. 971.

⁷¹ *McHenry v. New York, P. & O. R. Co.*, 22 Fed. 130; *Da Ponte v. Louisiana State Lottery Co.*, 1 La. Law J. 184, Fed. Cas. No. 3,569.

In a suit brought by a stockholder against a corporation, the court in a New Jersey case said: "My opinion is that a suit of the present character must be based upon an ownership of record at the time of filing the bill, and that the ownership of shares standing in the name of another will not be sufficient to maintain the suit." *Hodge v. United States Steel Corporation*, 64 N. J. Eq. 90, 53 Atl. 601.

⁷² See *Fisher v. Patton*, 134 Mo. 32, 34 S. W. 1096, 33 S. W. 451; *Great Western Ry. Co. v. Rushout*, 5 De G. & Sm. 290.

An assignee of stock need not reduce his claim against his assignor to judgment before bringing action to rectify wrongs to the corporation by the corporate president. *First Nat. Bank of Sulphur Springs v. Stribling*, 16 Okla. 41, 86 Pac. 512.

⁷³ The mere fact that a party has not received a certificate of his stock does not bar action by him. *Mulvihill v. Vicksburg Railroad, Power & Manufacturing Co.*, 88 Miss. 689, 40 So. 647. See also *Hirsch v. Jones*, 115 N. Y. App. Div. 156, 100 N. Y. Supp. 687.

⁷⁴ **California.** *Parrott v. Byers*, 40 Cal. 614.

Iowa. *Carson v. Iowa City Gas-Light Co.*, 80 Iowa 638, 45 N. W. 1068.

Minnesota. *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261, 276.

New York. *Ervin v. Oregon Ry. & Nav. Co.*, 28 Hun 269.

England. *Great Western Ry. Co. v. Rushout*, 5 De G. & Sm. 290; *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare 114.

The holder of the certificate not yet

enjoined from voting it⁷⁵ or has been fraudulently deprived of it.⁷⁶ A transferee of stock subsequent to dissolution is not a stockholder, but is merely the assignee of an equity in the property of the late corporation.⁷⁷

If the plaintiff is in fact a bona fide stockholder, however, it is immaterial how he became such or whether or not he became such on a bona fide subscription for stock.⁷⁸ In the federal courts the transfer of stock to plaintiff must be a real one, but the motive of it is immaterial.⁷⁹ As in the state courts, possession of the certificate is not essential.⁸⁰ The federal statute denying to federal courts jurisdiction of suits by an assignee on the ground of diverse citizenship which the assignor could not have brought, does not apply to a plaintiff suing on shares transferred to him.⁸¹ The holder of watered

transferred on the books may sue. *Mitchell v. Aulander Realty Co.*, 169 N. C. 516, 86 S. E. 358.

In *O'Connor v. International Silver Co.*, 68 N. J. Eq. 67, 59 Atl. 321, the court indicated that one who owns stock in fact, although it still stands on the corporate books in the name of its grantor, may sue to prevent the directors and officers from illegally voting certain shares of stock of the corporation owned by the corporation as such. The court said: "I am able to perceive little, if any, resemblance in the relations between the registered owner and the real owner of shares of stock and those which exist between the ordinary trustee of an express trust and his cestui que trust. In the latter case the trustee is the actual legal owner and the cestui que trust the owner only in equity. In the case of a transfer of a certificate of shares of stock by an assignment in the usual form for value received and a delivery of the certificate, which is the usual mode of making title to shares of stock, the complete legal and beneficial title passes, and the transfer on the books of the company is not necessary in order to make the legal title complete."

⁷⁵ It has been held, however, al-

though a stockholder be enjoined from disposing of or voting his stock and from exercising any right incident to ownership, pending an action for the cancellation of a sale of stock to him, he may nevertheless join with other stockholders as plaintiff in another action brought to require certain directors to return certain property to the corporation without being guilty of contempt of court. *Maine Products Co. v. Alexander*, 115 N. Y. App. Div. 475, 101 N. Y. Supp. 464.

⁷⁶ *Empire Realty Co. v. Harton*, 176 Ala. 99, 57 So. 763.

⁷⁷ *Aalwyn's Law Institute v. Martin*, 173 Cal. 21, 159 Pac. 158.

⁷⁸ *Stewart v. Erie & W. Transp. Co.*, 17 Minn. 372.

⁷⁹ *In re Cleland*, 218 U. S. 120, 54 L. Ed. 962.

Such a transferee may bring a federal suit, notwithstanding the sale to him was motivated by that purpose. *O'Neil v. Walcott Min. Co.*, 174 Fed. 527, 27 L. R. A. (N. S.) 200.

⁸⁰ A prior beneficial ownership, but with the certificate withheld, is sufficient under the 94th rule. *Citizens' Savings & Trust Co. v. Illinois Cent. R. Co.*, 182 Fed. 607, rev'g 173 Fed. 556.

⁸¹ A purchaser of shares is not the assignee of the cause of action to re-

stock may maintain such a suit when the stock is valid as between him and the corporation;⁸² but it is otherwise where his certificate is an absolute nullity because of an express statutory or constitutional prohibition.⁸³

The fact that a stockholder suing to enjoin or obtain redress from another corporation also holds stock in the latter corporation does not preclude him from maintaining the suit.⁸⁴

§ 4059. — Executors, trustees, pledgees and other qualified holders.

Such a suit may be brought by an administrator or executor having the title to shares as such, or by any person holding shares in trust,⁸⁵ or by a cestui que trust of shares, if the trustee refuses to sue, and is made a party defendant,⁸⁶ or by a pledgee⁸⁷ or pledgor of shares.⁸⁸ It has been held, however, that unregistered pledgees of corporate stock do not sustain such relation to the corporation as permits them to maintain action against it and its officers for mismanagement.⁸⁹

strain ultra vires acts, and as such disentitled to invoke federal jurisdiction which the assignor could not. *Consumers' Gas Trust Co. v. Quinby*, 137 Fed. 882.

⁸² A holder of stock illegally issued for less than par may nevertheless sue. The agreement on the part of the corporation that it should be considered as fully paid would be voidable, but the stock not a nullity. *Shaw v. Staight*, 107 Minn. 152, 20 L. R. A. (N. S.) 1077, 119 N. W. 951.

See supra, this chapter, subd. XII, "Watered or Fictitiously Paid Up Stock."

⁸³ *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21. And see this chapter, subd. XII "Watered or Fictitiously Paid Up Stock," supra.

⁸⁴ *Carter v. Producers' & Refiners' Oil Co.*, 164 Pa. St. 463, 30 Atl. 391.

⁸⁵ *Jones v. Pearl Min. Co.*, 20 Colo. 417, 38 Pac. 700; *Scanlan v. Snow*, 2 App. Cas. (D. C.) 137; *Hirsch v. Jones*, 115 N. Y. App. Div. 156, 100 N. Y. Supp. 687.

⁸⁶ *Great Western Ry. Co. v. Rushout*, 5 De Gex & S. 290.

⁸⁷ *Green v. Hedenberg*, 159 Ill. 489,

50 Am. St. Rep. 178, 42 N. E. 851, aff'g 55 Ill. App. 425; *Baldwin v. Canfield*, 26 Minn. 43; *Campbell v. American Zylonite Co.*, 122 N. Y. 455, 11 L. R. A. 596, 25 N. E. 853; *Chafee v. Quidnick Co.*, 14 R. I. 75; and see elsewhere this chapter, subd. "Pledge of Shares."

The equitable interest of a pledgee of stock is such as to entitle him to the protection of a court of equity in matters pertaining to the preservation of the value of the stock to an extent, at least, equal to that possessed by the pledgor. *Gorman-Wright Co. v. Wright*, 134 Fed. 363; *Smith v. Smith, Sturgeon & Co.*, 125 Mich. 234, 84 N. W. 144.

⁸⁸ *Fisher v. Patton*, 134 Mo. 32, 34 S. W. 1096, 33 S. W. 451.

A stockholder who has pledged his stock for corporate debts and put it into a voting trust may have a right as pledgor, even if he no longer can sue as stockholder. *Milliken v. McGarrah*, 159 N. Y. App. Div. 725, 144 N. Y. Supp. 964.

⁸⁹ *Erny v. G. W. Schmidt Co.*, 197 Pa. 475, 47 Atl. 877.

As to the necessity of registration

Legatees cannot sue where title to the stock is in the executor,⁹⁰ but a legatee of a qualified title who has bought an absolute one from the executor is regarded as holding under the latter.⁹¹

§ 4060. — Transferees after injury complained of. A stockholder cannot sue in equity in the federal courts to set aside or enjoin an ultra vires transaction, or redress a misapplication of corporate assets, or to enjoin or obtain redress for fraud or negligence on the part of the directors or other shareholders, etc., unless he was a stockholder at the time of the transactions complained of, or his shares have devolved upon him since by operation of law;⁹² and the same rule has been asserted in several states upon the authority of the decisions of the Supreme Court of the United States, or by independent reasoning.⁹³ If his acquisition of right antedated the grievance, it suffices, though his certificate came to him afterwards.⁹⁴ The decisions and dicta in the federal courts, however, are not based upon any general principle, but upon an equity rule adopted by the Supreme Court,⁹⁵ and which was designed as a rule of practice merely, to guard those courts against collusion of parties for the purpose of bringing cases within their jurisdiction;⁹⁶ and they are not binding rules of decision in state courts.⁹⁷ The doctrine that one not a

of pledge to be effective, see § 3814, supra.

⁹⁰ Mere distributees of an estate claiming as executors of a residuary legatee therein, are not stockholders though the stock was comprised in a trust which was to go into the residue. *Whitaker v. Whitaker Iron Co.*, 238 Fed. 980. In such a case the trustee was the stockholder. *Id.*

⁹¹ Where the holder has bought stock at an executor's sale to pay debts of the estate, it is immaterial that it was also bequeathed to him by a qualified title. *Mitchell v. Aulander Realty Co.*, 169 N. C. 516, 86 S. E. 358.

⁹² See § 4069, infra.

⁹³ A purchaser subsequent to a sale of its property pursuant to power voted by the stockholders, including the holders of that stock which he later purchased, cannot urge that the vote was ultra vires. The same was held of other stock subsequently pur-

chased which had not been voted. *Boldenweck v. Bullis*, 40 Colo. 253, 90 Pac. 634; *Mackey v. Burns*, 16 Colo. App. 6, 64 Pac. 485; *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630; *Tevis v. Hammer-smith*, 31 Ind. App. 281, 66 N. E. 912; *Hanna v. Lyon*, 179 N. Y. 107, 71 N. E. 778.

⁹⁴ It has been held that a stockholder may sue to enjoin a misapplication of corporate funds under an agreement entered into before his stock was issued, if he had a vested right to receive the stock before the agreement was made. *Hill v. Glasgow R. Co.*, 41 Fed. 610.

⁹⁵ New Equity Rule 27 (former 94th Rule), and see § 4069, infra.

⁹⁶ 1 *Morawetz*, Priv. Corp. § 269; *Parsons v. Joseph*, 92 Ala. 403, 8 So. 788.

⁹⁷ *North v. Union Savings & Loan Ass'n*, 59 Ore. 483, 117 Pac. 822; *Southwestern Portland Cement Co. v.*

stockholder at the time of the commission of wrong against the corporation may not bring suit therefor has been criticized as based in part on jurisdictional considerations which are peculiar to the federal courts, and as based in part on the common-law doctrines of champerty and maintenance which have become obsolete.⁹⁸ By the weight of authority, in the absence of such a rule, a stockholder is not precluded from suing in equity on behalf of himself and other stockholders by the mere fact that he purchased his shares after the transactions complained of, even though he may have known of them at the time of his purchase, and though he may have made the purchase for the purpose of acquiring a standing to sue, for the transfer of stock not only conveys to the transferee the ownership of the shares and the right to the future dividends thereon, but also places him upon an equal footing with the other stockholders—provided neither he nor his transferrer is otherwise estopped—in respect to the right to call the officers and agents of the corporation to account, and to enjoin or set aside ultra vires transactions, etc.⁹⁹ It has been said that

Latta & Happer, — Tex. Civ. App. —, 193 S. W. 1115.

⁹⁸ *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 60 L. R. A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024, where the court indicated its opinion that the doctrine was not based on either of these grounds.

⁹⁹ *Alabama*. *Parsons v. Joseph*, 92 Ala. 403, 8 So. 788.

Illinois. *Chicago v. Cameron*, 22 Ill. App. 91, aff'd 120 Ill. 447, 11 N. E. 899.

Iowa. *Carson v. Iowa City Gas-Light Co.*; 80 Iowa 638, 45 N. W. 1068. Compare *Clark v. American Coal Co.*, 86 Iowa 436, 17 L. R. A. 557, 53 N. W. 291.

New Hampshire. *Winsor v. Bailey*, 55 N. H. 218.

New Jersey. *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 5.

New York. *Pollitz v. Gould*, 202 N. Y. 11, Ann. Cas. 1912 D 1098, 38 L. R. A. (N. S.) 988, 94 N. E. 1088, with full discussion; *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138, aff'g 150 App.

Div. 298, 134 N. Y. Supp. 635, 75 Misc. 234, 133 N. Y. Supp. 560; *Ervin v. Oregon Ry. & Nav. Co.*, 28 Hun 269; *Continental Securities Co. v. Belmont*, 83 Misc. 340, 144 N. Y. Supp. 801; *Ramsey v. Gould*, 57 Barb. 398; *Frothingham v. Broadway & S. Ave. R. Co.*, 9 N. Y. Civ. Proc. 304.

England. *Bloxam v. Metropolitan Ry. Co.*, 3 Ch. App. 337; *Seaton v. Grant*, 2 Ch. App. 459; *Pender v. Lushington*, 6 Ch. Div. 70.

In *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 60 L. R. A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024, the argument is fully discussed and the decisions commonly cited to sustain the doctrine enunciated in the text are referred to.

Questioned but not decided: *National Power & Paper Co. v. Rossman*, 122 Minn. 355, 532, Ann. Cas. 1914 D 830, 142 N. W. 818.

The ratification by a majority of the stockholders of an illegal and incomplete transfer of the property of the corporation may be enjoined at the suit of stockholders who acquired their stock after the transfer was at-

one who is a mere interloper or trouble seeker cannot sue.¹ It has been held that fraud in promotion may be redressed by a stockholders' suit brought by one who took without notice, although all holders are necessarily subsequent to the promotion of the corporation,² and in New Jersey, syndicate members who afterwards became stockholders were allowed to sue for like secret profits.³ In Missouri the right has been denied on the ground of estoppel to one who purchased by means of subscription through a promoters' scheme, the action being to recover illegal profits made by the promoters, and the subscription having imparted notice to him of what the profits were.⁴ The logic of these last two cases is that knowledge or notice of a voidable transaction may deprive the stockholder of equity entitling him to sue, rather than that the fact of his being a subsequent

tempted. *Forrester v. Boston & M. Consol. Copper & Silver Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353.

Transferee may sue even where he bought after promulgation of corporate plans and for purpose of suing to prevent them. *General Inv. Co. v. Bethlehem Steel Corporation*, — N. J. Eq. —, 100 Atl. 347.

He may sue "except in cases where it is shown that he purchased the stock with the intent and for the purpose of bringing suit, or where his vendor was for some reason estopped from maintaining the action, and the purchaser had notice of such bar." *Just v. Idaho Canal & Improvement Co.*, 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

The courts are reluctant to interfere at suit of one who acquired stock with full knowledge, and one who took from his son stock which he had purchased for the son cannot claim that the transaction was merely the revocation of a gift reinstating him as an original stockholder. *Von Schlemmer v. Keystone Life Ins. Co.*, 121 La. 987, 46 So. 991.

¹Plaintiff alleged that he had become the owner of his stock for value in the regular course of business. Certain of the wrongs complained of had been committed prior to the time

plaintiff became a stockholder. The court held that this did not bar plaintiff from maintaining the suit. The court, after stating these facts, calling special attention to the allegation that plaintiff had become the owner for value in the regular course of business, said: "A court of equity will, therefore, grant him relief. It is only in cases where the party has bought the stock for the mere purpose of bringing an action—where he is a mere interloper seeking for trouble—that a court of equity refuses to grant him relief." *O'Connor v. Virginia Passenger & Power Co.*, 46 N. Y. Misc. 530, 92 N. Y. Supp. 525. See also *Moore v. Silver Valley Min. Co.*, 104 N. C. 534, 10 S. E. 679; *McDonnell v. Grand Canal Co.*, 3 Ir. Ch. 578.

²*Wills v. Nehalem Coal Co.*, 52 Ore. 70, 96 Pac. 528. See also § 142, *supra*.

³Syndicate members who furnished money to reorganize a corporation and afterwards became stockholders may sue for restoration to the corporation of secret profits made by promoters. *Arnold v. Searing*, 73 N. J. Eq. 262, 67 Atl. 831.

⁴*Brooker v. William H. Thompson Trust Co.*, 254 Mo. 125, 162 S. W. 187.

transferee is a bar. Harmonious with this is a Michigan decision that subsequent members of a nonstock corporation may sue to annul an agreement which the corporation was wholly lacking in power to make.⁵

As will be seen hereafter, the defenses of laches, estoppel, ratification and assent and other like equities may afford a bar to the plaintiff's suit⁶ and these defensive equities should not be confused with the title on which plaintiff sues; for even if a subsequent holder brings the suit he will be subject to all of these equities, if they can be proved against him as a privy to a former stockholder.⁷ If one of the stockholders who sues was an antecedent holder, it is immaterial that some other one was subsequent.⁸

§ 4061. Grounds and occasions for relief—In general. The cause of action when a stockholder sues is dual in composition, consisting of the basic cause of action which pertains to the corporation and on which it might have sued, and the derivative cause of action pertaining to the stockholder, consisting in the fact that the corporation will not or cannot sue for its own protection. Both elements are essential.⁹ For the purpose of making out a cause of action the stockholder stands in the corporation's shoes¹⁰ and must ground the suit on the corporation's rights and a wrong thereto,¹¹ and to the plaintiff as

⁵ New members of a benevolent corporation could sue to annul a conveyance by it to its old members which it wholly lacked power to make. *German Corporation of Negaunee v. Negaunee German Aid Society*, 172 Mich. 650, 138 N. W. 343.

⁶ See § 4072, *infra*.

⁷ See § 4072, *infra*.

⁸ *National Power & Paper Co. v. Rossman*, 122 Minn. 355, Ann. Cas. 1914 D 830, 142 N. W. 818.

⁹ *Grant v. Cobre Grande Copper Co.*, 126 N. Y. App. Div. 750, 111 N. Y. Supp. 386, rev'g 59 N. Y. Misc. 1, 111 N. Y. Supp. 1089. And see other cases, § 4062, *infra*.

Until refusal, plaintiff has no right of action. *Bartlett v. New York, N. H. & H. R. Co.*, — Mass. —, 115 N. E. 976; *Bartlett v. New York, N. H. & H. R. Co.*, 221 Mass. 530, 109 N. E. 452.

Both must be pleaded, see § 4084, *infra*.

It is incumbent upon a stockholder bringing suit against directors for moneys alleged to be due to the corporation to show both that a cause of action exists in favor of the corporation and that the facts are such that he is entitled to bring the suit. *Young v. Equitable Life Assur. Society*, 49 N. Y. Misc. 347, 99 N. Y. Supp. 446.

¹⁰ *Tevis v. Hammersmith*, 170 Ind. 286, 84 N. E. 337.

He cannot rescind, if it cannot. *Johnson v. United Rys. Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63.

In New York a corporation cannot make the defense of usury, hence neither can the stockholder. *MacQuoid v. Queens Estates*, 143 N. Y. App. Div. 134, 127 N. Y. Supp. 867.

¹¹ *Lawrence v. Southern Pac. Co.*,

well,¹² and the wrong in question must have been either accom-

180 Fed. 822; *Turner v. Markham*, 155 Cal. 562, 102 Pac. 272; *Waters v. Horace Waters & Co.*, 201 N. Y. 184, 94 N. E. 602, aff'g 130 N. Y. App. Div. 678, 115 N. Y. Supp. 432; *Dusenberry v. Sagamore Development Co.*, 164 N. Y. App. Div. 573, 150 N. Y. Supp. 229.

Mere insolvency is not enough. *Worth Mfg. Co. v. Bingham*, 116 Fed. 785.

Insolvency resulting from nonpayment for stock, without any waste or mismanagement charged, will not support a suit in equity. *Fuller v. McCormick*, 156 Mich. 518, 121 N. W. 280. See also *Town v. Duplex-Power Car Co.*, 172 Mich. 519, 138 N. W. 338.

In order that a stockholder may maintain a suit in a court of equity, the right to maintain which is primarily in the corporation, the evidence must show some actual or contemplated action by the corporate managers or by a majority of the stockholders in excess of their lawful power, or which will be fraudulently subversive of the interests of the corporation or the stockholders. *Clark v. Apex Gold Min. Co.*, 13 N. M. 416, 85 Pac. 968. See also *Edwards v. Mercantile Trust Co.*, 124 Fed. 381; *Phillips v. Sonora Copper Co.*, 90 N. Y. App. Div. 140, 86 N. Y. Supp. 200; *O'Connor v. Virginia Pass. & Power Co.*, 45 N. Y. Misc. 228, 92 N. Y. Supp. 161.

Continuing a debt for its face after pledge for part of it, which was paid by the corporation, is not a fraud where the arrangement was for security and did not satisfy the larger debt. *Collins v. Penn-Wyoming Copper Co.*, 203 Fed. 726.

Corporate deed and bill of sale in satisfaction of debt are binding on stockholder, and unless the corporation intended it to be a mortgage, the stockholder cannot sue to declare it

such. *Osborne v. Morgan*, 171 Ill. App. 549.

Wrong must be to corporation, not towards "future stockholders." *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

Representing to purchasers that stock was treasury stock, whereas it was not, having been given in payment for property, is a wrong to the purchaser, not to the corporation. *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312; *Turner v. Markham*, 155 Cal. 562, 102 Pac. 272.

Agreement among stockholders as to allotment and purchase of stock affords no basis for action in right of corporation not a party to it. *Waters v. Horace Waters & Co.*, 130 N. Y. App. Div. 678, 115 N. Y. Supp. 432.

A statutory liability for all present or future debts, imposed on directors who declare dividends when the corporation is or will thereby become insolvent, accrues to creditors, not to the corporation. Hence stockholders cannot sue. *Collins v. Penn-Wyoming Copper Co.*, 203 Fed. 726.

Violation of federal interstate commerce laws can be pursued only by government. *Venner v. New York Cent. & H. River R. Co.*, 81 N. Y. Misc. 298, 143 N. Y. Supp. 211, aff'd 160 N. Y. App. Div. 127, 145 N. Y. Supp. 725.

In an action by a stockholder in behalf of the corporation against a third party, it is incumbent on the stockholder to show that there is some actual existing right which the directors refuse to enforce. *Rosenbaum v. Rice*, 86 N. Y. App. Div. 617, 83 N. Y. Supp. 494.

As to what are corporate as distinguished from individual causes of action, see § 4051, *supra*.

As to specific causes, see §§ 4062-4066, *infra*.

¹² At the instance of a minority

plished or threatened;¹³ and the suit must be promotive of the ends of justice¹⁴ and beneficial to the corporation.¹⁵ Within the limits of discretion, however, the governing body may decline to sue in which event the stockholder, being not aggrieved, is without any cause of action, though one exists in favor of the corporation.¹⁶ Accordingly action by a stockholder is not necessarily maintainable merely by reason of unlawful action on the part of the corporation. If the interests of the stockholder be in no wise affected directly or indirectly, he will not be heard to complain. Until the corporation has actually entered upon a course which renders it amenable to the law, and hence places his interests in the corporation in jeopardy, he has no cause of action.¹⁷ The action is not to establish a personal

stockholder not injured by any deviation from the charter purposes, equity will not decree the stock of another stockholder forfeited to the corporation on the ground that the stock of such other stockholder was originally acquired and is now held in violation of the corporate charter. *MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 428, 75 Pac. 89.

Stockholder cannot complain of discontinuance of corporation's business and of sale of all property by directors, though they exceeded their powers by not voting unanimously so to do as required, where the corporation was losing and no harm resulted to plaintiff. *Levin v. Mayer*, 86 N. Y. Misc. 116, 149 N. Y. Supp. 112.

Cannot sue for violation of laws against combinations or Sherman Act when not injured. *Venner v. New York Cent. & H. River R. Co.*, — N. Y. App. Div. —, 164 N. Y. Supp. 626. See also § 3401, supra.

Where the stock has no value because of the corporation's insolvency, a sale of its assets by the majority, though illegally done, is not actionable by the minority. *Stebbins v. Michigan Wheelbarrow & Truck Co.*, 191 Fed. 238.

As to the defense that a corporation is insolvent, so that plaintiff

could not realize anything on distribution, and hence that he has no interest and is not harmed, see § 4077, *infra*.

¹³ *Pierce v. Old Dominion Copper Mining & Smelting Co.*, 67 N. J. Eq. 399, 58 Atl. 319.

The result of a stockholders' meeting to vote on a plan to alter the relative status of classes of stock need not be awaited by the minority before suing, where the defendants hold the majority and will vote in affirmance of the plan. *Page v. Whitterton Mfg. Co.*, 211 Mass. 424, 97 N. E. 1006.

¹⁴ In order that a stockholder may secure assistance from a court of equity where directors refuse to bring an action at law to protect the corporation, the stockholder must show to the satisfaction of the court that the result of the action will be to promote justice. *Siegmán v. Maloney*, 63 N. J. Eq. 422, 51 Atl. 1003.

¹⁵ Action must be for benefit of corporation and not for individual right as a winding-up suit. *Troutman v. Council Bluffs Street Fair & Carnival Co.*, 142 Iowa 140, 120 N. W. 730.

¹⁶ See § 4065, *infra*.

¹⁷ *MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 428, 75 Pac. 89.

right. Stockholders are permitted to sue *ex necessitate rei*, and although by the record the corporation may be made a party defendant, the stockholder bringing the action is in fact its representative. Otherwise than in name the action is by the corporation, and if relief be obtained it belongs, not to the stockholder bringing the action, but to the corporation.¹⁸ A suit by a minority stockholder to protect the corporate interests therefore cannot be maintained where the corporation itself could not maintain the action were it disposed so to do,¹⁹ and a person who is a stockholder in two corporations cannot sue to enjoin one of them from engaging in a business, on the ground that it is an illegal interference with the business of the other, and will therefore expose it to vexatious and expensive litigation and thus diminish the value of his stock.²⁰ Violations of law which ordinarily are redressable by the state will not support a stockholders' suit.²¹

A stockholder cannot maintain a bill in equity to set aside an act or transaction which was done irregularly or illegally, but which a majority of the stockholders are entitled to do regularly or legally.²² Nor can a stockholder sue to set aside a transaction on the part of the directors on the ground that it was fraudulent, irregular, illegal

Under a statute providing that the debts of the company shall not exceed its capital stock, payment by the corporation for a benefit by it actually received will not be restrained at the instance of a stockholder merely because such payment will result in extending the corporate debt beyond the authorized limit. *Rankin v. Southwestern Brewery & Ice Co.*, 12 N. M. 49, 73 Pac. 612.

¹⁸ *Peck v. Peck*, 33 Colo. 421, 80 Pac. 1063; *Louisville Bridge Co. v. Dodd*, 27 Ky. L. Rep. 454, 85 S. W. 683; *Groel v. United Elec. Co. of New Jersey*, 69 N. J. Eq. 397, 60 Atl. 822; *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 54 Atl. 454; *Wilson v. American Palace Car Co.*, 64 N. J. Eq. 534, 54 Atl. 415.

¹⁹ *Kessler v. Ensley Co.*, 123 Fed. 546. See also *MacQuoid v. Queens Estates*, 143 N. Y. App. Div. 134, 127 N. Y. Supp. 867.

²⁰ *Converse v. Hood*, 149 Mass. 471,

4 L. R. A. 521, 21 N. E. 878.

²¹ They cannot restrain an attempted appropriation of water in a manner not according to statute. Such right belongs to the state. *Skeen v. Warren Irrigation Co.*, 42 Utah 602, 132 Pac. 1162.

Stockholder cannot complain of violation of law which it is the province of the state to pursue. *Von Schlemmer v. Keystone Life Ins. Co.*, 121 La. 987, 46 So. 991.

As to violations of anti-trust laws or Sherman Act, when not injurious to plaintiff, see *Venner v. New York Cent. & H. River R. Co.*, — N. Y. App. Div. —, 164 N. Y. Supp. 626.

²² *Dudley v. Kentucky High-School*, 9 Bush (Ky.) 576; *Macdougall v. Gardiner*, 1 Ch. Div. 13; *Foss v. Harbottle*, 2 Hare 461. See also *Levin v. Mayer*, 86 N. Y. Misc. 116, 149 N. Y. Supp. 112, where action was illegal because vote was not unanimous but no harm resulted.

or in excess of the powers conferred upon the directors, where the transaction is within the powers of the corporation, and such, therefore, as a majority of the stockholders may ratify,²³ unless, as may sometimes be the case, it is impossible to procure a meeting of the stockholders to pass upon the transaction.²⁴ This principle was applied in a leading English case, where a stockholder sued to set aside a purchase by the directors for the corporation of their own land. It was held that, while the transaction might be avoided by the corporation, it might also be ratified, and that the suit, therefore, could not be maintained without showing that no action of the stockholders could be obtained. "Whilst the court," said Vice Chancellor Wigram, "may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority, is decisive to shew that the frame of this suit cannot be sustained whilst that body retains its functions. In order then that this suit may be sustained, it must be shewn either that there is no such power as I have supposed remaining in the proprietors, or, at least, that all means have been resorted to and found ineffectual to set that body in motion."²⁵

§ 4062. — Ultra vires acts, waste, diversion or misapplication of assets. While a corporation, for the purpose of holding and managing its property, and carrying on its business, is in law an entity or artificial person distinct from the stockholders who compose it, the stockholders are the real parties in interest. Each stockholder has contributed his share of the capital stock under a contract with the corporation, by which the corporation has agreed to hold and manage the same for the purpose of carrying out the objects for which it was created, and for no other purpose, and every stockholder has a right to insist that this contract shall be complied with. In equity, therefore, a trust is created by implication in favor of the stockholders, that the corporation will not so manage its business or affairs as to defeat the objects for which it was created, and that it will use and apply its assets for the purpose of carrying out those

²³ *Bill v. Western U. Tel. Co.*, 16 Fed. 14; *Foss v. Harbottle*, 2 Hare 461.

Mass. 378; *Foss v. Harbottle*, 2 Hare 461.

²⁵ *Foss v. Harbottle*, 2 Hare 461.

²⁴ *Brewer v. Boston Theatre*, 104

objects, and not divert them to other purposes.²⁶ Nothing, therefore, is now more surely settled in the law of corporations than the doctrine that any unauthorized act or contract by the directors or a majority of the stockholders of a corporation, which will destroy the existence of the corporation or render it unable to perform its functions, or any misapplication or diversion of assets to purposes not authorized by its charter, even though all other stockholders may consent, is a breach of trust towards a dissenting stockholder, against which he is entitled to relief in equity. Therefore, in the absence of estoppel²⁷ and if he cannot obtain relief through the corporation or its officers,²⁸ any stockholder may maintain a bill in equity in his own name to enjoin a waste, misapplication or diversion of its assets, or to enjoin or set aside ultra vires acts or contracts which will result in such a waste, misapplication or diversion, or which may destroy the corporation or render it unable to carry out its objects.²⁹ In a leading

²⁶ "As the shareholders are in substance partners in a trading concern the management of which is committed to the body corporate, a trust is by implication created in favor of the shareholders that the corporation will manage the corporate affairs, and apply the corporate funds for the purpose of carrying out the original speculation." *Taylor v. Chichester & M. Ry. Co.*, L. R. 2 Exch. 378. See also *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. Ed. 401; *Peabody v. Flint*, 6 Allen (Mass.) 52; *Stevens v. Rutland & B. R. Co.*, 29 Vt. 549; *Russell v. Wakefield Water Works Co.*, L. R. 20 Eq. 474; and cases cited in the notes following. This question is also discussed in some of its phases in Chap. 1, *supra*.

²⁷ The general doctrine of ultra vires is discussed in Chap. 37, *supra*, and that as to illegal contracts in Chap. 38, *supra*.

As to the defense of estoppel and acquiescence, see § 4072, *infra*.

²⁸ As to requisite effort to induce corporation to sue, see §§ 4068, 4069, 4084, 4085, *infra*.

²⁹ *United States. Greenwood v. Union Freight R. Co.*, 105 U. S. 13, 26 L. Ed. 961; *Hawes v. Oakland*,

104 U. S. 450, 26 L. Ed. 827; *Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 958; *Bronson v. La Crosse M. R. Co.*, 2 Wall. 283, 17 L. Ed. 725; *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 How. 381, 16 L. Ed. 488; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Schell v. Alston Mfg. Co.*, 149 Fed. 439; *Brown v. Equitable Life Assur. Soc. of United States*, 142 Fed. 835; *Edwards v. Mercantile Trust Co.*, 124 Fed. 381; *Kessler v. Ensley Co.*, 123 Fed. 546; *Metcalf v. American School-Furniture Co.*, 108 Fed. 909; *Eldred v. American Palace Car Co.*, 96 Fed. 59; *Easun v. Buckeye Brewing Co.*, 51 Fed. 156; *Pond v. Vermont Valley R. Co.*, 12 Blatchf. 280, Fed. Cas. No. 11,265; *Hardon v. Newton*, 14 Blatchf. 376, Fed. Cas. No. 6,054; *Forbes v. Memphis, E. P. & P. R. Co.*, 2 Woods 323, Fed. Cas. No. 4,926.

Alabama. *Morris v. Elyton Land Co.*, 125 Ala. 263, 28 So. 513; *Jasper Land Co. v. Wallis*, 123 Ala. 652, 26 So. 659; *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 59 Am. St. Rep. 140, 21 So. 315; *Elyton Land Co. v. Dowdell*, 113 Ala. 177, 59 Am. St. Rep. 105, 20 So. 981; *Perry v. Tuska-loosa Cotton-Seed Oil-Mill Co.*, 93 Ala. 364, 9 So. 217; *Parsons v. Joseph*, 92

English case it was said on this point: "It is a breach of trust towards a shareholder in a joint-stock incorporated company, estab-

Ala. 403, 8 So. 788; *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 16 Am. St. Rep. 81, 7 So. 108; *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747; *Bliss v. Anderson*, 31 Ala. 612, 70 Am. Dec. 511.

Arizona. *Henshaw v. Salt River Valley Canal Co.*, 6 Ariz. 151, 54 Pac. 577.

Arkansas. *Mississippi, O. & R. River R. Co. v. Cross*, 20 Ark. 443; *Ex parte Booker*, 18 Ark. 338.

Colorado. *People's Sav. Bank v. Colorado Min. Exch. Bldg. Co.*, 8 Colo. App. 354, 46 Pac. 620.

Connecticut. *Byrne v. Schuyler Elec. Mfg. Co.*, 65 Conn. 336, 28 L. R. A. 304, 31 Atl. 833; *Pratt v. Pratt, Read & Co.*, 33 Conn. 446; *Seofield v. Eighth School Dist.*, 27 Conn. 499; *Sears v. Hotchkiss*, 25 Conn. 171, 65 Am. Dec. 557.

Georgia. *Cherokee Iron Co. v. Jones*, 52 Ga. 276; *Hazlehurst v. Savannah, G. & N. A. R. Co.*, 43 Ga. 13; *Central R. Co. v. Collins*, 40 Ga. 582.

Illinois. *Gunderson v. Illinois Trust & Savings Bank*, 199 Ill. 422, 65 N. E. 326, aff'g 100 Ill. App. 461; *Harding v. American Glucose Co.*, 182 Ill. 551, 64 L. R. A. 738, 74 Am. St. Rep. 189, 55 N. E. 577, writ of error dismissed 187 U. S. 651, 47 L. Ed. 349; *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048, rev'g 66 Ill. App. 427; *Green v. Hedenberg*, 159 Ill. 489, 50 Am. St. Rep. 178, 42 N. E. 851, aff'g 55 Ill. App. 425; *Kadish v. Garden City Equitable Loan & Building Ass'n*, 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236, aff'g 47 Ill. App. 602; *Bruschke v. Nord Chicago Schuetzen Verein*, 145 Ill. 433, 34 N. E. 417; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *Chicago v. Cameron*, 22 Ill. App. 91, aff'd 120 Ill. 447, 11 N. E. 899.

Indiana. *Rogers v. Lafayette Agr. Works*, 52 Ind. 297; *Tippecanoe County v. Lafayette, M. & B. R. Co.*, 50 Ind. 85; *McCray v. Junction R. Co.*, 9 Ind. 358.

Iowa. *Carson v. Iowa City Gas-light Co.*, 80 Iowa 638, 45 N. W. 1068; *Teachout v. Des Moines Broad-Gauge St. Ry. Co.*, 75 Iowa 722, 38 N. W. 145.

Kentucky. *Pittsburg, C., C. & St. L. R. Co. v. Dodd*, 115 Ky. 176, 72 S. W. 822.

Maryland. *Davis v. Gemmell*, 73 Md. 530, 21 Atl. 712.

Massachusetts. *Richardson v. Clinton Wall Trunk Mfg. Co.*, 181 Mass. 580, 64 N. E. 400; *Messer v. Grand Lodge A. O. U. W.*, 180 Mass. 321, 62 N. E. 252; *Blair v. Telegram Newspaper Co.*, 172 Mass. 201, 51 N. E. 1080; *Peabody v. Flint*, 6 Allen 52.

Minnesota. *Pencille v. State Farmers' Mut. Hail Ins. Co.*, 74 Minn. 67, 73 Am. St. Rep. 326, 76 N. W. 1026; *Morrill v. Little Falls Mfg. Co.*, 46 Minn. 260, 48 N. W. 1124; *Small v. Minneapolis Electro Matrix Co.*, 45 Minn. 264, 47 N. W. 797; *Stewart v. Erie & W. Transp. Co.*, 17 Minn. 372.

Missouri. *Exter v. Sawyer*, 146 Mo. 302, 47 S. W. 951.

Montana. *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194; *Forrester v. Boston & M. Consol. Copper & Silver Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353.

Nebraska. *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 41 Neb. 374, 59 N. W. 838.

New Hampshire. *Pearson v. Concord R. Corporation*, 62 N. H. 537, 13 Am. St. Rep. 590; *March v. Eastern R. Co.*, 43 N. H. 515, 40 N. H. 548, 77 Am. Dec. 732.

New Jersey. *Hayes v. Pierson*, 65

lished for certain definite purposes prescribed by its charter, if the funds or credit of the company are, without his consent, diverted from such purposes, though the misapplication be sanctioned by the votes of a majority, and, therefore, he may file a bill in equity against the company in his own behalf to restrain the company by injunction from any such diversion or misapplication."³⁰ And in a leading case in the Supreme Court of the United States it was said: "It is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation,

N. J. Eq. 353, 58 Atl. 728, 45 Atl. 1091; *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 5; *Zabriskie v. Haecken-sack & N. Y. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617; *Gifford v. New Jersey R. & Transp. Co.*, 10 N. J. Eq. 171; *Kean v. Johnson*, 9 N. J. Eq. 401.

New York. *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363; *Davis v. Congregation Beth Tephila Israel*, 40 App. Div. 424, 57 N. Y. Supp. 1015; *Flynn v. Brooklyn City R. Co.*, 9 App. Div. 269, 41 N. Y. Supp. 566, aff'd 158 N. Y. 493, 53 N. E. 520; *O'Connor v. Virginia Passenger & Power Co.*, 45 Misc. 228, 92 N. Y. Supp. 161, aff'd 107 App. Div. 630, 95 N. Y. Supp. 1149; *Abbot v. American Hard Rubber Co.*, 33 Barb. 578.

North Carolina. *Wiswall v. Greenville & R. Plank Road Co.*, 3 Jones Eq. 183.

Ohio. *Taylor v. Miami Exporting Co.*, 5 Ohio 162, 22 Am. Dec. 785.

Pennsylvania. *Manderson v. Commercial Bank*, 28 Pa. St. 379; *Lan-golf v. Seiberlitch*, 2 Pars. Eq. Cas. 64.

Rhode Island. *Hazard v. Durant*, 11 R. I. 195.

South Carolina. *Stahn v. Catawba*

Mills, 53 S. C. 519, 31 S. E. 498.

Tennessee. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

Texas. *Cates v. Sparkman*, 73 Tex. 619, 15 Am. St. Rep. 806, 11 S. W. 846.

Utah. *Hatch v. Lučky Bill Min. Co.*, 25 Utah 405, 71 Pac. 865.

Vermont. *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545.

Virginia. *Baltimore & O. R. Co. v. Wheeling*, 13 Gratt. 40.

West Virginia. *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73, 16 S. E. 501.

England. *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1; *Hoole v. Great Western Ry. Co.*, 3 Ch. App. 262; *Seaton v. Grant*, 2 Ch. App. 459; *Tomkinson v. Southeastern Ry. Co.*, 35 Ch. Div. 675; *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare 114; *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. Cas. 712, 6 Jur. (N. S.) 985; *Cunliff v. Manchester & B. Canal Co.*, 2 Russ. & M. 481; *Ware v. Grand Junct. Water Works Co.*, 2 Russ. & M. 470.

See also § 1526, supra.

³⁰ *Cunliff v. Manchester & B. Canal Co.*, 2 Russ. & M. 481.

if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into; and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law."³¹

In order that a person may sue as a stockholder, he must stand on a corporate right and an injury thereto³² and to him as a stockholder, as well,³³ but to give a court of equity jurisdiction to enjoin ultra vires acts upon the part of a corporation at the suit of a stockholder, it is not necessary that there shall be any intentional wrong or actual fraud on the part of the officers or other stockholders. It is enough that the act is ultra vires.³⁴ Nor need there be any loss to the corporation. The fact that an ultra vires act or business will be beneficial to the corporation, and cannot injure its stockholders, makes it none the less ultra vires, and is no answer to a suit by a dissenting stockholder to enjoin the same.³⁵ No relief will be given on the ground that a transaction would be unlawful by subsequent legislation, if it was not so when done.³⁶

It is impossible a priori to catalogue all the varying forms of ultra vires transactions, waste or diversion of assets, and this is not the place for a consideration of the scope and objects of corporate power or the proper application of corporate assets. Those subjects have been treated in earlier chapters of this work. But as exemplifying the principles set forth at the beginning of this section some instances are given.³⁷ The clearest case in which a stockholder may sue to

³¹ Mr. Justice Wayne, in *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. Ed. 401. See also *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732.

³² See § 4061, *supra*.

³³ See § 4061, *supra*.

³⁴ *March v. Eastern R. Co.*, 43 N. H. 515, and other cases cited in notes preceding in this section.

³⁵ *Byrne v. Schuyler Elec. Mfg. Co.*, 65 Conn. 336, 28 L. R. A. 304, 31 Atl. 833; *Davis v. Congregation Beth Tephila Israel*, 40 N. Y. App. Div. 424, 57 N. Y. Supp. 1015.

Any departure from the chartered purpose, even though profitable, may

be resisted by such a suit. *Central Ry. Co. v. Collins*, 40 Ga. 582.

That benefit to the corporation is not the test of its powers, see Chap. 21, *supra*.

³⁶ *Continental Securities Co. v. Belmont*, 83 N. Y. Misc. 340, 144 N. Y. Supp. 801.

³⁷ An ultra vires action or a diversion of funds often partakes also of fraud or wrongdoing by the majority or by some of the officers of the corporation, and as either will support the suit, the courts do not always indicate clearly which element controlled the decision. For this reason the succeeding sections and the

enjoin ultra vires acts or contracts of the directors or majority of the stockholders is where the act or contract will render the charter of the corporation subject to forfeiture in proceedings by the state, or otherwise tend to destroy the corporation.³⁸ But it is not at all necessary that it shall have this effect. A stockholder is entitled to relief against any application or diversion of the assets of the corporation to a purpose which is beyond its objects or the powers conferred upon it by its charter, or any unauthorized surrender of rights or property by it.³⁹

In the case of a public service corporation the duty towards the public may be an important factor in determining whether a given action or policy is wasteful or improvident, since those duties cannot be abdicated without risk of forfeiture.⁴⁰ Thus an attempt to relinquish a valuable franchise to the public,⁴¹ or to extend beyond the charter terminus,⁴² or to depart from the charter place for carrying on its business,⁴³ or the making organic changes in the number of

cases cited thereunder should be consulted.

38 United States. *Pond v. Vermont Valley R. Co.*, 12 Blatchf. 280, Fed. Cas. No. 11,265.

Indiana. *Rogers v. Lafayette Agr. Works*, 52 Ind. 304.

Minnesota. *Stewart v. Erie & W. Transp. Co.*, 17 Minn. 372.

Pennsylvania. *Manderson v. Commercial Bank*, 28 Pa. St. 379.

England. *Rendall v. Crystal Palace Co.*, 4 Kay & J. 326.

Expenditure of funds illegally and contrary to the public policy of the state is ground. *Central Ry. Co. v. Collins*, 40 Ga. 582.

39 Skeen v. Warren Irrigation Co., 42 Utah 602, 132 Pac. 1162.

Illegal expenditures and fictitious charges. *Merle v. Beifeld*, 275 Ill. 594, 114 N. E. 369.

Dissipating personality and involving corporation in debt so that realty would be resorted to. *Fleming v. Black Warrior Copper Co.*, *Amalgamated*, 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273.

May sue to uncover and reclaim assets for it. *State v. Milwaukee Elec.*

Railway & Light Co., 136 Wis. 179, 116 N. W. 900.

Withdrawal of assets for an improper purpose (savings and loan association). *North v. Union Savings & Loan Ass'n*, 59 Ore. 483, 117 Pac. 822.

Payment of counsel fees in defense of foreign suits to set aside a reorganization was held not a wrongful use of funds in *Corey v. Independent Ice Co.*, 226 Mass. 391, 115 N. E. 488.

40 See Johnson v. United Rys. Co. of St. Louis, 227 Mo. 423, 127 S. W. 63.

41 A stockholder in a toll bridge corporation may sue to enjoin the majority from opening the bridge to the public as a free bridge. *East Rome Town Co. v. Nagle*, 58 Ga. 474.

Power to sell or alienate property or franchises, see Chap. 32, supra.

Powers as to franchises, see Chap. 31, supra.

42 A stockholder in a railroad company may sue to enjoin the extension of its road beyond the terminus fixed by its charter. *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545.

43 A stockholder in a manufactur-

directors,⁴⁴ have been held to be ultra vires and enjoined. Likewise injunction has been granted against acceptance of or action under an act of the legislature fundamentally altering or amending the charter of the corporation,⁴⁵ or it may be set aside,⁴⁶ or an unauthorized consolidation with another corporation,⁴⁷ or any combination or control which is unlawful and injurious may be redressed.⁴⁸ A stockholder in any corporation may sue to enjoin its

ing corporation may sue to enjoin it from removing its plant and business to another state, where its charter requires the same to be located and carried on within the state. *Stickle v. Liberty Cycle Co.* (N. J. Eq.), 32 Atl. 708.

⁴⁴ Increasing number of directors without unanimous consent contrary to provision in certificate of incorporation. A limitation of this kind in articles was held not invalid as "increasing" the powers of the minority or as contrary to the statutes. *Ripin v. United States Woven Label Co.*, 205 N. Y. 442, 98 N. E. 855, aff'g 145 N. Y. App. Div. 916, 130 N. Y. Supp. 20, which aff'd 71 N. Y. Misc. 510, 130 N. Y. Supp. 20.

⁴⁵ *Arkansas*. *Witter v. Mississippi, O. & R. R. Co.*, 20 Ark. 463.

Georgia. *Academy of Music v. Flanders*, 75 Ga. 14.

Indiana. *Bove v. Junction R. Co.*, 10 Ind. 93.

New Jersey. *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617; *Kean v. Johnson*, 9 N. J. Eq. 401.

Vermont. *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545.

See generally, in this connection, Chap. 57, *infra*.

See Chap. 17, *supra*, as to effect on subscriptions of such alteration; Chap. 42 as to powers of directors.

⁴⁶ Unauthorized amendment of charter may be set aside and action under it restrained. *Woodruff v. Columbus Inv. Co.*, 135 Ga. 215, 68 S. E. 1103.

⁴⁷ *Nathan v. Tompkins*, 82 Ala. 437,

2 So. 747; *Davis v. Congregation Beth Tephila Israel*, 40 N. Y. App. Div. 424, 57 N. Y. Supp. 1015. See chapter on Consolidation and Merger, *infra*.

Ultra vires merger of fraternal benefit societies. *Knapp v. Supreme Commandery, United Order of Golden Cross of World*, 121 Tenn. 212, 118 S. W. 390.

An illegal consolidation (merging a foreign corporation which the statute did not sanction) may be enjoined at suit of a dissenting holder, even if it is yet necessary to submit the proposal to a stockholders' meeting. *William B. Riker & Son Co. v. United Drug Co.*, 79 N. J. Eq. 580, Ann. Cas. 1913 A 1190, 82 Atl. 930, rev'g 78 N. J. Eq. 319, 79 Atl. 1044.

Irregular consolidation and alienation of assets to the new corporation will not alone sustain a suit where ratification and subsequent procedure has cured it. *Alabama Fidelity Mortgage & Bond Co. v. Dubberly*, — Ala. —, 73 So. 911.

⁴⁸ One corporation changing another into a mere holding corporation. *Robinson v. Holbrook*, 148 Fed. 107.

Contract to cause directors to resign and for others to be named by another corporation is ultra vires under New Jersey law. *Holt v. California Development Co.*, 161 Fed. 3.

Combination by stock purchases to create monopoly of street railways in one of which plaintiff was stockholder. *Burrows v. Interborough Metropolitan Co.*, 156 Fed. 389.

Merger of trust companies owned

officers and majority of the stockholders from engaging in a line of business which is not authorized by its charter, however beneficial and profitable it may be,⁴⁹ from carrying out ultra vires contracts,⁵⁰ or acquisitions of property,⁵¹ from ultra vires dealings in stocks of other corporations⁵² or its own stock⁵³ or an unlawful increase or reduction of stock.⁵⁴

partly by Equitable Life Assurance Society held lawful and not fraudulent though the exchange of new for old stock was at ratio of one for two, the stability and prospects of the other constituent corporation being better. *Colby v. Equitable Trust Co.*, 124 N. Y. App. Div. 262, 108 N. Y. Supp. 978, which rev'd 55 N. Y. Misc. 355, 106 N. Y. Supp. 801, and was aff'd in 192 N. Y. 535, 84 N. E. 1111.

Issue of equipment trust certificates jointly by two lines held not void. *Venner v. New York Cent. & H. River R. Co.*, 160 N. Y. App. Div. 127, 145 N. Y. Supp. 725, aff'g 81 N. Y. Misc. 298, 143 N. Y. Supp. 211.

The statement in the text is not true as to violation of an anti-trust act which can be pursued only by the government. *Venner v. New York Cent. & H. River R. Co.*, 81 N. Y. Misc. 298, 143 N. Y. Supp. 211, aff'd 160 N. Y. App. Div. 127, 145 N. Y. Supp. 725, 217 N. Y. 615, 111 N. E. 487; and see *Venner v. New York Cent. & H. River R. Co.*, — N. Y. App. Div. —, 164 N. Y. Supp. 626.

Right of stockholder to sue under Sherman Act for individual injuries, see § 3401 and § 4050, *supra*.

⁴⁹ *Cherokee Iron Co. v. Jones*, 52 Ga. 276. And see generally, Chap. 21, et seq., *supra*.

Trust company issuing a prospectus and engaging in flotation of a shipbuilding company. *Kavanaugh v. Commonwealth Trust Co.*, 64 N. Y. Misc. 303, 118 N. Y. Supp. 758.

⁵⁰ *Byrne v. Schuyler Elec. Mfg. Co.*, 65 Conn. 336, 28 L. R. A. 304, 31 Atl.

833; *Carson v. Iowa City Gaslight Co.*, 80 Iowa 638, 45 N. W. 1068.

Not ultra vires to employ retiring president as general agent at large contingent salary, in order to continue his services. *Warner v. Morgan*, 81 N. Y. Misc. 685, 143 N. Y. Supp. 516.

Powers of corporation as to contracts, see Chap. 22 et seq., *supra*.

Power to act as trustee or fiduciary, see Chap. 24, *supra*.

Power to enter into contracts of suretyship or guaranty, see Chap. 23, *supra*.

General power of corporation to loan money, see Chap. 25, *supra*.

⁵¹ Bill will lie to recover for corporation and to sell and distribute to stockholders property originally acquired ultra vires, but turned over to a holding copartnership and by it to trustees for the corporation and its stockholders. *Venner v. Great Northern R. Co.*, 117 Minn. 447, 136 N. W. 271.

Powers as to acquiring or holding personal or real property, see Chaps. 28, 29, *supra*.

⁵² *Central R. Co. v. Collins*, 40 Ga. 582.

Power to purchase or own stocks or those of other corporations, see Chap. 30, *supra*.

⁵³ *Lowe v. Pioneer Threshing Co.*, 70 Fed. 646. See Chap. 30, *supra*.

⁵⁴ Forming a new corporation out of assets of the old, which was to receive all the new stock and then sell it to such old stockholders as would buy, the practical result being an unlawful stock increase. *Schwab v. E. G. Potter Co.*, 194 N. Y. 409, 87 N. E.

They may enjoin the payment of dividends when there are no surplus profits available for the purpose,⁵⁵ or sue to cancel stock issued illegally or fraudulently, and to enjoin the holders thereof from voting at corporate meetings.⁵⁶ Relief may be had against illegal stock issues or fraudulent profits to promoters.⁵⁷ The making of

670, aff'g 129 N. Y. App. Div. 36, 113 N. Y. Supp. 439.

Proposed stock increase beyond the charter amount may be restrained at suit of dissenters. *Macon Gas Co. v. Richter*, 143 Ga. 397, 85 S. E. 112.

See this chapter, subd. vi, Increase or Reduction of Stock.

⁵⁵ *Macdougall v. Jersey Imperial Hotel Co.*, 2 Hem. & M. 528; this chapter, subd. on Dividends, *supra*.

Since P. L. 1904, p. 275, which gave an individual action to stockholders, there is no derivative common-law right of action in the corporation to recover from directors for payment of dividends out of capital. (See the statute, which entitles the corporation to sue if it was wilfully or negligently done, or in case of insolvency if loss has resulted.) *Fleisher v. West Jersey Securities Co.*, 84 N. J. Eq. 55, 92 Atl. 575.

⁵⁶ *Perry v. Tuskaloosa-Cotton Seed-Oil Mill Co.*, 93 Ala. 364, 9 So. 217; *Parsons v. Joseph*, 92 Ala. 403, 8 So. 788; *Kraft v. Griffon Co.*, 82 N. Y. App. Div. 29, 81 N. Y. Supp. 438; *Wood v. Union Gospel Church Bldg. Ass'n*, 63 Wis. 9, 22 N. W. 756.

As to meetings, see Chap. 40, *supra*.

Issue below par to create a friendly holding and gain control. *Essex v. Essex*, 141 Mich. 200, 104 N. W. 622.

Sale of original stock at less than par contrary to statute. *Anderson v. Scandia Min. Syndicate*, 26 S. D. 558, 128 N. W. 1016.

To cancel stock issued without value in exchange. *Brahm v. M. C. Gehl Co.*, 132 Wis. 674, 112 N. W. 1097.

Using all stock to buy property if not fraudulent is not a wrong. *Whit-*

ten v. Dabney, 171 Cal. 621, 154 Pac. 312.

Making payments for land in stock instead of in money as contracted for held not ultra vires. *Chilton v. Bell County Coke & Improvement Co.*, 153 Ky. 775, 156 S. W. 889.

An agreement to give property for stock held not to have been abandoned so that it was a wrong for subscribers to sell the stock. *Turner v. Markham*, 155 Cal. 562, 102 Pac. 272.

⁵⁷ Illegal stock issue without payment of value or of any equivalent. *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666.

Forming corporation to take over options which cost nothing and pay for them in stock and to loot treasury of money paid in by other stockholders. *Simon v. Weaver*, 143 Wis. 330, 127 N. W. 950.

Stockholder may sue to annul stock fraudulently issued to promoters. *Stephany v. Marsden* (N. J. Ch.), 71 Atl. 598. See also § 142, *supra*.

So where plaintiffs are new holders in a newly reorganized corporation. *Arnold v. Searing*, 73 N. J. Eq. 262, 67 Atl. 831.

Purchasers of preferred stock from the treasury may sue to annul a fraudulent secret transfer of common stock to promoters even if the corporation could not. *Mason v. Carrothers*, 105 Me. 392, 74 Atl. 1030. See also § 142, *supra*.

Profits to promoters on a merger are not ground for recovery unless there was fraudulent concealment or nondisclosure. Evidence held to show no fraud. *Brooker v. William H.*

usurious agreements may be redressed when unlawful or wasteful⁵⁸ or where the payments are otherwise unlawful.⁵⁹ They may annul or have injunction or other relief against ultra vires bonds and a mortgage securing the same,⁶⁰ or ultra vires transfers and conveyances of property⁶¹ such as an illegal or fraudulent assignment by the directors in contemplation of insolvency,⁶² or a transfer of all the corporate property and the execution of all the corporate trusts to third persons,⁶³ or a sale or lease of all the property of the cor-

Thompson Trust Co., 254 Mo. 125, 162 S. W. 187.

It is not material what was paid to consenting holders on a merger, unless it affords evidence of fraud. *Beidenkopf v. Des Moines Life Ins. Co.*, 160 Iowa 629, 46 L. R. A. (N. S.) 290, 142 N. W. 434.

As to the right of the corporation to maintain such a suit directly, see the conflicting decisions in *Old Dominion Copper Min. Co. v. Lewisohn*, 136 Fed. 915, aff'd 148 Fed. 1020, 210 U. S. 206, 52 L. Ed. 1025, and *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653, adhering to *Hayward v. Lesson*, 176 Mass. 310, 49 L. R. A. 725, 57 N. E. 656. See also § 142, supra.

⁵⁸ Where as between one stockholder and the remaining stockholders it is not inequitable for the stockholder to enjoin the corporation from making a usurious contract, and the transaction will work injury to the stockholder, action for such purpose may be maintained by the stockholder. *George N. Fletcher & Sons v. Alpena Circuit Judge*, 136 Mich. 511, 99 N. W. 748.

Usurious issue of bonds at a discount is not ultra vires but voidable at election of corporation. *George N. Fletcher & Sons v. Alpena Circuit Judge*, 136 Mich. 511, 99 N. W. 748.

In New York it is lawful to issue bonds for less than par, and a stockholder cannot complain in absence of fraud or wrong. *MacQuoid v. Queens*

Estates, 143 N. Y. App. Div. 134, 127 N. Y. Supp. 867.

⁵⁹ Paying hush money to prevent complaints against Sunday shows. *Roth v. Robertson*, 64 N. Y. Misc. 343, 118 N. Y. Supp. 351.

Power to borrow money and issue negotiable paper, bonds or promises of repayment, see Chaps. 25-27, supra.

⁶⁰ *Chicago v. Cameron*, 22 Ill. App. 91, aff'd 120 Ill. 447, 11 N. E. 899.

Thus, where a statute provides that neither stock nor bonds shall be issued except for money or property or services rendered, the court may enjoin an issue of bonds, without due return to the corporation, at the instance of a stockholder. *American Ice & Industries Co. v. Crane*, 142 Ala. 620, 39 So. 233.

Bond issue where bondholders after full payment would share equally with stockholders in liquidation of assets. *Smith v. Westchester Bronxville Realty Co.*, 78 N. Y. Misc. 75, 137 N. Y. Supp. 690.

Power as to mortgages, see Chap. 34, supra.

Powers as to bonds in general, see Chap. 27, supra.

⁶¹ Conveyance by benevolent society to its officers and members wholly ultra vires. *German Corporation of Negaunee v. Negaunee German Aid Society*, 172 Mich. 650, 138 N. W. 343.

⁶² *Smith v. New York Consolidated Stage Co.*, 18 Abb. Pr. (N. Y.) 419.

⁶³ *Langolf v. Seiberlitch*, 2 Pars. Ed. Cas. (Pa.) 64.

poration and abandonment of its business, where such action is not demanded by the exigencies of its business or the condition of its affairs,⁶⁴ or a transfer for an illusory or unreal consideration.⁶⁵ Breach of a contract by action of directors is not ultra vires, though a wrong.⁶⁶ Therefore a mere promise by a corporation to a subscriber for its stock not to engage in a particular business does not entitle him to enjoin its engaging in such business, if it is within the powers conferred upon it by its charter.⁶⁷

§ 4063. — Fraud or wrongdoing by majority stockholders. It frequently happens that persons who own a majority of the stock of a corporation, and thus elect and control the directors or other

Transfer of all assets to a foreign corporation in exchange for its stock which was given to stockholders in return for surrender of theirs and a promise to assume corporate debts is ultra vires, because no consideration passes to the corporation. *Dalsheimer v. Graphic Arts Co.* (N. J. Ch.), 97 Atl. 497.

64 United States. *Metcalf v. American School-Furniture Co.*, 108 Fed. 909; *Eldred v. American Palace-Car Co.*, 96 Fed. 59.

Alabama. *Morris v. Elyton Land Co.*, 125 Ala. 263, 28 So. 513; *Elyton Land Co. v. Dowdell*, 113 Ala. 177, 59 Am. St. Rep. 105, 20 So. 981.

Minnesota. *Small v. Minneapolis Electro Matrix Co.*, 45 Minn. 264, 47 N. W. 797.

Montana. *Forrester v. Boston & M. Consol. Copper & Silver Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353.

New Jersey. *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617.

New York. *Flynn v. Brooklyn City R. Co.*, 9 App. Div. 269, 41 N. Y. Supp. 566, 158 N. Y. 493, 53 N. E. 520.

Sale of entire property by going, solvent corporation. *Tillis v. Brown*, 154 Ala. 403, 45 So. 589.

Lease of entire property to a new company, there being neither express power to make such a lease nor any

necessity for it. *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492, 65 Pac. 765.

Leases and assignments whereby corporation was stripped of its property. *Kelly v. Dolan*, 218 Fed. 966.

The fact that the value of the shares of a stockholder who has not consented to an ultra vires transfer by the corporation to another corporation has been tendered to him, or deposited in court for him, does not defeat his right to commence or continue a suit to enjoin or set aside the transfer. *Morris v. Elyton Land Co.*, 125 Ala. 263, 28 So. 513.

Power as to leases of property, see Chap. 33, supra.

65 Transfer of tracks in return for running rights over new track to be built by company with better charter, held fraudulent where running rights could not be enjoyed and there was no danger of loss even under the poorer charter. *Robinson v. New York, W. & B. R. Co.*, 55 N. Y. Misc. 516, 105 N. Y. Supp. 897, aff'd 123 N. Y. App. Div. 339, 108 N. Y. Supp. 91.

66 *Holmes v. St. Joseph Lead Co.*, 84 N. Y. Misc. 278, 147 N. Y. Supp. 104, aff'd 163 N. Y. App. Div. 885, 147 N. Y. Supp. 1117.

67 *Converse v. Hood*, 149 Mass. 471, 4 L. R. A. 521, 21 N. E. 878.

officers, take advantage of their position to control or act in the name of the corporation through its directors or other officers for their own benefit, and in fraud of the other stockholders, or to obtain possession of and appropriate its assets to their own use. In such a case, while the injury is, in legal contemplation, an injury to the corporation, it is clear that the minority stockholders would be absolutely without remedy, and helpless, if they were compelled to seek relief or redress through the corporation; and it is well settled, therefore, that any stockholder may sue in equity on his own behalf, and on behalf of the other stockholders not participating in the fraud, to enjoin the majority, or to set the fraudulent contract or transaction aside, and compel restoration.⁶⁸ This principle applies where

68 United States. *Lucas v. Milliken*, 139 Fed. 816; *Earle v. Seattle, L. S. & E. Ry. Co.*, 56 Fed. 909; *Ervin v. Oregon Ry. & Nav. Co.*, 20 Fed. 577, 27 Fed. 625; *Meeker v. Winthrop Iron Co.*, 17 Fed. 48. See also *Eldred v. American Palace-Car Co.*, 96 Fed. 59; *Weir v. Bay State Gas Co.*, 91 Fed. 940.

Alabama. See *Jasper Land Co. v. Wallis*, 123 Ala. 652, 26 So. 659; *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 59 Am. St. Rep. 140, 21 So. 315.

Arizona. See *Henshaw v. Salt River Valley Canal Co.*, 54 Pac. 577.

California. *Woodroof v. Howes*, 88 Cal. 184, 26 Pac. 111.

Connecticut. *Sears v. Hotchkiss*, 25 Conn. 171, 65 Am. Dec. 557.

Illinois. *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 33 Am. St. Rep. 315, 30 N. E. 667.

Maryland. *Davis v. Gemmell*, 73 Md. 530, 21 Atl. 712.

Michigan. *Hanley v. Balch*, 94 Mich. 315, 53 N. W. 954.

Minnesota. *Rothwell v. Robinson*, 39 Minn. 1, 12 Am. St. Rep. 608, 38 N. W. 772.

Missouri. See *Exter v. Sawyer*, 146 Mo. 302, 47 S. W. 951.

Montana. See *Gerry v. Bismarck Bank*, 19 Mont. 191, 47 Pac. 810.

Nebraska. *Wilcox v. Bickel*, 11

Neb. 154. See also *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 41 Neb. 374, 59 N. W. 838.

New Jersey. *Bohmrich v. Knoop*, 50 N. J. Eq. 485, 27 Atl. 636; *Fougeray v. Cord*, 50 N. J. Eq. 185, 24 Atl. 499; *Knoop v. Bohmrich*, 49 N. J. Eq. 82. See also *Trimble v. American Sugar-Refining Co. (N. J. Ch.)*, 48 Atl. 912.

New York. *Pondir v. New York, L. E. & W. R. Co.*, 72 Hun 384; *Currier v. New York, W. S. & B. R. Co.*, 35 Hun 355; *Dyckman v. Valiente*, 43 Barb. 131.

Pennsylvania. In re *Bailey's Appeal*, 96 Pa. St. 253.

Washington. See *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492, 65 Pac. 765; *Cross v. Johnson*, 20 Wash. 124, 54 Pac. 1000.

England. *Menier v. Hooper's Tel. Works*, 9 Ch. App. 350; *Atwood v. Merryweather*, L. R. 5 Eq. 464, note.

As to suits to recover from officers compensation received by them, see § 2779 et seq., supra.

Paying themselves as officers extravagant salaries (facts considered in detail as to duties performed and relatively small value of them). *Heublein v. Wight*, 227 Fed. 667.

Causing purchase of property at an excessive price with agreement by seller to pay excess to incorporators personally. *Ebling v. Nekarda*, 148

the same interests control two or more corporations, including plaintiff's, in a manner prejudicial and unfair to it,⁶⁹ or a "freeze out" is attempted by consolidation and transfer,⁷⁰ or where a majority of the stock in a corporation is acquired by another corporation, and the latter takes advantage of its position to obtain an inequitable lease or other contract from the former. In such a case, a dissenting stockholder of the former may sue in equity in behalf of himself and other stockholders to set the contract aside, and compel restoration, and for other appropriate relief.⁷¹ Such control may be exerted by

N. Y. App. Div. 193, 132 N. Y. Supp. 309.

Allegations in a bill charging the defendant stockholder, he being not only owner of a majority of the stock but also president, treasurer and a member of the board of directors, with having used the corporate property wrongfully to the injury of such minority stockholder and that he had paid to himself and his wife, who was not a stockholder, salaries which they did not earn, and with having lent out the corporate funds without adequate security, so that moneys which should have been used in payment of dividends were not available for such purpose, state a cause of action. *Bixler v. Summerfield*, 195 Ill. 147, 62 N. E. 849.

Altering an executed gift of stock for use of corporate treasury, causing stock already sold to be accounted as treasury stock, abstracting proceeds of that and paying unearned dividends to stimulate sale of their own holdings, held sufficient. *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

As to the right or wrong of particular acts or dealings done or controlled by the majority, either in the name of the corporation directly, or through the agency of officers under majority control, or by officers who are themselves the majority holders, see the foregoing cases and also those cited in the accompanying sections, §§ 4062, 4064, 4065.

As to injuries by third persons in

collusion with majority, see § 4066, *infra*.

⁶⁹ Majority holder in two corporations controlled both in the interest of one in which plaintiffs had no stock. *Merle v. Beifeld*, 275 Ill. 594, 114 N. E. 369.

Preventing defendant corporation from receiving payments belonging to it under contract with another corporation controlled by a defendant. *Merle v. Beifeld*, 275 Ill. 594, 114 N. E. 369.

Scheme to pay one of defendants for running other corporations at expense of plaintiff's corporation. *Dana v. Morgan*, 219 Fed. 313.

Fraudulent alienation of lands to another corporation which mortgaged them to a third. *Price v. Union Land Co.*, 187 Fed. 886.

⁷⁰ *Backus v. Brooks*, 195 Fed. 452, modifying decree 189 Fed. 922.

⁷¹ *Earle v. Seattle, L. S. & E. Ry. Co.*, 56 Fed. 909; *Meeker v. Winthrop Iron Co.*, 17 Fed. 48; *George v. Central Railroad & Banking Co.*, 101 Ala. 607, 14 So. 752; *Pearson v. Concord R. Corporation*, 62 N. H. 537, 13 Am. St. Rep. 590; *Clark v. Memphis St. Ry. Co.*, 123 Tenn. 232, 130 S. W. 751.

Independently of anti-trust statutes, the majority cannot use its power except in good faith towards the minority and with diligence to protect its interests. *Hyams v. Calumet & H. Min. Co.*, 221 Fed. 529.

Where the holding corporation votes a majority of stock in favor of pur-

the instrumentality of proxies as well as by ownership of stock.⁷²

It is not, of course, every slight breach of regularity in the corporate management that will sustain a suit against the majority stockholders,⁷³ and domination or control of a corporation is not equivalent to fraud,⁷⁴ for the power of management with the attendant risk of errors of judgment by the majority is committed to it, and no right of action can be predicated on the mere impolicy or inexpediency of what the majority does in good faith;⁷⁵ but the rule of law that the internal affairs of the corporation are to be controlled by the majority gives way where the majority are manipulating the

chase by it of the other's property, the transaction is to be tested like that of a purchase by attorney from client or trustee from cestui que trust. *Binney v. Cumberland Ely Copper Co.*, 183 Fed. 650. It would be void per se if voted by it over protest of all of minority. *Id.*

Conspiracy to loot corporation by a merger. *Meredith v. Art Metal Const. Co.*, 97 N. Y. Misc. 69, 161 N. Y. Supp. 1.

A cause of action is stated and relief may be granted under a bill filed by minority stockholders alleging that through directors whom they have elected and who are acting in the interests of the majority only, the majority have caused the property of the corporation, through certain contracts, to be transferred for a wholly inadequate consideration to a second corporation owned by such majority stockholders. *Mumford v. Ecuador Development Co.*, 111 Fed. 639.

Causing subsidiary corporations, secretly controlled, to abrogate leases and to make new leases and transfers inadequately paid to the principal is a fraud on stockholder. *Citizens' Savings & Trust Co. v. Illinois Cent. R. Co.*, 182 Fed. 607, rev'g 173 Fed. 556.

Lease by which lessor could be required by lessee to issue stock and bonds for purposes set out in the lease, held oppressive on stockholders, even if other alternative options to the

lessee would not result disastrously. *Westchester Fire Ins. Co. v. Syracuse, B. & N. Y. R. Co.*, 97 N. Y. Misc. 471, 161 N. Y. Supp. 759.

A nine hundred and ninety-nine-year lease voted by means of stock owned by lessee was held not in excess of rights of minority holder. *Sabre v. United Traction & Electric Co.*, 225 Fed. 601.

⁷² Though a holding company does not own a majority of stock in plaintiff's corporation, it may be in control by means of proxies. *Hyams v. Calumet & H. Min. Co.*, 221 Fed. 529.

⁷³ *Bixler v. Summerfield*, 210 Ill. 66, 70 N. E. 1059.

⁷⁴ *Continental Securities Co. v. Belmont*, 83 N. Y. Misc. 340, 144 N. Y. Supp. 801.

Merely obtaining a majority in a new corporation is not a fraud. *North v. Union Savings & Loan Ass'n*, 59 Ore. 483, 117 Pac. 822.

Control of two merging companies held not a fraud per se on minority. *Beidenkopf v. Des Moines Life Ins. Co.*, 160 Iowa 629, 46 L. R. A. (N. S.) 290, 142 N. W. 434.

Exchange of stock in forming operating company for New York subways held not fraudulent. *Continental Securities Co. v. Belmont*, 83 N. Y. Misc. 340, 144 N. Y. Supp. 801.

⁷⁵ See §§ 4065, 4078, *infra*.

As to rule of the majority, see Chaps. 39, 40, *supra*.

corporate affairs for private profit, or for ends conflicting with its interests,⁷⁶ and the majority stockholders have no power to bind a minority stockholder by doing or ratifying an unauthorized act or a fraud on him.⁷⁷

Mere dissent or diversity of opinion as to the policy to be followed is not a ground for relief.⁷⁸ It is for the majority to decide whether to sell the corporate property for the purpose of meeting a condition of insolvency or to further the corporate ends⁷⁹ unless the sale is one destructive of the corporation or subversive of its objects or beyond the power of a majority.⁸⁰

In view of the good faith which is mutually owing among stockholders,⁸¹ acts of a majority with conflicting interests may be regarded as constructively fraudulent and redressable by the minority.⁸² The fact that there were stockholders or directors common to both corporations does not render a transaction between them *prima facie* fraudulent, but it is subject to scrutiny in the suit of a stockholder.⁸³

⁷⁶ *Louisville Bridge Co. v. Dodd*, 27 Ky. L. Rep. 454, 85 S. W. 683.

Giving mortgage and misapplying proceeds fraudulently. *Investors' Syndicate v. North America Coal & Mining Co.*, 31 N. D. 259, 153 N. W. 472.

Controlling a stockholders' meeting so that the majority accomplished a transfer of its property in fraud of the corporation and the minority. *Cole v. Wells*, 224 Mass. 504, 113 N. E. 189.

Causing lease and bond of mining property to be made to majority holder at great undervaluation, and attempting to ratify it by his own vote. *Franklin v. Havalena Min. Co.*, 16 Ariz. 200, 141 Pac. 727.

⁷⁷ As to *ultra vires* acts, see § 4062, *supra*.

As to ratification of officers' or directors' acts, see § 4072, *infra*.

⁷⁸ *Troutman v. Council Bluffs Street Fair & Carnival Co.*, 142 Iowa 140, 120 N. W. 730.

Not enough that the minority deem the action unfair to them. *Colby v. Equitable Trust Co.*, 124 N. Y. App. Div. 262, 108 N. Y. Supp. 978, *aff'd* 192

N. Y. 535, 84 N. E. 1111, and which *rev'd* 55 N. Y. Misc. 355, 100 N. Y. Supp. 801.

⁷⁹ See § 4065, *infra*.

⁸⁰ In that event it is redressable as an *ultra vires* act, see § 4062, *supra*.

⁸¹ See § 4062, *supra*, also *infra* this chapter, subd. xxx, *Dealings Between Corporation and Its Stockholders*.

Owner of majority on whom minority is dependent for knowledge must make full disclosure when selling the stock control. *McManus v. Durant*, 168 N. Y. App. Div. 643, 154 N. Y. Supp. 580.

⁸² Where majority had conflicting interests in two corporations contracting together, actual dishonesty need not appear. *Just v. Idaho Canal & Improvement Co.*, 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

⁸³ *Boldenweck v. Bullis*, 40 Colo. 253, 90 Pac. 634; *Bergman Clay Mfg. Co. v. Bergman*, 73 Wash. 144, 131 Pac. 485.

Sale to or dealings with a corporation having same officers and stockholders will be scrutinized but is not *per se* void. *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

The majority cannot, after the incorporation of a partnership, divide the profits by agreement as they did before, if it discriminates against a stockholder; but they must be fair and strict in dealings towards the minority.⁸⁴ A secret and unfair sale of controlling stock may be redressed by suit of the minority.⁸⁵

If certificates of stock are illegally issued, a stockholder may sue to cancel them and enjoin the holders from voting the same.⁸⁶ So where one corporation acquires a majority of the stock of another corporation, and the two have substantially the same field of operation, so that the profits of one may be enhanced by a diminution of those of the other, or where there is a conflict of interest between the two in the matter of expenditures or in the division of earnings, the corporation owning the majority of the stock in the other, its agents and employees, and all other persons acting in its interest, may be enjoined from voting the stock in the election of officers of the other corporation, or from exercising the power which a majority of stock confers in controlling and governing such corporation.⁸⁷

The stockholder may sue to enforce a contract which has been fraudulently rescinded or fraudulently broken by anticipation.⁸⁸ The majority, as well as the officers, may be restrained from wrongfully or collusively suffering the corporate property to be lost by failing to protect or redeem it from involuntary sale.⁸⁹ It is prema-

Guaranteeing the bonds needed to finance building of an important connecting line in consideration of the issuance of 51 per cent of its stock, was not a fraud on a single dissenter, merely because more might have been exacted than 51 per cent and because the building syndicate contained some directors. *Teller v. Tonopah & G. R. R.*, 155 Fed. 482.

⁸⁴ *Godley v. Crandall & Godley Co.*, 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236.

⁸⁵ Secretly selling controlling shares for 150 while urging others to sell at par shows fraud. *McManus v. Durant*, 168 N. Y. App. Div. 643, 154 N. Y. Supp. 580.

⁸⁶ *Wood v. Union Gospel Church Bldg. Ass'n*, 63 Wis. 9, 22 N. W. 756. See also preceding section.

⁸⁷ *George v. Central Railroad &*

Banking Co., 101 Ala. 607, 14 So. 752; *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L. R. A. 605, 16 Am. St. Rep. 81, 7 So. 108.

As to the right of a corporation owning stock to vote it, see Chaps. 30, 40, *supra*.

⁸⁸ *Callanan v. Keeseville, A. C. & L. C. R. Co.*, 199 N. Y. 268, 92 N. E. 747, rev'g 131 N. Y. App. Div. 306, 115 N. Y. Supp. 779.

May enforce contracts fraudulently rescinded. *Donald v. Manufacturers' Export Co.*, 142 Ala. 573, 38 So. 841.

⁸⁹ Minority who bought in property under judgment sale to protect corporation may enjoin majority from allowing it to be sold and not redeemed under subsequent sale. *Paxton v. Heron*, 41 Colo. 147, 124 Am. St. Rep. 123, 92 Pac. 15.

As to relief against judgments suf-

ture for a minority stockholder to institute action to restrain a consummation of a proposed contract by a corporation where as yet no opportunity has been afforded to the stockholders to approve or disapprove thereof.⁹⁰

§ 4064. — **Wrongdoing or neglect by officers and directors.** If the directors or other officers of a corporation exceed their authority, not under an honest mistake, or are guilty of fraud or negligence in the management of the affairs of the corporation, threatening or causing loss to the corporation, the corporation, by action of the majority, may remove them, and may sue them for redress.⁹¹ In such a case, the right to remove them and to sue for redress is in the corporation, for the injury is to the stockholders collectively, and individual stockholders cannot maintain a suit for relief or redress, unless for some reason it cannot be obtained through the corporation.⁹² If for any reason, however, relief or redress cannot be obtained through the corporation, as where the guilty directors own a majority of the stock, or the majority of the stockholders approve or acquiesce in the fraud or mismanagement, or will not sue or take other steps to prevent the same, or hold the directors liable, or where there is no time to obtain action by the stockholders, any stockholder may obtain appropriate relief for the benefit of the corporation by a suit in equity on behalf of himself and other stockholders. The suit may be maintained under such circumstances in any case in which it appears that the directors or other officers are exceeding their authority by engaging in transactions which are beyond the powers conferred upon the corporation by its charter, or that, by making fraudulent contracts in the name of the corporation, or otherwise, they are or have been fraudulently managing the affairs of the corporation in their own interest, or in the interest of any other person than the corporation and its stockholders, or that they are converting or have converted the assets of the corporation to their own use, or that they have neglected or are neglecting their duty, to the injury of the corporation. And the suit may be either to enjoin or remove them, or to compel them to account⁹³ or make

ferred by delinquency of officers and directors, see § 4055, supra; § 4064, infra.

⁹⁰ *Pierce v. Old Dominion Copper Mining & Smelting Co.*, 67 N. J. Eq. 399, 58 Atl. 319.

⁹¹ See Chap. 42, supra.

⁹² See § 4068, infra; § 4053 and § 2681, supra.

⁹³ *United States. Weir v. Bay State Gas Co.*, 91 Fed. 940; *Excelsior Pebble Phosphate Co. v. Brown*, 74 Fed. 321; *Earle v. Seattle, L. S. & E. Ry. Co.*, 56 Fed. 909; *Ranger v. Cham-*

good the loss to the corporation, or both. A single stockholder may

pion Cotton-Press Co., 52 Fed. 611; Pond v. Vermont Val. R. Co., 12 Blatchf. 280, Fed. Cas. No. 11,265.

Alabama. Decatur Mineral Land Co. v. Palm, 113 Ala. 531, 59 Am. St. Rep. 140, 21 So. 315; Bell v. Montgomery Light Co., 103 Ala. 275, 15 So. 569; George v. Central Railroad & Banking Co., 101 Ala. 607, 14 So. 752; Perry v. Tuskaloosa Cotton-Seed Oil-Mill Co., 93 Ala. 364, 9 So. 217.

California. Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444; Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024; Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111; Ashton v. Dashaway Ass'n, 84 Cal. 61, 7 L. R. A. 809, 23 Pac. 1091, 22 Pac. 660; Moyle v. Landers, 21 Pac. 1133; Beach v. Cooper, 72 Cal. 99, 13 Pac. 161; Wright v. Oroville Gold, Silver & Copper Min. Co., 40 Cal. 20; Neal v. Hill, 16 Cal. 145, 76 Am. Dec. 508.

Connecticut. Sears v. Hotchkiss, 25 Conn. 171, 65 Am. Dec. 557.

Georgia. Weslosky v. Quarterman, 123 Ga. 312, 51 S. E. 426; Colquitt v. Howard, 11 Ga. 556.

Illinois. Harding v. American Glucose Co., 182 Ill. 551, 64 L. R. A. 738, 74 Am. St. Rep. 189, 55 N. E. 577, writ of error dismissed 187 U. S. 651, 47 L. Ed. 349; Chicago Hansom Cab Co. v. Yerkes, 141 Ill. 320, 33 Am. St. Rep. 315, 30 N. E. 667; Chicago v. Cameron, 120 Ill. 447, 11 N. E. 899, aff'g 22 Ill. App. 91.

Iowa. Schoening v. Schwenk, 112 Iowa 733, 84 N. W. 916.

Maryland. Davis v. Gemmell, 73 Md. 530, 21 Atl. 712.

Massachusetts. Peabody v. Flint, 6 Allen 52.

Michigan. Hanley v. Balch, 94 Mich. 315, 53 N. W. 954.

Minnesota. Rothwell v. Robinson, 39 Minn. 1, 12 Am. St.-Rep. 608, 38 N. W. 772.

Missouri. Exter v. Sawyer, 146 Mo.

302, 47 S. W. 951; Hannerty v. Standard Theater Co., 109 Mo. 297, 19 S. W. 82.

Montana. Gerry v. Bismarck Bank, 19 Mont. 191, 47 Pac. 810.

Nebraska. Fitzgerald v. Fitzgerald & Mallory Const. Co., 41 Neb. 374, 59 N. W. 838; Wilcox v. Bickel, 11 Neb. 154.

New Hampshire. Pearson v. Concord R. Corporation, 62 N. H. 537, 13 Am. Rep. 590; Windsor v. Bailey, 55 N. H. 218; March v. Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732, 43 N. H. 515.

New Jersey. Wildes v. Rural Homestead Co., 53 N. J. Eq. 452, 32 Atl. 676; Fougerey v. Cord, 50 N. J. Eq. 185, 24 Atl. 499; Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250.

New York. Barr v. New York, L. E. & W. R. Co., 96 N. Y. 444; Greaves v. Gouge, 69 N. Y. 154; Butts v. Wood, 37 N. Y. 317; Bloom v. National United Ben. Savings & Loan Co., 81 Hun 120, 30 N. Y. Supp. 700; Sheridan v. Sheridan Elec. Light Co., 38 Hun 396; Ithaca Gaslight Co. v. Treman, 30 Hun 212; Gray v. New York & V. Steamship Co., 3 Hun 383; Dickman v. Valiente, 43 Barb. 131; Carpenter v. Roberts, 56 How. Pr. 216; Robinson v. Smith, 3 Paige 222, 24 Am. Dec. 212.

Ohio. Taylor v. Miami Exporting Co., 5 Ohio 162, 22 Am. Dec. 785.

Pennsylvania. Langolf v. Seiberlitch, 2 Pars. Eq. Cas. 64.

Rhode Island. Hazard v. Durant, 11 R. I. 195; Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624.

South Dakota. Loftus v. Farmers' Shipping Ass'n, 8 S. D. 201, 65 N. W. 1076.

Tennessee. Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; Deaderick v. Wilson, 8 Baxt. 108.

sue.⁹⁴ What are fraudulent or wrongful acts suable within the rule just stated depends on the powers and duties which officers and directors have, wrong being merely the converse or correlative of right or power; and this subject is treated in another chapter.⁹⁵ Relief may be had against action by directors not legally chosen,⁹⁶ even though title to office is thus incidentally tried,⁹⁷ and acts of a president under authority attempted to be given by a void stockholders' meeting may be enjoined at the instance of a stockholder.⁹⁸ Slight irregularities⁹⁹ or mere irregularities in action or procedure, where the stockholders may ratify the act, will not support the suit.¹ A director may be liable as a third person, though he was not a director when the wrong was done.²

Exemplifying the rules enunciated in this section the following

Texas. *Becker v. Gulf City St. Railway & Real Estate Co.*, 80 Tex. 475, 15 S. W. 1094; *Cates v. Sparkman*, 73 Tex. 619, 15 Am. St. Rep. 806, 11 S. W. 646; *Mussina v. Goldthwaite*, 34 Tex. 125, 7 Am. Rep. 281.

Washington. *Cross v. Johnson*, 20 Wash. 124, 54 Pac. 1000.

Wisconsin. *Eschweiler v. Stowell*, 78 Wis. 316, 23 Am. St. Rep. 411, 47 N. W. 361.

England. *Gregory v. Patchett*, 33 Beav. 595; *Salomons v. Laing*, 12 Beav. 339, 14 Jur. 279, 471; *Menier v. Hooper's Tel. Works*, 9 Ch. App. 350; *Mason v. Harris*, 11 Ch. Div. 97; *Atwood v. Merryweather*, L. R. 5 Eq. 464, note.

See also § 2681, *supra*.

⁹⁴ He may have relief from fraud, in the absence of intervening rights of third parties. *Merriman v. National Zinc Corporation*, 82 N. J. Eq. 493, 89 Atl. 764.

⁹⁵ See Chap. 42, *supra*. See also cases cited under § 4062, *supra*.

The foregoing cases are cited here for their general doctrine, which is expressed in the text. On examination they will be found to afford particular instances of wrongdoing on which suit could lie, and they are cited elsewhere herein as to such

points. Many if not most of them involve more than one element of official delinquency, and it is therefore impossible to classify them with regard to the wrong involved, since the placing of a case in a particular category might falsely imply a decision solely on one ground rather than on the others involved or on all of them collectively. To find the cases decisive of whether any given act is right or wrong in view of directors' or officers' powers and duties, Chap. 42 should be consulted.

⁹⁶ Usurpation by illegally chosen directors. *Lebus v. Stansifer*, 154 Ky. 444, 157 S. W. 727.

⁹⁷ See §§ 1828, 3325, *supra*.

Waste and misappropriation by usurping officers may be remedied, though the title to corporate office is thus incidentally tried in equity. *Sheehy v. Barry*, 87 Conn. 656, 89 Atl. 259.

⁹⁸ *Rankin v. Southwestern Brewery & Ice Co.*, 12 N. M. 54, 73 Pac. 614.

⁹⁹ *Relender v. Riggs*, 20 Colo. App. 423, 79 Pac. 328.

¹ See § 4061, *supra*.

² Not material whether defendants were directors at time of wrong. *Meredith v. Art Metal Const. Co.*, 97 N. Y. Misc. 69, 161 N. Y. Supp. 1.

instances of actionable wrong or neglect may be noted.³ After proper demand, a stockholder may sue to recover or to restrain the payment of unlawful salaries to the corporate directors, officers or agents,⁴ or for relief against the making of secret profits or improper contracts or sales with themselves or in their interest,⁵ or with

³ Since most corporate action is through officers, the instances of ultra vires acts and wrongs by the majority, cited supra, §§ 4062, 4063, are also usually instances of official misdoing or neglect. See those cases also.

⁴ *Donald v. Manufacturers' Export Co.*, 142 Ala. 578, 38 So. 841. See also § 2779, supra.

Excessive salaries. *Wight v. Heublein*, 238 Fed. 321; *Connors v. Connors Bros. Co.*, 110 Me. 428, 86 Atl. 843; *Lawrence v. Weber*, 65 N. Y. Misc. 603, 120 N. Y. Supp. 289, modified 137 N. Y. App. Div. 907, 122 N. Y. Supp. 1134.

Granting salaries to themselves over the amount contracted for, and making large contributions to a political campaign, presents, entertainment, etc. *Kreitner v. Burgweger*, 174 N. Y. App. Div. 48, 160 N. Y. Supp. 256.

Voting salaries to themselves especially where, if they have a claim, it prefers them as creditors. *Pride v. Pride Lumber Co.*, 109 Me. 452, 84 Atl. 989.

Salaries voted by directors to themselves as an incident of office. *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818, modifying 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236; *Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152, 76 N. E. 1075; *Butts v. Wood*, 37 N. Y. 317.

Minority stockholders may sue in the corporate right for excessive salaries paid, they not being barred by laches or otherwise disentitled. *Matthews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645.

Paying salaries before earning dividends, that being a violation of the charter. *Mitchell v. Aulander Realty Co.*, 169 N. C. 516, 86 S. E. 358.

Survivor of two partners who had incorporated, and who was also one of the executors of decedent stockholder, owes a duty of good faith in corporate dealings; and it was prima facie fraudulent to vote an inexperienced man, his son, in as director, and to take a back salary voted without previous agreement. *Monmouth Inv. Co. v. Means*, 151 Fed. 159.

But a distinction should be made as to salaries for services outside of usual duties. *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818, modifying 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236.

Not wrong to pay a salary though prospectus stated none would be paid. *Metzger v. Knox*, 77 N. Y. Misc. 271, 136 N. Y. Supp. 681, aff'd 153 N. Y. App. Div. 911, 137 N. Y. Supp. 1129.

Evidence held insufficient to show misconduct in employing attorneys and paying exorbitant salaries to officers, etc. *Bounds v. Stephenson*, — Tex. Civ. App. —, 187 S. W. 1031.

A fraud in voting an increased salary to the president will not be inferred from the fact that directors who voted it were then under contract to sell their stock to him. *Cowell v. McMillin*, 177 Fed. 25. Nor does the fact that he used part of his salary in paying for their stock. *Id.*

As to compensation of officers and agents in general, see Chap. 43, supra.

⁵ Making a contract with themselves as partners to market the product of the corporation on a commis-

another corporation in which they are officers,⁶ or to prevent the

sion. *Ross v. Quinnesec Iron Min. Co.*, 227 Fed. 337.

Equity on ground of fraud will take a bill to recover secret profits from directors on land sold to the corporation. Assumpsit is not the sole remedy. *Deveny v. Hart Coal Co.*, 63 W. Va. 650, 60 S. E. 789.

Selling to themselves or one in their interest. *Mitchell v. United Box Board & Paper Co. (N. J. Ch.)*, 66 Atl. 938; *Nueces Valley Irr. Co. v. Davis (Tex. Civ. App.)*, 116 S. W. 633.

President suffering property to be sold for taxes and getting tax titles to himself by mesne conveyances. *Donnelly v. Sampson*, 135 Wis. 368, 115 N. W. 1089.

Sale of corporate property through intermediary to officer himself. *Eckberg v. Swedish-American Pub. Co.*, 114 Minn. 196, 130 N. W. 1029.

Not illegal to form subsidiary marketing corporation if no fraud is practiced, or to rent property from an officer if fair. *Metzger v. Knox*, 77 N. Y. Misc. 271, 136 N. Y. Supp. 681, aff'd 153 N. Y. App. Div. 911, 137 N. Y. Supp. 1129.

Making a contract with a lime company to sell barrels to it made in a factory leased from it is not a fraud by its president, where he made full disclosure and went into the business only after being urged to by another director and after the corporation refused to do so. *Cowell v. McMillin*, 177 Fed. 25.

Selling stock and income certificates to themselves at fifty per cent in compensation of pretended services as incorporators (Delaware corporation). *Voorhees v. Mason*, 245 Ill. 256, 91 N. E. 1056, rev'g 148 Ill. App. 647.

Selling their own property to corporation for more than it was worth, though perhaps it was worth to the corporation what was paid. *Klein v. Independent Brewing Ass'n*, 231 Ill.

594, 83 N. E. 434, rev'g 135 Ill. App. 234.

Making a lease at \$22,500 rental to a company their relatives and non-voting directors were interested in, and rejecting a responsible offer of \$30,000 for it. *Schmid v. Lancaster Ave. Theater Co.*, 244 Pa. 373, 91 Atl. 363.

A transaction in their own interest is not purged of fraud by abstaining from voting thereon, while it is being carried by votes of relatives who were really interested and controlled but not nominally interested in the conflicting enterprise. *Schmid v. Lancaster Ave. Theater Co.*, 244 Pa. 373, 91 Atl. 363. See also § 2752, supra.

It is illegal for directors who hold overdue notes of the corporation secured by its stock as collateral to resolve without notice to it or stockholders that the stock will be forfeited if not redeemed in a time certain. Their good faith does not affect it. *Endicott v. Marvel*, 81 N. J. Eq. 378, 87 Atl. 230.

Buying in an execution sale for protection of an indorser of corporation paper, and then selling to corporate officers on a promise to pay the purchase price and save purchaser harmless, held not shown to be fraudulent. *Tiffany v. Smith*, 124 N. Y. Supp. 85.

Buying in shares, which the company could not buy, and a mortgage on its property, and through foreclosure obtaining title, held not to raise a constructive trust for the corporation against a director, who practiced no fraud and had only endeavored to protect it. *Buehler v. Black*, 213 Fed. 880.

⁶ Regardless of actual fraud, if another corporation with the same controlling officers is under contract with defendant corporation, stockholders may sue to enforce the contract if the officers do not. *Just v. Idaho*

violation of his contract with the corporation by a controlling officer,⁷ or for an accounting for property of the corporation in their hands.⁸ A transaction is not actionable merely because the directors may derive an advantage from it.⁹ Suit lies to restrain entry into an unlawful enterprise in jeopardy of corporate interests,¹⁰ or to restrain the corporate officers from placing a mortgage upon the corporate property with a view to foreclosure later and absorption of the corporate assets,¹¹ or for relief against any fraudulent dissipation or waste of corporate assets,¹² or unlawful payments.¹³ Relief

Canal & Improvement Co., 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381; *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

A consolidation can be assailed on the ground of constructive fraud arising from directors being such in both of two adversely interested corporations, unless the equities of complainant are overcome by those of other innocent stockholders in the new one. *Alabama Fidelity Mortgage & Bond Co. v. Dubberly*, — Ala. —, 73 So. 911.

May object to sale of assets to new corporation made by directors, where subscription rights accorded to old stockholders are onerous and do not amount to equitable scheme for a division. *Mitchell v. United Box Board & Paper Co.* (N. J. Ch.), 66 Atl. 938.

⁷Violating agreement not to use a trade-mark except on goods made by the corporation and certain imported goods. *Metzger v. Knox*, 77 N. Y. Misc. 271, 136 N. Y. Supp. 681, aff'd 153 N. Y. App. Div. 911, 137 N. Y. Supp. 1129.

⁸Treasury stock unaccounted for. *Moneuse v. Riley*, 40 N. Y. Misc. 110, 81 N. Y. Supp. 325.

⁹Making a mining lease for development work will not be regarded as fraudulent, merely because if successful it would afford evidence in favor of the directors under indictment for fraudulent use of the mails in selling stock. *Merriman v. National Zinc*

Corporation, 82 N. J. Eq. 493, 89 Atl. 764.

¹⁰*MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 428, 75 Pac. 89.

¹¹*Gunderson v. Illinois Trust & Savings Bank*, 199 Ill. 422, 65 N. E. 326, aff'g 100 Ill. App. 461.

Issuance of bonds secured by mortgage in order that one in control of the corporation may obtain the property by foreclosure may be set aside as a fraud upon the corporation. *Jacobus v. Diamond Soda Water Mfg. Co.*, 94 N. Y. App. Div. 366, 88 N. Y. Supp. 302.

¹²*Pride v. Pride Lumber Co.*, 109 Me. 452, 84 Atl. 989.

Dissipating assets of local subsidiary corporation in fraud of stockholders in principal corporation whose membership gave them certain contract rights to benefits. *Tipton v. Railway Postal Clerks Inv. Ass'n*, — Tex. Civ. App. —, 173 S. W. 562.

Misappropriating by fraud proceeds of sale of stock which had been turned back to the corporation to provide funds, and concealing the true state of affairs. *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

Usurping corporate powers misusing its funds and excluding plaintiff. *Brock v. Automobile Livery & Sales Co.*, 130 La. 414, 58 So. 25, 130 La. 404, 58 So. 21.

¹³Payment of money to procure the exercise of corrupt influence in public affairs in the interest of the cor-

may be had by a stockholder for denying recognition to legal stock,¹⁴ or the illegal or fraudulent issue of stock,¹⁵ or from levying unlawful assessments on stock,¹⁶ or refusing to make calls on unpaid subscriptions,¹⁷ or fraudulently instituting winding up proceedings,¹⁸ or other wrongful depreciation of stock.¹⁹ Right to see and inspect corporate books and records or to have a report of affairs may be enforced.²⁰

Where the directors of a corporation wrongfully refuse to call a meeting of stockholders for the election of new directors, and a meeting cannot be called in any other way, a stockholder may sue in equity in behalf of himself and other stockholders²¹ unless there is an adequate remedy at law by writ of mandamus.²²

Action for injunction against the enforcement of an unconstitutional regulation will lie where the officers are unwilling or afraid to resist.²³

Neglect of a director in a corporation engaged in banking to be

poration. *Conners v. Conners Bros. Co.*, 110 Me. 428, 86 Atl. 843.

¹⁴ A stockholder may maintain action to protect the corporation where the directors are refusing recognition to fall paid stock under color of a reduction of capital effected in fraud of such stock. *Theis v. Durr*, 125 Wis. 651, 1 L. R. A. (N. S.) 571, 110 Am. St. Rep. 880, 104 N. W. 985.

¹⁵ Fraudulently issuing stock in payment for property. *National Power & Paper Co. v. Rossman*, 122 Minn. 355, 532, Ann. Cas. 1914 D 830, 142 N. W. 818, 822.

Issuing stock to themselves gratuitously, paying dividends thereon and other moneys paid to themselves as fees, and failure to account for funds. *Granara v. Italian Catholic Cemetery Ass'n*, 218 Mass. 387, 105 N. E. 1073.

¹⁶ Assessment on paid up stock. *Redkey Citizens' Natural Gas, Light, Fuel & Petroleum Co. v. Orr*, 27 Ind. App. 1, 60 N. E. 716.

¹⁷ An action by a paid up holder against directors for refusing to call unpaid subscriptions due from them will lie though no call and notice thereof has been given. The action

is not on the call but for delinquency in duty. *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 96.

¹⁸ Winding up corporation to form a new one on its business and assets, held a fraud. *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818, modifying 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236.

¹⁹ *Glover v. Manila Gold Mining & Milling Co.*, 19 S. D. 559, 104 N. W. 261.

²⁰ Right of access to and inspection of corporate books and records, see Chap. 45, *supra*.

Right to reports from corporate officers, see Chap. 46, *supra*.

²¹ *Pond v. Vermont Valley R. Co.*, 12 Blatchf. 280, Fed. Cas. No. 11,265; *Lehigh Coal & Navigation Co. v. Central R. Co.*, 35 N. J. Eq. 349.

²² See *People v. Cummings*, 72 N. Y. 433. And see Chapters 40 and 42 and the chapter on Mandamus, *supra*.

²³ Threatened compliance with confiscatory rate regulations under fear of penalties imposed for noncompliance. *Perkins v. Northern Pac. Ry. Co.*, 155 Fed. 445.

present and supervise its affairs was held suable by a stockholder where losses from bad loans resulted,²⁴ and where the directors of a national bank have violated the national banking act to the damage of the bank as such and its members, a stockholder may maintain action for recovery for the injury suffered.²⁵

A stockholder may sue to enforce a right to damages or a debt for which the directors will not sue,²⁶ and a suit will lie in equity to vacate a judgment obtained by collusion with corporate officers,²⁷ or, as already stated, the stockholder may intervene in proper cases to open it or to prevent its entry by interposing a defense on behalf of the corporation²⁸ or to prevent a bankruptcy by default.²⁹

§ 4065. — Impolitic and inexpedient acts and dealings; discretion in management and policy. The doctrine that a stockholder may sue in equity to redress or prevent wrongs on the part of the directors

²⁴ Taking vacations or delegating duties in disregard of needs of business with result that bad loans were made. But one who was justifiably absent was not liable. *Kavanaugh v. Commonwealth Trust Co.*, 64 N. Y. Misc. 303, 118 N. Y. Supp. 758.

²⁵ *Zinn v. Baxter*, 65 Ohio St. 341, 62 N. E. 327.

²⁶ *Callanan v. Keeseville*, A. C. & L. C. R. Co., 199 N. Y. 268, 92 N. E. 747, rev'g 131 N. Y. App. Div. 306, 115 N. Y. Supp. 779; and see other cases cited § 4065, *infra*.

May sue to collect debt. *Bergman Clay Mfg. Co. v. Bergman*, 73 Wash. 144, 131 Pac. 485.

Where corporation refuses to sue directors for whose libel it had to pay, a stockholders' suit will lie against them. *Hill v. Murphy*, 212 Mass. 1, 40 L. R. A. (N. S.) 1102, Ann. Cas. 1913 C 374, 98 N. E. 781.

²⁷ Where a decree in foreclosure was obtained by collusion between the president of the corporation and the mortgagee, and the motion by the plaintiff to set aside the decree in the foreclosure suit failed by reason of false statements of the mortgagee, an independent action lay in equity to have the decree set aside, the plain-

tiff stockholders not having been parties to the foreclosure suit. *Whitney v. Hazzard*, 18 S. D. 490, 101 N. W. 346.

Conspiracy to suffer a judgment will not be inferred solely from identity of the creditors and the corporate officers who refused a demand of payment, subsequent circumstances showing that the judgment was recognized as valid by endeavoring to call in contributions to redeem from sheriff's sale. *Burns v. National Mining, Tunnel & Land Co.*, 23 Colo. App. 545, 130 Pac. 1037.

²⁸ See § 4055, *supra*.

May intervene where they are colluding to dismiss an action brought by corporation to cancel stock fraudulently issued. *National Power & Paper Co. v. Rossman*, 122 Minn. 355, 532, Ann. Cas. 1914 D 830, 142 N. W. 818, 822.

²⁹ Bill sustained to prevent fraudulent bankruptcy and protect corporation from levy of executions, where it was alleged that stock was not paid in, and that books were kept outside state in violation of statute. *Torrey v. Toledo Portland Cement Co.*, 150 Mich. 86, 113 N. W. 580.

or majority of the stockholders, or to obtain redress on behalf of the corporation for injuries by strangers, where he cannot obtain relief through the corporation, does not give a stockholder the right to maintain such a bill where the act complained of, or the refusal of the directors or majority of the stockholders to sue, is properly within the discretionary power with respect to the internal affairs of the corporation vested in them by the charter. So long as they act, not fraudulently, illegally or oppressively, but in good faith, in the exercise of their discretion, and for what they deem to be the best interests of the company, a court of equity has no jurisdiction to interfere at the suit of a dissenting stockholder, or a dissenting minority of the stockholders. Such a suit cannot be maintained by showing a mere mistake or error of judgment on the part of the directors or majority of the stockholders. Their conduct must be ultra vires, illegal, fraudulent or oppressive.³⁰ "Questions of

30 United States. Carson v. Alleghany Window Glass Co., 189 Fed. 791; Ryan v. Williams, 100 Fed. 172; Hendrickson v. Bradley, 85 Fed. 508; Hayden v. Official Hotel Red Book & Directory Co., 42 Fed. 875; Bill v. Western U. Tel. Co., 16 Fed. 14; Samuel v. Holladay, Woolw. 400, Fed. Cas. No. 12,288.

Alabama. Tuscaloosa Mfg. Co. v. Cox, 68 Ala. 71.

Connecticut. Town of Middletown v. Boston & N. Y. Air Line R. Co., 53 Conn. 351, 5 Atl. 706; Pratt v. Pratt, Read & Co., 33 Conn. 446.

Georgia. Hand v. Dexter, 41 Ga. 454.

Illinois. Wheeler v. Pullman Iron & Steel Co., 143 Ill. 197, 17 L. R. A. 818, 32 N. E. 420, aff'g 43 Ill. App. 626.

Kentucky. Dudley v. Kentucky High-School, 9 Bush. 576.

Maine. Inhabitants of Waldoborough v. Knox & L. R. Co., 84 Me. 469, 24 Atl. 942; Kennebec & P. R. Co. v. Portland & K. R. Co., 54 Me. 173.

Maryland. Shaw v. Davis, 78 Md. 308, 23 L. R. A. 294, 28 Atl. 619.

Massachusetts. Dunphy v. Traveler Newspaper Ass'n, 146 Mass. 495,

16 N. E. 426; Durfee v. Old Colony & F. River R. Co., 5 Allen 230.

Minnesota. Rothwell v. Robinson 44 Minn. 538, 47 N. W. 255.

New Jersey. Trimble v. American Sugar Refining Co., 61 N. J. Eq. 340, 48 Atl. 912; Meredith v. New Jersey Zinc & Iron Co., 59 N. J. Eq. 257, 44 Atl. 55; Sewell v. East Cape May Beach Co., 50 N. J. Eq. 717, 25 Atl. 929; Ellerman v. Chicago Junct. Railways & Union Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287; Story v. Jersey City & B. Point Plank Road Co., 16 N. J. Eq. 13, 84 Am. Dec. 134; Gifford v. New Jersey R. & Transp. Co., 10 N. J. Eq. 171.

New York. Godley v. Crandall & Godley Co., 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818, modifying 153 App. Div. 697, 139 N. Y. Supp. 236; Leslie v. Lorillard, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363; Rafferty v. Buffalo City Gas Co., 37 App. Div. 618, 56 N. Y. Supp. 288; Hart v. Ogdensburg & L. C. R. Co., 89 Hun 316, 35 N. Y. Supp. 566; Lewisoohn Bros. v. Anaconda Copper Min. Co., 26 Misc. 613, 56 N. Y. Supp. 807; Thompson v. Erie Ry. Co., 11 Abb. Pr. (N. S.) 188.

Pennsylvania. Lauman v. Lebanon

policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation." ³¹

Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

Tennessee. Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; Memphis Gayoso Gas Co. v. Williamson, 9 Heisk. 314.

Texas. Cates v. Sparkman, 73 Tex. 619, 15 Am. St. Rep. 806, 11 S. W. 846.

Virginia. Baltimore & O. R. Co. v. Wheeling, 13 Gratt. 40.

Wyoming. Smith v. Stone, 21 Wyo. 62, 128 Pac. 612.

England. Macdougall v. Gardiner, 1 Ch. Div. 13; Foss v. Harbottle, 2 Hare 461.

See also Chaps. 41 and 42, *supra*, for the limits and subjects of discretion and for illustrations.

³¹ Ellerman v. Chicago Junct. Railways & Union Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287.

Directors are not liable for mistakes of judgment or policy. Braswell v. Pamlico Insurance & Banking Co., 159 N. C. 628, 42 L. R. A. (N. S.) 101, 75 S. E. 813.

In a leading English case it was said by James, L. J.: "Nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent—unless there is something ultra vires on the part of the company, qua company, or on the part of the majority of the company, so that they are not fit persons to determine it; but * * * every litigation must be in

the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company—there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is a wrong to the company a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done." Macdougall v. Gardiner, 1 Ch. Div. 13.

"The cases in which the minority can maintain such action [one to reverse the majority's policy] are therefore confined to those in which the acts complained of are of a fraudulent character, or beyond the powers of the company." Burland v. Earle, [1902] A. C. 83, 85 L. T. Rep. 553; Campbell v. Australian Mut. Prov. Society, 99 L. T. Rep. 3, 77 L. J. P. C. 117, 15 Manson 344, 24 T. L. R. 623.

"Each and every stockholder contracts that the will of the majority shall govern in all matters coming within the limits of the act of incorporation; and in cases involving no breach of trust, but only error or mistake of judgment upon the part of the directors who represent the company, individual stockholders have

A payment of funds of the corporation, or other act by the directors, which is conceded to be ultra vires, as the payment of a tax which is conceded to be illegal, but the payment of which the directors consider it inadvisable to resist, cannot be said to be due to a mere error of judgment,³² but the compromise of an established claim for damages after protracted litigation to the Supreme Court of the United States was sustained as against a dissenting plaintiff stockholder.³³

The making or rescission of intra vires contracts though unwise, will not sustain a suit, if there is no fraud,³⁴ e. g., the issuance of notes or bonds at a discount,³⁵ or the establishment of a pension system for employees and the composition by contract of their claims therein.³⁶

no right to appeal to the courts to dictate the line of policy to be pursued by the corporation." *Dudley v. Kentucky High-School*, 9 Bush (Ky.) 576.

Unwise installation of a pumping plant to supply water to an irrigation company will not be restrained. *Skeen v. Warren Irrigation Co.*, 42 Utah 602, 132 Pac. 1162.

Holding rather than selling high priced and not remunerative property held discretionary. *Sullivan v. Central Land Co.*, 173 Ala. 426, 55 So. 612.

³² *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. Ed. 401. See also cases where the stockholders' suit was sustained on a showing that the directors and officers, though willing, refrained from resisting the enforcement of unconstitutional regulations through fear of the excessive penalties imposed. *Wathen v. Jackson Oil & Refining Co.*, 235 U. S. 635, 59 L. Ed. 395; *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Perkins v. Northern Pac. Ry. Co.* 155 Fed. 445.

³³ Compromising a claim for damages for boycott against labor unions after legal right to recover was established, is not a wrong to minority. *Post v. Buck's Stove & Range Co.*, 200 Fed. 918, 43 L. R. A. (N. S.) 498.

³⁴ Cancellation of contract held not

fraudulent. *Trendley v. Illinois Traction Co.*, 241 Mo. 73, 145 S. W. 1.

³⁵ An issue of corporate notes at 90 per cent is not ground for relief if no fraud is alleged and the controversy is merely over the expediency of such transaction. *Holmes v. St. Joseph Lead Co.*, 84 N. Y. Misc. 278, 147 N. Y. Supp. 104, aff'd 163 N. Y. App. Div. 885, 147 N. Y. Supp. 1117.

Sale of bonds below par and method of managing subsidiary companies. *Smiley v. New River Co.*, 72 W. Va. 221, 77 S. E. 976.

Usurious bonds held voidable at instance of corporation. *George N. Fletcher & Sons v. Alpena Circuit Judge*, 136 Mich. 511, 99 N. W. 748. As to this, especially where the discount is usurious, see also § 4062, supra.

³⁶ The validity of a long established pension fund for employees is "pre-eminently for the consideration of the stockholders as a body," where they authorized it and directed that the plan be carried out. *Heinz v. National Bank of Commerce in St. Louis*, 237 Fed. 942.

Compounding a pension expectancy by a gross payment. *Heinz v. National Bank of Commerce in St. Louis*, 237 Fed. 942.

The allowance of salaries and fixing the amount of them,³⁷ or payment for property or services by stock, and the valuation of such relatively to each other, are within discretion subject to the qualification that it must be fair and free from fraud or illegality.³⁸

Stockholders cannot compel the directors to declare a dividend, where there is no abuse of discretion on their part in refusing to do so,³⁹ or to sell its merchandise to make a fund for that purpose.⁴⁰

Dealings in stocks of other corporations, when not ultra vires,⁴¹ or voting them in favor of a merger or subsidiary corporations,⁴² have been held not to be actionable at the instance of dissatisfied stockholders. So of an acceptance of or acting under an alteration or amendment of the charter of the corporation, when its acceptance is within the discretion of a majority of the stockholders.⁴³

³⁷ As to the fixing of salaries and the liability of directors if excessive salaries be allowed, see generally Chaps. 42 and 43, supra.

Directors' decision to pay large salaries to themselves and relatives over protest of minority is not conclusive. *Heublein v. Wight*, 227 Fed. 667.

It is not a discretionary power of directors to vote themselves salaries for past services. *Kleinschmidt v. American Min. Co.*, 49 Mont. 7, 139 Pac. 785.

³⁸ See generally this chapter, subd. xii, Watered or Fictitiously Paid Up Stock.

Issuance of full paid and nonassessable stock for grossly overvalued services is invalid if any dissent, but not if values are reasonably commensurate. *Vogeler v. Punch*, 205 Mo. 558, 103 S. W. 1001.

Their judgment is not, however, binding on the courts, at least in a formative stage of the transaction. *Donald v. American Smelting & Refining Co.*, 62 N. J. Eq. 729, 48 Atl. 771.

³⁹ See this chapter, subd. xvi, Dividends, supra.

It is for the directors to decide whether there exist net profits properly applicable to distribution as dividends. *Siegman v. Electric Vehicle*

Co., 72 N. J. Eq. 403, 65 Atl. 910.

⁴⁰ One cannot require sale of manufactured product in order to produce a dividend. *Carson v. Allegany Window Glass Co.*, 189 Fed. 791.

⁴¹ Where a portion of the stockholders do not object to a proposed purchase of stock of another corporation, an injunction by a minority stockholder may in certain cases be refused. *Geer v. Amalgamated Copper Co.*, 61 N. J. Eq. 364, 49 Atl. 159.

⁴² The Equitable Life Assurance Society of New York had power to hold trust company stocks acquired prior to December 31, 1906, and to vote for a merger of companies; hence a stockholder could not, except on grounds of fraud, prevent it. *Morse v. Equitable Life Assur. Society*, 124 N. Y. App. Div. 235, 108 N. Y. Supp. 986.

⁴³ *United States*. *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 How. 381, 16 L. Ed. 488; *Mowrey v. Indianapolis & C. R. Co.*, 4 Biss. 78, Fed. Cas. No. 9,891.

Illinois. *Sprague v. Illinois River R. Co.*, 19 Ill. 174.

Kentucky. *Sage v. Dillard*, 15 B. Mon. 340.

Maryland. *Sprigg v. Western Tel. Co.*, 46 Md. 67.

Massachusetts. *Durfee v. Old Colony & F. River R. Co.*, 5 Allen 230.

A resolution to dissolve or liquidate the corporation⁴⁴ or a sale of all or part of the corporate property may be a just and proper exercise of discretion if necessary to pay debts that cannot otherwise be met, or if the corporation is unprofitable and facing loss, or for other good reason, where it is not ultra vires or inherently illegal.⁴⁵ So may a lease, which is within the powers of the corporation,⁴⁶ and the dissentient stockholders cannot litigate such sales or leases, but they will be relieved where winding up is come at by fraudulent

Michigan. *Joy v. Jackson & M. Plank Road Co.*, 11 Mich. 155.

See Chap. 17, *supra*, as to effect of alteration on subscriptions; Chap. 41, *supra*, on Management and Control, and Chap. 57, *infra*.

A minority holder cannot complain of acceptance of a new franchise by a street railway company which it was within the power of the majority to accept, the charter having contemplated amendment, modification or annulment by the city council. *Vener v. Chicago City Ry. Co.*, 236 Ill. 349, 86 N. E. 226.

⁴⁴ Minority cannot litigate the lawful discretion of directors voting to dissolve according to a law which enabled it to be done. *Windmuller v. Standard Distilling & Distributing Co.*, 114 Fed. 491.

Minority cannot prevent dissolution and winding up, but the majority will be restrained if it does so fraudulently. *Beidenkopf v. Des Moines Life Ins. Co.*, 160 Iowa 629, 46 L. R. A. (N. S.) 290, 142 N. W. 434.

⁴⁵ *Hayden v. Official Hotel Red-Book & Directory Co.*, 42 Fed. 875; *Sewell v. East Cape May Beach Co.*, 50 N. J. Eq. 717, 25 Atl. 929; *Story v. Jersey City & B. Point Plank Road Co.*, 16 N. J. Eq. 13, 84 Am. Dec. 134; *Hall v. Syracuse*, 71 Hun (N. Y.) 465, 24 N. Y. Supp. 959; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685; *Lipton v. Bald Eagle Plank Road Co.*, 17 Leg. Int. (Pa.) 365. See also Chap. 32, *supra*.

Sale of all assets without fraud, if corporation is unprofitable and failing, is within right of majority. E. g., sale to clear up debt equal to par of its stock, when it could not borrow, to stop further loss, was valid. *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612. See also § 1207, *supra*.

Selling property in order to meet pressing debts after approval of stockholders is not a fraud or minority. *Collins v. Penn-Wyoming Copper Co.*, 203 Fed. 726.

Sale of all the property of the corporation in good faith to another corporation engaged in the same business for paid up stock in the latter, where the business of the corporation can no longer be carried on profitably, and it is approaching serious financial embarrassment. *Sawyer v. Dubuque Printing Co.*, 77 Iowa 242, 42 N. W. 300; *Triseoni v. Winship*, 43 La. Ann. 45, 26 Am. St. Rep. 175, 9 So. 29.

Sale of property by an insolvent corporation unable to recuperate otherwise, and purchase by a new corporation formed by majority is not a fraud on minority which declined participation in the scheme. *Marks v. Merrill Paper Co.*, 203 Fed. 16.

As to corporate power to transfer or convey property, see Chaps. 32, 33 and 34, *supra*.

As to power to take stocks in other corporations, see Chap. 30, *supra*.

⁴⁶ *Town of Middletown v. Boston & N. Y. Air Line R. Co.*, 53 Conn. 351, 5 Atl. 706.

waste or dissipation of assets with a view to dissolution or an uncontested bankruptcy.⁴⁷

The mere fact that a corporation has a cause of action for an injury does not always make it incumbent upon it to sue, any more than in the case of an individual. If, in the opinion of the directors or a majority of the stockholders, the best interests of the company do not require it to sue, it need not do so. The matter is within their discretion, and if they act in good faith, their refusal to sue violates no right of dissenting stockholders, so as to entitle them to maintain a suit in their own behalf.⁴⁸ The exercise of such discretion by the directors will not be lightly set aside by the court, and where a stockholder complains of such action of the directors the court will consider the circumstances, and, if no bad faith is shown, will decline to substitute the judgment of the stockholder for that of the managing directors.⁴⁹ Although this is true, and while it is true, also, that the law will presume that the corporate officers are acting in good faith,⁵⁰ yet, nevertheless, refusal on the part of the governing body to bring suit must in fact be free from fraud in order to bar out right of action by minority stockholders.⁵¹ "It would be contrary

⁴⁷ Relief was granted where a majority voted an unfair distribution of assets as salaries and then dissolved the corporation in bad faith to form a new one, which took the assets and good will without adequate payment. *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818, modifying 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236.

Scheme to increase stock and create debts and then to cause bankruptcy proceedings to be filed and to go by default is sufficient ground, and the fact that dissolution is also asked does not defeat it. *Ellis v. Vandergrift*, 173 Ala. 142, 55 So. 781.

⁴⁸ *Samuel v. Holladay*, Woolw. (U. S.) 400, Fed. Cas. No. 12,288; *Dumphy v. Traveller Newspaper Ass'n*, 146 Mass. 495, 16 N. E. 426; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; *Macdougall v. Gardiner*, 1 Ch. Div. 13; *Foss v. Harbottle*, 2 Hare 461; *In re London & Mercantile Discount Co.*, L. R. 1 Eq. 277.

Institution and control of suits is within directors' power, but minority may intervene to prevent dismissal where it was first instituted at their instance. *Eagle Iron Co. v. Colyar*, 156 Fed. 954.

See *Post v. Buck's Stove & Range Co.*, 200 Fed. 918, 43 L. R. A. (N. S.) 498, wherein a compromise of a suit was sustained although the right to recover was determined after prolonged litigation to the highest court.

⁴⁹ *Macon, D. & S. R. Co. v. Shailer*, 141 Fed. 585. See also, supporting the principle enunciated in the text, *Kessler v. Ensley Co.*, 123 Fed. 546; *Hutchison v. Rock Hill Real Estate & Loan Co.*, 65 S. C. 45, 43 S. E. 295.

⁵⁰ *McCloskey v. Snowden*, 212 Pa. 249, 108 Am. St. Rep. 867, 61 Atl. 796.

⁵¹ *Siegmán v. Kissel*, 71 N. J. Eq. 123, 62 Atl. 941.

Directors have no discretion to refuse to sue for fraud by them on stockholders. *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340.

Directors have no discretion to re-

to the fundamental principles of corporate organization," said Judge Knowlton in a Massachusetts case, "to hold that a single shareholder can at any time launch the corporation into litigation to obtain from another what he deems to be due to it, or to prevent methods of management which he thinks unwise. Intelligent and honest men differ upon questions of business policy. It is not always best to insist upon all one's rights; and a corporation acting by its directors, or by vote of its members, may properly refuse to bring a suit which one of its stockholders believes should be prosecuted. In such a case the will of the majority must control. It is only when the action of a corporation in refusing to proceed at the request of a stockholder is fraudulent as against him, or in disregard of his rights, that he can maintain a suit in his own name in the corporate right. The court cannot interfere with the management of corporations in matters which are properly within their discretion, so long as their discretion is fairly exercised, and it is always assumed until the contrary appears, that they and their officers obey the law, and act in good faith towards all their members." ⁵²

The same discretion exists as to defending suits,⁵³ or suing to set aside a judgment suffered,⁵⁴ or to redeem or attack a foreclosure suit.⁵⁵ Thus the directors are not bound as a matter of law, where action is instituted against the corporation, to plead the statute of limitations.⁵⁶

fuse to sue to redress a fraudulent stock issue. *Shaw v. Staight*, 107 Minn. 152, 20 L. R. A. (N. S.) 1077, 119 N. W. 951.

⁵² *Dunphy v. Traveller Newspaper Ass'n*, 146 Mass. 495, 16 N. E. 426.

⁵³ As to the right to intervene in an action and make defense on behalf of the corporation which fails or refuses to do so, see § 4055, *supra*.

⁵⁴ A stockholder cannot maintain a suit to set aside a judgment obtained against the corporation upon allegations which show merely that the corporation itself has declined to bring the suit on the advice of competent attorneys that it could not be successful. *Hendrickson v. Bradley*, 85 Fed. 508.

⁵⁵ Where the property of a corpora-

tion has been sold in proceedings to foreclose a mortgage thereon and there is no showing of fraud or acts ultra vires, and the majority stockholders are satisfied that the best price obtainable has been received, minority stockholders cannot sustain exceptions to the ratification of the sale. *Bond v. Gray Improvement Co.*, 102 Md. 426, 62 Atl. 827. See also, in general, *McKee v. Chautauqua Assembly*, 124 Fed. 808.

Whether the corporation shall pay a mortgage debt and redeem the property is a purely corporate question, and a stockholder cannot bring a suit to redeem. *Leff v. Nachod*, 64 N. Y. Misc. 497, 119 N. Y. Supp. 470.

⁵⁶ *Meyer v. Bristol Hotel Co.*, 163 Mo. 59, 63 S. W. 96.

§ 4066. — Injury to corporation by third persons or other corporations. As affecting the right to have a stockholders' suit, there is no essential distinction between a wrong by a third person to the corporation and a wrong by its officers, directors or stockholders. All are equally distinct entities, and the heading of this section indicates a mere division of matter for convenience.⁵⁷

If third persons, whether individuals or other corporations, or public officers, threaten to commit a wrong against the corporation, or have committed a wrong for which they are liable to the corporation in damages, or if a corporation has a right of action against another to enforce a contract or recover damages for its breach, or to recover property,—in all these cases, the injury to be prevented or redressed is an injury to the corporation, and not to the stockholders individually, except indirectly, and ordinarily the corporation is the only proper party to sue.⁵⁸ The stockholders, however, are indirectly injured, and are entitled to relief in equity, for the protection of their equitable rights, if for any reason they cannot obtain relief through the corporation. And it is well settled, therefore, that a stockholder may maintain a suit in equity for appropriate relief on behalf of himself and the other stockholders, for the benefit of the corporation, if the directors refuse to sue or take other steps to prevent or redress the injury—their refusal not being a proper exercise of their discretion⁵⁹—and if, for any reason, relief cannot be obtained through the action of the corporation.⁶⁰

⁵⁷ It must be remembered that the right to sue rests on the same essential basis of a wrong to the corporation, whether it be done by third persons or by directors, stockholders or any of them in concert or combination. Therefore many of the cases cited under the four sections preceding this will be found to have involved as parties defendant third persons who were to be charged or who were necessary to a decision. See §§ 4061-4065, *supra*.

As to the propriety or necessity of making third persons parties defendant, see § 4082, *infra*.

⁵⁸ As to primary right of action being in corporation, see §§ 4051-4053, 4061, *supra*.

⁵⁹ Discretion to sue or not to sue, see § 4065, *supra*, § 4078, *infra*.

⁶⁰ **United States.** *Greenwood v. Union Freight R. Co.*, 105 U. S. 13, 26 L. Ed. 961; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Elkins v. Chicago*, 119 Fed. 957; *Metcalf v. American School-Furniture Co.*, 108 Fed. 909; *Pond v. Vermont Valley R. Co.*, 12 Blatchf. 280, Fed. Cas. No. 11,265.

California. *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444.

Colorado. *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46.

Indiana. *Carter v. Ford Plate Glass Co.*, 85 Ind. 180.

Maryland. *Sloan v. Clarkson*, 105 Md. 171, 66 Atl. 18; *Mottu v. Primrose*, 23 Md. 432.

Massachusetts. *Brewer v. Boston Theatre*, 104 Mass. 378.

Missouri. *Exter v. Sawyer*, 146 Mo.

Thus, a stockholder may sue under such circumstances to enjoin the collection or payment of an illegal tax, as where the statute imposing the tax is unconstitutional,⁶¹ or compliance with an unconstitutional attempt to regulate rates for public service rendered by the corporation,⁶² or other unconstitutional regulation,⁶³ or to enjoin another corporation (as in the case of railroad companies) from taking or using its property under an unconstitutional statute, or otherwise without right,⁶⁴ or to enjoin any other injury against which a suit for injunction is a proper remedy.⁶⁵ A stockholder may also sue under such circumstances to compel performance of a lease or other contract,⁶⁶ to recover money illegally paid by the directors

302, 47 S. W. 951; *Hannerty v. Standard Theater Co.*, 109 Mo. 297, 19 S. W. 82.

Nebraska. *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997; *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 41 Neb. 374, 59 N. W. 838.

New Hampshire. *Winsor v. Bailey*, 55 N. H. 218; *March v. Eastern R. Co.*, 43 N. H. 515, 40 N. H. 548, 77 Am. Dec. 732.

New York. *Barr v. New York, L. E. & W. R. Co.*, 96 N. Y. 444; *Bloom v. National United Ben. Savings & Loan Co.*, 81 Hun 120, 30 N. Y. Supp. 700; *Currier v. New York, W. S. & B. R. Co.*, 35 Hun 355.

South Dakota. *Frederick Milling Co. v. Frederick Farmers' Alliance Co.*, 20 S. D. 335, 106 N. W. 298; *Lofthus v. Farmers' Shipping Ass'n*, 8 S. D. 201, 65 N. W. 1076.

England. *Atwood v. Merryweather*, L. R. 5 Eq. 464, note.

See also cases cited in succeeding notes under this section.

⁶¹ *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 39 L. Ed. 759; *Davenport v. Daws*, 18 Wall. (U. S.) 626, 21 L. Ed. 938; *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. Ed. 401; *Barnes v. Kornegay*, 62 Fed. 671; *Forbes v. Gracey*, Fed. Cas. No. 4,924; *Foote v. Linck*, 5 McLean 616, Fed. Cas. No. 4,913.

⁶² *Ex parte Young*, 209 U. S. 123,

52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Perkins v. Northern Pac. Ry. Co.*, 155 Fed. 445.

⁶³ *Wathen v. Jackson Oil & Refining Co.*, 235 U. S. 635, 59 L. Ed. 395.

⁶⁴ *Greenwood v. Union Freight R. Co.*, 105 U. S. 13, 26 L. Ed. 961; *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. 615.

⁶⁵ *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. 615; *Samuel v. Holladay, Woolw. (U. S.)* 400, Fed. Cas. No. 12,288.

⁶⁶ *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732, 43 N. H. 515; *Barr v. New York, L. E. & W. R. Co.*, 96 N. Y. 444.

Lessor corporation suffering property to depreciate under a lease and then merging plaintiff's corporation. *Howe v. New York, N. H. & H. R. Co.*, 142 N. Y. App. Div. 451, 126 N. Y. Supp. 1090.

The remedy at law is inadequate, and equitable action by a stockholder will lie at once without waiting for lapse of the full time for performance where a railroad made a contract for reconstruction of its road paying the contractors out of increased stock, and where they have taken the stock without performing the contract, have misused obligations issued by the railroad company and have repudiated a substantial part of their undertaking. *Callanan v. Keeseville, A. C. & L. C.*

to a stockholder, upon allowing him to withdraw,⁶⁷ to recover damages for conversion of corporate property,⁶⁸ to recover damages for negligence or fraud resulting in injury to the corporation,⁶⁹ to rescind and cancel a contract which the corporation has a right to avoid,⁷⁰ to set aside a fraudulent contract between the promoters of the corporation and the directors, by which property is purchased from the promoters at an excessive valuation, or to compel the promoters or directors, or both, to account to the corporation for secret profits made by them in such a transaction,⁷¹ to set aside an ultra vires or fraudulent lease or other conveyance of the property of the corporation,⁷² to declare ultra vires and cancel bonds and a mortgage securing the same⁷³ and in many other cases. A trust may be impressed on property of the corporation and an accounting had of a successor to whose hands it has wrongfully come.⁷⁴ In an action for misappropriation of assets it is not material whether a wrong doing defendant was or was not a director when it was done,⁷⁵ but the third

R. Co., 199 N. Y. 268, 92 N. E. 747, rev'g 131 N. Y. App. Div. 306, 115 N. Y. Supp. 779, 132 N. Y. App. Div. 940, 118 N. Y. Supp. 1097, 136 N. Y. App. Div. 934, 120 N. Y. Supp. 1116, 123 N. Y. Supp. 1109 (mem. dec.).

⁶⁷ *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199. See Chap. 17, supra, as to withdrawals of subscriptions.

⁶⁸ *Steele Lumber Co. v. Laurens Lumber Co.*, 98 Ga. 329, 24 S. E. 755.

⁶⁹ *Colquitt v. Howard*, 11 Ga. 556.

⁷⁰ *Illinois*. *Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899, aff'g 22 Ill. App. 91.

Mississippi. *Hinds & Adams Counties v. Natchez, J. & C. R. Co.*, 85 Miss. 599, 107 Am. St. Rep. 305, 38 So. 189.

Nebraska. *McLeod v. Lincoln Medical College*, 69 Neb. 550, 98 N. W. 672, 96 N. W. 265.

New York. *Jacobs v. Mexican Sugar Refining Co.*, 104 App. Div. 242, 93 N. Y. Supp. 776; *Currier v. New York, W. S. & B. R. Co.*, 35 Hun 355.

South Dakota. *Loftus v. Farmers' Shipping Ass'n*, 8 S. D. 201, 65 N. W. 1076.

⁷¹ *Burbank v. Dennis*, 101 Cal. 90, 35

Fac. 995; *Exter v. Sawyer*, 146 Mo. 302, 47 S. W. 951; *Atwool v. Merryweather*, L. R. 5 Eq. 464, note.

Compare *Foss v. Harbottle*, 2 Hare 461. See Chap. 5, supra, on Promoters.

⁷² *People's Sav. Bank v. Colorado Min. Exch. Bldg. Co.*, 8 Colo. App. 354, 46 Pac. 620; *Wilcox v. Bickel*, 11 Neb. 154.

⁷³ *Chicago v. Cameron*, 22 Ill. App. 91, aff'd 120 Ill. 447, 11 N. E. 899.

Intervention may be permitted to stockholders and bondholders in a proper case where suit is brought to foreclose a mortgage on the corporate property by the holder of such mortgage. See § 4055, supra.

⁷⁴ *Grant v. Cobre Grande Copper Co.*, 193 N. Y. 306, 86 N. E. 34, rev'g 126 N. Y. App. Div. 750, 111 N. Y. Supp. 386, 59 N. Y. Misc. 1, 111 N. Y. Supp. 1089.

⁷⁵ *Meredith v. Art Metal Const. Co.*, 97 N. Y. Misc. 69, 161 N. Y. Supp. 1.

The gist of such an action is to redress injury to the corporation and not alone to charge directors who have been remiss. *Meredith v. Art Metal Const. Co.*, 97 N. Y. Misc. 69, 161 N. Y. Supp. 1.

party must have been a party in something more than mere knowledge.⁷⁶

§ 4067. Prerequisites and conditions to suit by stockholder—In general. It is not only necessary that the cause of action be mature in favor of the corporation,⁷⁷ but that all of the conditions to the stockholder's suing be performed as well, such as request on the corporate authorities to act and their refusal or unwillingness,⁷⁸ and where plaintiff as stockholder can control and remove the wrongdoing officer, he must exhaust that recourse.⁷⁹ In addition, since the suit is in its nature equitable, plaintiff must have done or offered to do equity to the defendants⁸⁰ or the corporation⁸¹ if equity is due. Whether on suing to set aside a transaction there should be a restitution or offer by plaintiff to restore benefits received depends on whether that is necessary to make out a cause of action to him. If it is, then he must restore what came to him of value.⁸² In cancellation and rescission

⁷⁶ A bank is not liable for misapplication merely because, without fraud, it knew for what purpose the money lent was to be used. *Beckett v. Planters' Compress & Bonded Warehouse Co.*, 107 Miss. 305, 65 So. 275.

⁷⁷ That the wrong to it must be accomplished or threatened, see § 4061, *supra*.

⁷⁸ See § 4053, *supra*, §§ 4068, 4069, *infra*.

⁷⁹ Bill for receiver on ground of insolvency due to mismanagement is bad where plaintiff appears to have sufficient stock to apply under the statute to wind up the corporation, or, with other friendly stock, to oust offending officers under another statute. *Ward v. Hotel Randolph Co.*, 65 W. Va. 721, 63 S. E. 613.

⁸⁰ Repayment of advances fraudulently made by a codefendant need not be tendered. *Holt v. California Development Co.*, 161 Fed. 3.

Stockholders need not tender back consideration which they do not have, and where there was no real consideration passed. *Citizens' Savings & Trust Co. v. Illinois Cent. R. Co.*, 182 Fed. 607, *rev'g* 173 Fed. 556.

Majority holder in control is not

entitled to repayment or offer thereof where the money paid by him for corporate property is in the treasury or to the repayment of money spent in working its mines, where he took the product. *Franklin v. Havalena Min. Co.*, 16 Ariz. 200, 141 Pac. 727.

The complaint need not contain such an offer if it does not show anything due to defendant. See *Franklin v. Havalena Min. Co.*, 16 Ariz. 200, 141 Pac. 727, and § 4071, *infra*.

Defense that plaintiff has but small holdings or unsubstantial interest, see § 4077, *infra*.

⁸¹ One cannot complain of failure to collect subscriptions when he himself is resisting a suit for that purpose. *Von Schlemmer v. Keystone Life Ins. Co.*, 121 La. 987, 46 So. 991.

⁸² There must be a wrong to the plaintiff as well as to the corporation. Hence where the plaintiff suffered no legal injury because his testator compromised the wrong, the action cannot be maintained in the corporate behalf without fixing the wrong by offer of restitution. *Babcock v. Farwell*, 245 Ill. 14, 137 Am. St. Rep. 284, 19 Ann. Cas. 74, 91 N. E. 683.

suits to annul contracts⁸³ or transfers to it⁸⁴ or from it and to recover assets for it⁸⁵ restitution must be offered if the transaction is merely a voidable one; and payment must be tendered or a lien restored where the effect of the relief would be to defeat it or undo a payment made previously.⁸⁶ It is not necessary where the relief prayed is not rescission but merely an accounting and adjustment of equities of parties⁸⁷ and not where the transaction was wholly void.⁸⁸ Furthermore the rescission, according to settled principles, cannot be partial, reserving the benefits and rejecting the burdens which fell to the plaintiffs, but it must be entire.⁸⁹

⁸³ The corporation must have returned or offered to return bonds of a foreign corporation, before its own bonds given in exchange for them can be canceled. *Wrightsville Hardware Co. v. McElroy*, 254 Pa. 422, 98 Atl. 1052.

Where a loan by directors was voidable and the corporation got the money, offer to repay is essential before a judgment on the loan note can be vacated. *Burns v. National Mining, Tunnel & Land Co.*, 23 Colo. App. 545, 130 Pac. 1037.

⁸⁴ Offer to pay the reasonable value of land sold to the corporation at an excessive price by defendant president is a sufficient offer of equity, where he has bought it in on foreclosure of the purchase money mortgage. *Peerson v. Gray*, 184 Ala. 312, 63 So. 467.

⁸⁵ A suit by a minority stockholder in behalf of the corporation seeking to have annulled a sale of corporate property to the directors must evince willingness to restore the consideration received by the corporation for the property, since he who seeks equity must do equity. *Mosher v. Sinnott*, 20 Colo. App. 454, 79 Pac. 742.

⁸⁶ Where liens on corporate property have been discharged as an incident of the transaction assailed, there must be an offer to restore their position. *Collins v. Penn-Wyoming Copper Co.*, 203 Fed. 726.

⁸⁷ *Anderson v. Scandia Min. Syndicate*, 26 S. D. 558, 128 N. W. 1016.

Such a complaint need not offer to return stock illegally issued. *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138, aff'g 150 N. Y. App. Div. 298, 134 N. Y. Supp. 635, 75 N. Y. Misc. 234, 133 N. Y. Supp. 560.

Payment of vendor's lien need not be tendered where defendants bought the corporation's land on which there was a lien, and the object of the bill is to adjust all rights and apply the land to payment of debts and for distribution. *Canadian Country Club v. Johnson*, — Tex. Civ. App. —, 176 S. W. 835.

⁸⁸ *McDermont v. Anaheim Union Water Co.*, 124 Cal. 112, 56 Pac. 779.

Repayment on a void stock issue need not be tendered. *Anderson v. Scandia Min. Syndicate*, 26 S. D. 558, 128 N. W. 1016.

Not necessary to cancel wholly illegal stock issue or where plaintiff received nothing from defendants. *Anderson v. Scandia Min. Syndicate*, 26 S. D. 558, 128 N. W. 1016.

⁸⁹ A dissolved corporation was in the hands of a receiver. In an action brought by the stockholders against the directors for mismanagement, averment was made of refusal to sue on the part of the receiver and that through the fraud of the directors the

§ 4068. — **Demand on, and refusal by corporation to sue.** Subject to the discretion of the corporate authorities, fairly exercised, to sue or not to sue,⁹⁰ the rule may be said to be unvarying that before the stockholder may sue for the corporation or to redress its wrongs, he must have requested it to sue or redress them by means at its hands, and it must have refused to do so, or, what is equivalent, there must be such a condition of hostile control or futility of making request that one is dispensed with.⁹¹ This applies only where the

receiver had been induced to request from the court an order approving a certain agreement, a portion of which provided for the release from personal liability of the directors, the prayer being for the cancellation of this portion of the order. The order contained provisions imposing upon the directors certain obligations which were of benefit to the stockholders. The court held that the action of the stockholders seeking to have canceled a portion only of the order under the conditions named could not be granted. It was an attempt to retain the benefits of a compromise while rejecting its burdens. *Craig v. James*, 89 N. Y. App. Div. 541, 85 N. Y. Supp. 583.

⁹⁰ As to such discretion, see § 4065, supra.

⁹¹ **United States.** *Stewart v. Washington & A. Steamship Co.*, 187 U. S. 466, 47 L. Ed. 261; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Kelly v. Dolan*, 218 Fed. 966; *Brinckerhoff v. Roosevelt*, 131 Fed. 955.

Colorado. *Holmes v. Jewett*, 55 Colo. 187, 134 Pac. 665; *Morgan v. King*, 27 Colo. 539, 63 Pac. 416; *Smith v. Bulkley*, 18 Colo. App. 227, 70 Pac. 958.

Georgia. *Proctor v. Piedmont Portland Cement & Lime Co.*, 134 Ga. 391, 67 S. E. 942.

Indiana. *Marcovich v. O'Brien*, — Ind. App. —, 114 N. E. 100; *Wright v. Floyd*, 43 Ind. App. 546, 86 N. E. 971.

Iowa. *Reed v. Hollingsworth*, 157 Iowa 94, 135 N. W. 37.

Kansas. *Fry v. Rush*, 63 Kan. 429, 65 Pac. 701.

Kentucky. *Burley Tobacco Co. v. Vest*, 165 Ky. 762, 178 S. W. 1102; *Lebus v. Stansifer*, 154 Ky. 444, 157 S. W. 727; *Chilton v. Bell County Coke & Improvement Co.*, 153 Ky. 775, 156 S. W. 889; *Gilman v. German Lithographic Stone Co.*, 152 Ky. 606, 153 S. W. 996.

Massachusetts. *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680.

Missouri. *Vogeler v. Punch*, 205 Mo. 558, 103 S. W. 1001; *Butler v. Hydro-Pneumatic Sprinkler & Manufacturing Co.*, — Mo. App. —, 190 S. W. 921.

Montana. *Deschamps v. Loiselle*, 50 Mont. 565, 148 Pac. 335.

New York. *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138, aff'g 150 App. Div. 298, 134 N. Y. Supp. 635, 75 Misc. 234, 133 N. Y. Supp. 560; *Polhemus v. Polhemus*, 108 App. Div. 353, 95 N. Y. Supp. 325; *Bowne v. Smith*, 44 Misc. 575, 90 N. Y. Supp. 204.

Oklahoma. *Starr v. Heald*, 28 Okla. 792, 116 Pac. 188.

Pennsylvania. *Law v. Fuller*, 217 Pa. 439, 66 Atl. 754.

South Dakota. *Whitney v. Hazzard*, 18 S. D. 490, 101 N. W. 346.

Virginia. *Virginia Passenger & Power Co. v. Fisher*, 104 Va. 121, 51 S. E. 198.

Washington. *Elliott v. Puget Sound*

suit is a technical stockholders' suit, and not to individual suits⁹² or dissolution and winding up suits.⁹³

Where, as ordinarily, the stockholders of a corporation have no control of its business except through an annual election of officers, a refusal of those officers to sue is sufficient to authorize a suit by a stockholder without resort to stockholders;⁹⁴ but by one doctrine it must appear not merely that the directors or other managing officers are parties to the frauds or other wrongs complained of, or that they cannot or will not sue for redress, or take other proper action to remedy the same, but also that redress or relief cannot be obtained at all or in time by application to and action by the stockholders, who have the power to control the directors or managing officers, or to remove them and appoint others in their place, who will take proper action; or else it must be shown that the majority of the stockholders are in collusion with the guilty officers, or that, for some other reason, an effort to obtain relief through them would be useless.⁹⁵ An accurate statement of the rule is that the governing

Wood Products Co., 52 Wash. 637, 101 Pac. 228.

Wisconsin. *Donnelly v. Sampson*, 135 Wis. 368, 115 N. W. 1089.

Wyoming. *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

See other cases cited *infra*, this section and section following, and in § 4085, *infra*.

"The decisions are clear and pointed, fully establishing the doctrine that a stockholder has not the right to bring an action in his own name against officers of a corporation for fraudulent acts or waste of the corporate property, unless such corporation, or its officers, upon being applied to for such purpose by the stockholder, refuses to prosecute, or unless it appears that a request to prosecute would be useless." *Doud v. Wisconsin, P. & S. Ry. Co.*, 65 Wis. 108, 56 Am. Rep. 620, 25 N. W. 533.

⁹² In them no demand is proper or necessary. See § 4050, *supra*.

⁹³ *Minona Portland Cement Co. v. Reese*, 167 Ala. 485, 52 So. 523.

⁹⁴ *Brewer v. Boston Theatre*, 104 Mass. 378; *Shaw v. Staight*, 107 Minn.

152, 20 L. R. A. (N. S.) 1077, 119 N. W. 951; *Planten v. National Nassau Bank of New York*, 174 N. Y. App. Div. 254, 160 N. Y. Supp. 297, *aff'g* 93 N. Y. Misc. 344, 157 N. Y. Supp. 31.

But failure to invite stockholders to act and keeping the proposed suit secret from them may be evidence that the corporate remedies were not exhausted. *Holmes v. Jewett*, 55 Colo. 187, 134 Pac. 665.

⁹⁵ **United States.** *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827.

Alabama. *Tuscaloosa Mfg. Co. v. Cox*, 68 Ala. 71.

West Virginia. *Rathbone v. Parkersburg Gas Co.*, 31 W. Va. 798, 8 S. E. 570.

Wisconsin. *Doud v. Wisconsin, P. & S. Ry. Co.*, 65 Wis. 108, 56 Am. Rep. 620, 25 N. W. 533.

England. *Foss v. Harbottle*, 2 Hare 461; *Mozley v. Alston*, 1 Phil. Ch. 800.

Canada. *McMurray v. Northern Ry. Co.*, 22 Grant Ch. 476.

Where directors of a bank purchase stock, which is paying large dividends, from the corporation, a minority stock-

body, whatever it is respecting the particular matter of grievance, should be appealed to; and ordinarily this is the directors,⁹⁶ but in a fraternal association was held to be the grand lodge.⁹⁷

The English and apparently some American cases make a distinction, that without any such request and refusal a single stockholder may sue to enjoin a corporation from committing an ultra vires act or misapplying its funds.⁹⁸

holder may institute action to have the sale annulled, the bank directors having voted down a motion to institute suit and there being not enough dissenting stockholders to cause a new election of directors. *Morgan v. King*, 27 Colo. 539, 63 Pac. 416.

⁹⁶ No demand on stockholders need be made as they are not the governing body in affairs of management. *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138, aff'g 150 N. Y. App. Div. 298, 134 N. Y. Supp. 635, 75 N. Y. Misc. 234, 133 N. Y. Supp. 560. See also Chap. 41, supra.

Since the liquidating committee of a national bank in voluntary dissolution does not displace the governing power of the directors, demand need not be made on it, but must be made on the directors or the corporation. *Planten v. National Nassau Bank of New York*, 174 N. Y. App. Div. 254, 160 N. Y. Supp. 297, aff'g 93 N. Y. Misc. 344, 157 N. Y. Supp. 31.

⁹⁷ In an insurance society composed of grand and local lodges with an "endowment board" in control of funds, the grand lodge to which the members of the endowment board are answerable must be resorted to before a member of a local lodge can sue for misuse of funds. *Howze v. Harrison*, 165 Ala. 150, 51 So. 614.

⁹⁸ *March v. Eastern R. Co.*, 43 N. H. 515; *Davis v. Congregation Beth Tephila Israel*, 40 N. Y. App. Div.

424, 57 N. Y. Supp. 1015 (questioning whether demand to sue is not prerequisite, but holding it was shown to be futile to do so); *Hoole v. Great Western R. Co.*, 3 Ch. App. 262; *Tomkinson v. Southeastern Ry. Co.*, 35 Ch. Div. 675; *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. Cas. 712; *Russell v. Wakefield Waterworks Co.*, L. R. 20 Eq. 474, per Sir G. Jessel, M. R.

This doctrine is said to have the support of respectable authority, but the court did not adopt it in *Shaw v. Staight*, 107 Minn. 152, 20 L. R. A. (N. S.) 1077, 119 N. W. 951. But see *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048, rev'g 66 Ill. App. 427, where it was said that a stockholder need not make demand where reparation was sought for an illegal issue of stock beyond the corporate powers. The force of this dictum is weakened by the fact that the action appears to have been grounded on an individual wrong to the stockholder by putting out spurious stock with rights equal to his own. It was on this wrong that he sued.

It is said in a recent North Carolina case that "it is settled that an action can be brought by a creditor or stockholder against the officers, including directors, of a corporation, for losses resulting from their fraud or negligence, without having first applied to the corporation to bring such action." *Braswell v. Pamlico Insurance & Banking Co.*, 159 N. C. 628, 42 L. R. A. (N. S.) 101, 75 S. E. 813. In the foregoing case the authorities cited by

The same requirement of demand and refusal applies to religious corporations whose members desire to sue in their behalf.⁹⁹

The notice and request ought to point out the persons to be sued,¹ and should describe all the causes of action which it intended to assert,² and should be addressed to the directors or governing body and not merely to the executive officers³ or to the stockholders alone.⁴

A reasonable time for investigation and action by the directors should be given unless occasion for haste is shown.⁵

Either an express refusal or one implied from the inaction of the

the court for this statement do not support it, at least in its broadly worded form. The action was for tort in causing a purchase by defendant banking corporation of certain shares in another corporation and voting them in harmony with shares owned by individual defendants. The facts would warrant classing this decision with those which dispense with a demand on a hostile majority but it is not based on that ground.

Where vital and fundamental change is threatened no request is necessary. *Macon Gas Co. v. Richter*, 143 Ga. 397, 85 S. E. 112.

It seems that all these cases might well have based their decisions on the principle that demand is dispensed with where it would be futile or for other reason useless or harmful to plaintiff's cause of action. If so, the distinction made in the text is unreal and the cases merely illustrate a phase of the general rule. See § 4070, *infra*.

⁹⁹ *Horst v. Traudt*, 43 Colo. 445, 96 Pac. 259.

¹ Inferential statements do not suffice. *Pellio v. Bulls Head Coal Co.*, 231 Pa. 157, 80 Atl. 71.

² Causes of action not included in the demand cannot be litigated. *Babcock v. Farwell*, 245 Ill. 14, 137 Am. St. Rep. 284, 19 Ann. Cas. 74, 91 N. E. 683.

Refusal to sue for cancellation of a contract is not equivalent to refusal to sue for breach or other wrong un-

der it. *Babcock v. Farwell*, 245 Ill. 14, 137 Am. St. Rep. 284, 19 Ann. Cas. 74, 91 N. E. 683.

³ Not only to president and secretary. *Brandt v. McIntosh*, 47 Mont. 70, 130 Pac. 413.

To the president and attorney alone was not sufficient. *Pellio v. Bulls Head Coal Co.*, 231 Pa. 157, 80 Atl. 71.

A demand sufficient to entitle stockholders to maintain action in the corporate behalf was deemed to have been made where two of the directors signed the demand, and the demand was then served upon the remaining two directors, one of them being the defendant and at the time secretary and the only officer which the corporation then had. *The Telegraph v. Lee*, 125 Iowa 17, 98 N. W. 364.

⁴ Appeal to stockholders and not to the directors is bad unless showing is made that an appeal to the directors would have been vain. *Smiley v. New River Co.*, 72 W. Va. 221, 77 S. E. 976.

⁵ One week's notice (five business days) by mail to twenty-three directors living in different states and towns is not a reasonable time to support a stockholders' suit for losses ramifying through prolonged and intricate transactions by a railroad company in purchasing street railway and steamship lines and the making of alleged ultra vires investments. *Bartlett v. New York, N. H. & H. R. Co.*, 221 Mass. 530, 109 N. E. 452.

corporate authorities after being requested to act will suffice as a refusal.⁶

§ 4069. — Under federal practice; 94th Equity Rule (New Equity Rule 27). The right to maintain such a suit was regulated by Equity Rule 94, adopted by the Supreme Court of the United States for the purpose of guarding against collusion of parties for the purpose of bringing cases within the jurisdiction of such courts. This rule was as follows: "Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action." This is now New Equity Rule 27, in which are added the words, "or the reasons for not making such effort." The rule was evoked by the case of *Hawes v. Oakland*,⁷ and was not designed to lay down merely technical prerequisites, but to protect the courts and enable the court viewing the bill as an entirety to say whether, in all the circumstances,

⁶ *Kavanaugh v. Commonwealth Trust Co. of New York*, 103 N. Y. App. Div. 95, 92 N. Y. Supp. 543. And the filing of a hostile cross-complaint was held to waive the objection that there was no previous demand. *Dundon v. McDonald*, 146 Cal. 585, 80 Pac. 1034.

"It is not necessary that the corporation should absolutely refuse by vote at the general meeting, if it can be shewn either that the wrong-doer had command of the majority of the votes, so that it would be absurd to call the meeting; or if it can be shewn that there has been a general meeting substantially approving of what has been done; or if it can be shewn from the acts of the corporation as a cor-

poration, distinguished from the mere acts of the directors of it, that they have approved of what has been done, and have allowed a long time to elapse without interfering, so that they do not intend and are not willing to sue. In all those cases the same doctrine applies, and the individual corporator may maintain the suit." Sir G. Jessel, M. R., in *Russell v. Wakefield Waterworks Co.*, L. R. 20 Eq. 474.

⁷ *Hawes v. Contra Costa Water Co.*, 104 U. S. 450, 26 L. Ed. 827. See *Delaware & H. Co. v. Albany & S. R. Co.*, 213 U. S. 435, 53 L. Ed. 862; *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455, 47 L. Ed. 256.

plaintiff has made a case of wrongdoing on the part of the corporation and its directors and injury to himself.⁸ Expounding it the federal Supreme Court said: "It must not be understood that a mere technical compliance with the foregoing rule is sufficient and precludes all inquiry as to the right of the stockholder to maintain a bill against the corporation. This court will examine the bill in its entirety and determine whether, under all the circumstances, the plaintiff has made such a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit. The directors represent all the stockholders and are presumed to act honestly and according to their best judgment for the interests of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder or at his instance submitted for review to a court of equity. The directors may sometimes properly waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a court of equity may not be called upon at the appeal of any single stockholder to compel the directors or the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs."⁹

In a federal case the court said: "To entitle the stockholder to relief, it is not enough that the governing body has refused to act, or that the refusal evinces mistaken judgment. The stockholder who seeks redress as to any corporate act which the charter permits the corporation to perform must show either that the governing body is so disorganized that it cannot act; or that it is interested adversely to the corporation, or under the dominion of those who are; or will be required to disapprove its own breaches of trust, as distinguished from mistakes or errors of judgment; or that its refusal will endanger the rights and franchises of the corporation, or result in irreparable loss and injury; or that its attitude, under the situation presented by the bill, discloses negligence or indifference to the interest of the corporation in such degree as amounts to the practical equivalent

⁸ Delaware & H. Co. v. Albany & Min. Co., 187 U. S. 455, 47 L. Ed. 256. S. R. Co., 213 U. S. 435, 53 L. Ed. ⁹ Corbus v. Alaska Treadwell Gold 862; Corbus v. Alaska Treadwell Gold Min. Co., 187 U. S. 455, 47 L. Ed. 256.

of bad faith; or else bring forward other pertinent facts which challenge and impeach the fitness of the governing body to properly decide the question at issue. Even then, if the case will admit of delay, the complaining stockholder must appeal from the decision of the directors to the body of the stockholders at large, and the facts averred in the bill must plainly put them in the wrong, before the court will feel authorized to entertain the complaint of the stockholder." ¹⁰

The rule applies only to technical stockholders' suits and not to those in which the stockholder sues on his individual rights.¹¹ Being given a practical operation, it does not require an obviously futile resort to a hostile majority, that affording a reason for not making the effort,¹² but the effort, if called for, must be shown to have been unsuccessful.¹³ The rule embraces cases founded on a wrong to the corporation from unconstitutional legislation,¹⁴ and it is no "reason for not making such effort," that directors and officers will unwill-

¹⁰ *Kessler v. Ensley Co.*, 123 Fed. 546.

¹¹ A stockholder brought suit in the federal court against his corporation for the appointment of a receiver and the winding up of its affairs. Allegation was made that it no longer actively conducted business or elected officers or directors and that it was largely indebted. This suit the court held was not founded on rights which should be primarily asserted by the corporation only within equity rule number 94 and that the maintenance of such suit by the stockholder did not require compliance by him with the provisions thereof. The court said that the action was one against the corporation rather than one founded on rights which might be asserted by it and that the rule was in no way applicable. *Briggs v. Traders' Co.*, 145 Fed. 254. To like effect see *Barcus v. Gates*, 89 Fed. 783.

Whenever the bill is essentially in the corporate right, the rule applies although it may be called an individual suit by plaintiff. *Smith v. Chase & Baker Piano Mfg. Co.*, 197 Fed. 466. See also § 4051, *supra*.

¹² *Delaware & H. Co. v. Albany & S. R. Co.*, 213 U. S. 435, 53 L. Ed. 862; *Ogden v. Gilt Edge Consol. Mines Co.*, 225 Fed. 723; *Field v. Western Life Indemnity Co.*, 166 Fed. 607; *Monmouth Inv. Co. v. Means*, 151 Fed. 159.

A protest, even if general, at a stockholders' meeting called to vote for a sale of corporate property is sufficient to dispense with demand under the rule, where the purchaser owned and voted a majority of the seller's stock. *Binney v. Cumberland Ely Copper Co.*, 183 Fed. 650.

The new rule requiring allegation of request, etc., "or the reasons for not making such effort" implies that effort need not be made if there be good reasons. Of these the court should judge in each instance. *Dana v. Morgan*, 219 Fed. 313.

¹³ *Strang v. Edson*, 198 Fed. 813.

¹⁴ *Wathen v. Jackson Oil & Refining Co.*, 235 U. S. 635, 59 L. Ed. 395; *Ex parte Young*, 200 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455, 47 L. Ed. 256.

ingly but through fear comply with the invalid statute or regulation because of penalties threatened.¹⁵

§ 4070. — Facts dispensing with demand and the like. A request or demand upon the directors or majority of the stockholders to bring suit or take other steps to obtain relief need not be made by a stockholder before suing in his own behalf, if the circumstances are such as to clearly show that it would be a mere useless form. No such request or demand is necessary, therefore, as a general rule, where the wrong or ultra vires act complained of was done or is threatened by a majority of the stockholders, or by the defendant directors with the consent or approval of a majority of the stockholders, or by defendant officers who own a majority of the stock or who otherwise have control and are hostile or adverse in interest to plaintiff's demands.¹⁶

¹⁵ *Wathen v. Jackson Oil & Refining Co.*, 235 U. S. 635, 59 L. Ed. 395; *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, (in which the bill additionally averred demand on president and directors); *Perkins v. Northern Pac. Ry. Co.*, 155 Fed. 445.

¹⁶ *United States*. *Delaware & H. Co. v. Albany & S. R. Co.*, 213 U. S. 435, 53 L. Ed. 862; *Universal Savings & Trust Co. v. Stoneburner*, 113 Fed. 251; *Savings & Trust Co. of Cleveland, Ohio v. Bear Valley Irrigation Co.*, 112 Fed. 693; *Weir v. Bay State Gas Co.*, 91 Fed. 940; *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299; *Barcus v. Gates*, 89 Fed. 783; *Excelsior Pebble Phosphate Co. v. Brown*, 74 Fed. 321; *Earle v. Seattle, L. S. & E. Ry. Co.*, 56 Fed. 909; *Sellers v. Phoenix Iron Co.*, 13 Fed. 20; *County of Tazewell v. Farmers' Loan & Trust Co.*, 12 Fed. 752; *Heath v. Erie Ry. Co.*, 8 Blatchf. 347, Fed. Cas. No. 6,306. Useless where contract assailed was made in bad faith to cover improper payments. *Dana v. Morgan*, 219 Fed. 313. See preceding section for text of the New Equity Rule 27, which implies this by providing that effort

to move the corporate authorities to action must be made and shown, or "reason for not making such effort."

Alabama. *Alabama Fidelity Mortgage & Bond Co. v. Dubberly*, 73 So. 911; *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897; *Tillis v. Brown*, 154 Ala. 403, 45 So. 589; *Crow v. Florence Ice & Coal Co.*, 143 Ala. 541, 39 So. 401; *Montgomery Traction Co. v. Harmon*, 140 Ala. 505, 37 So. 371; *Jasper Land Co. v. Wallis*, 123 Ala. 652, 26 So. 659; *Bell v. Montgomery Light Co.*, 103 Ala. 275, 15 So. 569; *George v. Central Railroad & Banking Co.*, 101 Ala. 607, 14 So. 752; *Mack v. De Bardeleben Coal & Iron Co.*, 90 Ala. 396, 9 L. R. A. 650, 8 So. 150; *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747. It is not excused by showing that the wives of complainant and respondent are sisters and that they and nephews and nieces own the stock. *Hagood v. Smith*, 162 Ala. 512, 50 So. 374.

Arizona. *Fleming v. Black Warrior Copper Co., Amalgamated*, 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273.

California. *Shively v. Eureka Telurium Gold-Min. Co.*, 129 Cal. 293, 61 Pac. 939; *Wickersham v. Critten-*

Demand is not excused unless the directors appealed to appear to

den, 106 Cal. 329, 39 Pa. 603; Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024; Moyle v. Landers, 21 Pac. 1133.

Colorado. Miller v. Murray, 17 Colo. 408, 30 Pac. 46; Ide v. Bascomb, 18 Colo. App. 415, 72 Pac. 62.

Connecticut. Starbuck v. Mercantile Trust Co., 60 Conn. 553, 24 Atl. 32.

Delaware. Suit to cancel illegal stock by which control is held. Ellis v. Penn Beef Co., 9 Del. Ch., 213, 80 Atl. 666.

Illinois. Merle v. Beifeld, 275 Ill. 594, 114 N. E. 369; Harding v. American Glucose Co., 182 Ill. 551, 628, 64 L. R. A. 738, 74 Am. St. Rep. 189, 223, 55 N. E. 577, writ of error dismissed 187 U. S. 651, 47 L. Ed. 349; Stebbins v. Perry County, 167 Ill. 567, 47 N. E. 1048, rev'g 66 Ill. App. 427; Green v. Hedenberg, 159 Ill. 489, 50 Am. St. Rep. 178, 42 N. E. 851, aff'g 55 Ill. App. 425; Chicago v. Cameron, 120 Ill. 447, 11 N. E. 899, aff'g 22 Ill. App. 91.

Iowa. Schoening v. Schwenk, 112 Iowa 733, 84 N. W. 916. Compare Dillon v. Lee, 110 Iowa 156, 81 N. W. 245.

Kentucky. Burley Tobacco Co. v. Vest, 165 Ky. 762, 178 S. W. 1102. Four out of seven directors having adverse interests. Chilton v. Bell County Coke & Improvement Co., 153 Ky. 775, 156 S. W. 889. Action to adjudge that directors defendant were not legally elected. Lebus v. Stansifer, 154 Ky. 444, 157 S. W. 727.

Maryland. Not necessary to request suit against agent for an accounting where he is also president, secretary, treasurer and chief stockholder. Sloan v. Clarkson, 105 Md. 171, 66 Atl. 18.

Massachusetts. Doherty v. Mercantile Trust Co., 184 Mass. 590, 69 N. E. 335; Blair v. Telegram Newspaper Co., 172 Mass. 201, 51 N. E. 1080; Brewer v. Boston Theatre, 104 Mass. 512.

Michigan. Torrey v. Toledo Portland Cement Co., 150 Mich. 86, 113 N. W. 580. Futile demand is not required by Michigan statute. Robinson v. DeLuxe Motor Car Co. of New Jersey, 170 Mich. 163, 135 N. W. 897.

Minnesota. National Power & Paper Co. v. Rossman, 122 Minn. 355, Ann. Cas. 1914 D 830, 142 N. W. 818; Pencille v. State Farmers' Mut. Hail Ins. Co., 74 Minn. 67, 73 Am. St. Rep. 326, 76 N. W. 1026; Rothwell v. Robinson, 39 Minn. 1, 12 Am. St. Rep. 608, 38 N. W. 772.

Mississippi. Beckett v. Planters' Compress & Bonded Warehouse Co., 107 Miss. 305, 65 So. 275.

Missouri. Loomis v. Missouri Pac. R. Co., 165 Mo. 469, 65 S. W. 962; Hannerty v. Standard Theater Co., 109 Mo. 297, 19 S. W. 82. Wrongdoers constituted majority of directors and stockholders. Hingston v. Montgomery, 121 Mo. App. 451, 97 S. W. 202.

Montana. Kleinschmidt v. American Min. Co., 49 Mont. 7, 139 Pac. 785; McConnell v. Combination Mining & Milling Co., 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194; Gerry v. Bismarck Bank, 19 Mont. 191, 47 Pac. 810.

New Jersey. Fish v. Harrison, —, N. J. Eq. —, 100 Atl. 185; Stephany v. Marsden, 75 N. J. Eq. 90, 71 Atl. 598; Siegman v. Maloney, 65 N. J. Eq. 372, 54 Atl. 405; Bohmrich v. Knoop, 50 N. J. Eq. 485, 27 Atl. 636; Knoop v. Bohmrich, 49 N. J. Eq. 82, 23 Atl. 118. Suit against directors for paying dividends out of capital. Appleton v. American Malting Co., 65 N. J. Eq. 375, 54 Atl. 454. Suit against directors for issuing stock at overvaluation of property turned in. Schoenfeld v. American Can Co. (N. J. Eq.) 55 Atl. 1044.

New York. Polhemus v. Polhemus, 114 App. Div. 781, 100 N. Y. Supp.

have control,¹⁷ and, on the other hand, is excused by the fact that though the plaintiffs are the majority of directors, they can be removed by a hostile majority of stockholders if the request be made,¹⁸

263; *Weber v. Wallerstein*, 111 App. Div. 693, 97 N. Y. Supp. 846; *Lowenstein v. Diamond Soda Water Mfg. Co.*, 94 App. Div. 383, 88 N. Y. Supp. 313; *Miller v. Barlow*, 78 App. Div. 331, 79 N. Y. Supp. 964; *Boaz v. Sterlingworth Ry. Supply Co.*, 68 App. Div. 1, 73 N. Y. Supp. 1039; *Davis v. Congregation Beth Tephila Israel*, 40 App. Div. 424, 57 N. Y. Supp. 1015; *Lawrence v. Weber*, 65 Misc. 603, 120 N. Y. Supp. 289, modified 137 App. Div. 907, 122 N. Y. Supp. 1134; *Roth v. Robertson*, 64 Misc. 343, 118 N. Y. Supp. 351; *O'Connor v. Virginia Passenger & Power Co.*, 46 Misc. 530, 92 N. Y. Supp. 525; *Lewisohn Bros. v. Anacanda Copper Min. Co.*, 23 Misc. 31, 50 N. Y. Supp. 263; *Walter v. F. E. McAlister Co.*, 21 Misc. 747, 48 N. Y. Supp. 26; *Meyers v. Scott*, 50 Hun 603, 2 N. Y. Supp. 753; *Currier v. New York, W. S. & B. R. Co.*, 35 Hun 355.

North Carolina. *Coble v. Beall*, 130 N. C. 533, 41 S. E. 793.

Oregon. *Wills v. Nehalem Coal Co.*, 52 Ore. 70, 96 Pac. 528. Conspiracy of majority to make away with assets. *North v. Union Savings & Loan Ass'n*, 59 Ore. 483, 117 Pac. 822.

South Carolina. *Sigwald v. City Bank*, 82 S. C. 382, 64 S. E. 398; *Stahn v. Catawba Mills*, 53 S. C. 519, 31 S. E. 498.

South Dakota. *Loftus v. Farmers' Shipping Ass'n*, 8 S. D. 201, 65 N. W. 1076.

Tennessee. *Tennessee Mountain Petroleum & Mining Co. v. Ayers* (Tenn. Ch. App.), 43 S. W. 744.

Texas. *Mussina v. Goldthwaite*, 34 Tex. 125, 7 Am. Rep. 281. Where majority of officers and some stockholders claim property of corporation and have allowed its charter to be forfeited for nonpayment of franchise

tax. *Canadian Country Club v. Johnson*, 176 S. W. 835.

Virginia. *Virginia Passenger & Power Co. v. Fisher*, 104 Va. 121, 51 S. E. 198.

Washington. Conspiracy by officers and exclusion of plaintiff from corporate books so that necessary data concerning property and conditions could not be had. *Williams v. Erie Mountain Consol. Min. Co.*, 47 Wash. 360, 91 Pac. 1091.

West Virginia. *Crumlish's Adm'r v. Shenandoah Valley R. Co.*, 28 W. Va. 623.

Wisconsin. *Simon v. Weaver*, 143 Wis. 330, 127 N. W. 950; *Eschweiler v. Stowell*, 78 Wis. 316, 23 Am. St. Rep. 411, 47 N. W. 361.

See also § 2682 et seq., *supra*.

The Wisconsin court says: "Whether any case falls within the principle stated or not must be determined by its own particular circumstances. In that regard there is no absolutely certain test. The trial court has considerable discretion in the matter." *Donnelly v. Sampson*, 135 Wis. 368, 115 N. W. 1089. It would seem that a chancellor's discretion is meant, for if a case for equity is made out the court should have no discretion to ignore it.

¹⁷ Adverse interest of two directors out of five or more does not excuse demand by the majority holder of stock where the control of the corporation by the two is not shown. *Dillon v. Pan-American Theatrical Co.*, 96 N. Y. Misc. 501, 160 N. Y. Supp. 549.

¹⁸ Plaintiffs constituting a majority of directors may sue as stockholders where the majority of stockholders is hostile and by holding a meeting could and would have suppressed a suit in

or if the controlling wrongdoer may take advantage of the request by further obstructing administration of relief.¹⁹ Where the officers are usurpers²⁰ or inactive dummies,²¹ the corporation is disabled to act by reason of receivership, dissolution or the like,²² or has ceased to appoint officers and has abandoned its business, a stockholder may sue for himself and others for the protection of their rights, without showing or alleging a refusal of corporate officers to act.²³ It is insufficient that no meeting of the corporation has been held for some time, and that the corporate project has been abandoned. Neither is it sufficient that the stockholder owns a majority of the stock, this fact rather weakening than strengthening his case, inasmuch as it enables him to obtain redress within the corporation.²⁴

§ 4071. Defenses and objections to suit—In general. The principles of abatement and survival apply as in other suits. Thus upon the decease of a corporate officer against whom suit is brought for misappropriation of corporate funds, the suit survives as against his representatives.²⁵

Under the doctrine that an action cannot be brought and maintained while another is pending for the same relief between the same parties, but in such circumstances the second will abate; a director's suit under the statute will not prevent the bringing of a stockholders' suit; but it is better practice to stay the second suit if issues to be tried are the same.²⁶

the corporate name. *Mason v. Carrothers*, 105 Me. 392, 74 Atl. 1030.

¹⁹ Domination of board by wrongdoer and the likelihood that if demand were made he would further obstruct relief by transfers to innocent purchasers. *Donnelly v. Sampson*, 135 Wis. 368, 115 N. W. 1089.

²⁰ Demand need not be made before suing usurping officers for waste, since, if there were officers acquiescing in the usurpation, it would be needless, and, if there were no officers, it would be impossible. *Sheehy v. Barry*, 87 Conn. 656, 89 Atl. 259.

²¹ Where corporate managers are nominees of wrongdoers and the corporation has practically gone into liquidation, leaving them no active duties to perform. *Commonwealth Title Insurance & Trust Co. v. Seltzer*, 227

Pa. 410, 136 Am. St. Rep. 896, 76 Atl. 77.

²² See §§ 4056, 4057, *supra*.

²³ *Crumlish's Adm'r v. Shenandoah Valley R. Co.*, 28 W. Va. 623.

It has been held that demand upon and refusal of a corporation to sue is not excused, so as to authorize a stockholder to sue, by the fact that the corporation has been dissolved, where it was in existence when the cause of action arose. *Dillon v. Lee*, 110 Iowa 156, 81 N. W. 245.

²⁴ *Tevis v. Hammersmith*, 31 Ind. App. 281, 66 N. E. 79.

²⁵ *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680.

Pleading defenses and objections, see § 4087, *infra*.

²⁶ Even if the real interests are the same, the actions are different. The

Prematurity in that the wrong is not yet accomplished or threatened,²⁷ or that the prerequisite demand on the corporation has not been made²⁸ will abate the suit, but this may be waived by pleading to the complaint.²⁹

Any defense, affirmative or for want of facts, that would be good if the corporation itself was the plaintiff, is also good to the stockholders' suit, because of his standing in its shoes and litigating only its rights. In addition, the specific defenses of laches, waiver, ratification, estoppel, limitations, bad motive, want of interest and interference with internal management are treated in the following sections, which see;³⁰ and it is a defense that the situation is one wherein the governing body had discretion which it has exercised against a suit, and in such case the stockholder is bound by the decision.³¹ A defense personal to the plaintiff, as where he is incapable of maintaining the suit, does not avail where a competent stockholder has come in to maintain it³² or where a co-complainant can do so.³³ Want of equity by reason of any of these specific defenses will defeat the plaintiff's suit wholly or as to part of the relief sought,³⁴ and he may

stockholders, if obliged to defer suit, might be barred by limitations. *Loewenstein v. Diamond Soda Water Mfg. Co.*, 94 N. Y. App. Div. 383, 88 N. Y. Supp. 313.

Other suits should be stayed, if begun, or a plea of another suit pending may be put in to abate them. *Dictum in Goodbody v. Delaney*, 80 N. J. Eq. 417, 83 Atl. 988.

That other proceedings are pending is not pleadable in abatement, where such proceedings are assailed as part of the means of fraud alleged. *Reed v. Hollingsworth*, 157 Iowa 94, 135 N. W. 37.

²⁷ See § 4061, *supra*.

²⁸ See §§ 4068, 4069, *supra*.

²⁹ A bank depositor brought action against the bank and the president thereof to have certain shares of stock in another corporation received by the president adjudged to be the property of the corporation. Objection was made that such action could not be maintained until after demand on the directors to institute same. The bank filed a cross-complaint in the action

in which judgment was rendered in its favor. Thereby the objection raised was deemed obviated. *Dundon v. McDonald*, 146 Cal. 585, 80 Pac. 1034.

Objection on the ground of want of proper demand is waived where all directors join in answer with the wrongdoer supporting the acts assailed. *Kleinschmidt v. American Min. Co.*, 49 Mont. 7, 139 Pac. 785.

³⁰ See §§ 4072-4077, *infra*.

As to standing in its shoes and suing on its rights, see §§ 4053, 4061, *supra*.

³¹ See § 4065, *supra*.

³² *Carver v. Southern Iron & Steel Co.*, 78 N. J. Eq. 81, 78 Atl. 240.

As to the right of others to intervene, see § 4055, *supra*.

As to controlling or dismissing suit after others have come in, see § 4089, *infra*.

³³ *Endicott v. Marvel*, 81 N. J. Eq. 578, 87 Atl. 230.

³⁴ See generally §§ 4072-4077, *infra*.

As to the proper measure of relief, see §§ 4090, 4091, *infra*.

be defeated by the fact that he is not an innocent holder of his stock in good faith,³⁵ as where he has taken his stock subsequently to the wrong complained of,³⁶ or has not done or offered to do equity,³⁷ or is inferior in equity to others interested and affected,³⁸ or refuses adequate and proper relief under a statute.³⁹

The courts will not aid a stockholder in a corporation for an illegal object⁴⁰ or if his hands are unclean in respect to the thing complained of.⁴¹

The complaint is objectionable and cannot withstand a demurrer, if there is a misjoinder of causes of action or of parties, or if it is multifarious.⁴²

§ 4072. — Laches, estoppel, ratification or compromise—In general.

Even when a stockholder would otherwise be entitled to maintain a suit in equity under the principles stated in the preceding sections, his right to relief may be barred by laches, or he may be estopped to complain by reason of acquiescence, consent or participation in the acts complained of. The essential basis of all these is equitable estoppel.⁴³ In a leading case a distinction was attempted, however,

³⁵ The right to rescission or injunction cannot be claimed against other innocent shareholders and bondholders by one who is himself not an innocent holder and who stands alone. *Johnson v. United Rys. Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63.

³⁶ See § 4060, *supra*.

³⁷ Necessity of doing or offering equity, see § 4067, *supra*.

³⁸ Equities of innocent stockholders and others will defeat a bill. *Alabama Fidelity Mortgage & Bond Co. v. Dubberly*, — Ala. —, 73 So. 911.

³⁹ The suit of a holder of one-fourth thousandth of stock was conditionally denied the right to maintain a winding-up suit with relief against a reorganization sale, where he had, by statute, the right to an appraisal and withdrawal on purchase of his shares at appraised values, and had refused at the trial to accept an exchange of shares in the new company. *Treadwell v. United Verde Copper Co.*, 134 N. Y. App. Div. 394, 119 N. Y. Supp. 112.

⁴⁰ *LeWarne v. Meyer*, 38 Fed. 191, cited in *Mann v. German-American Inv. Co.*, 70 Neb. 454, 97 N. W. 600.

⁴¹ One cannot complain of payments to corrupt public officers and agents, if he knew of it and as a stockholder benefited by it. The maximum of clean hands applies. *Conners v. Conners Bros. Co.*, 110 Me. 428, 86 Atl. 843.

The maximum of unclean hands cannot be invoked on the basis of other illegal transactions not part of the matter in litigation. *Mason v. Carrothers*, 105 Me. 392, 74 Atl. 1030.

⁴² See § 4083, *infra*, and consult standard treatises on Equity Pleading and Practice.

⁴³ "The doctrine of laches as a defense is grounded on the principle of equitable estoppel." *Young v. Jones*, 72 Wash. 277, 130 Pac. 90, quoted approvingly in *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

"Equitable estoppel is the indispensable foundation of such laches, acquiescence, or ratification as will

between ratification and estoppel in this connection.⁴⁴ For convenience this section treats them separately in such cases as the courts have done so, the question being properly within the scope of a general work on estoppel or laches rather than of one treating the law of corporations.

If a stockholder, with knowledge of wrongful acts on the part of the directors or a majority of the stockholders, stands by for an unreasonable time without taking any steps to set the same aside, and rights are acquired by others, his right to maintain a suit to set the transaction aside is barred by his laches, however clear his right to relief would have been if he had moved promptly.⁴⁵ The general

bar a suit." *Elder v. Western Min. Co.*, 237 Fed. 966.

⁴⁴ "Acquiescence as a defense has, speaking generally, a dual nature. It may * * * rest upon the principle of ratification, and may be denominated implied ratification, or it may * * * rest upon the principle of estoppel, and may be denominated equitable estoppel." The basic principle is ratification when plaintiff's subsequent conduct justifies the reasonable conclusion that he has accepted and adopted the act. Estoppel is the basic principle when plaintiff has remained silent and inactive under a duty to speak. Facts may show acquiescence of the first kind when they are insufficient to impose an equitable estoppel on the corporation. *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721, modifying 150 N. Y. App. Div. 715, 135 N. Y. Supp. 789.

This is not very clarifying because ratification implies original power, which a single stockholder or a minority could never have. Hence, it would seem inaccurate to use that term of a minority which merely signifies affirmance of what was previously done. See *infra*, this section as to distinctive uses of "ratification" in this connection.

⁴⁵ *United States. Dimpfel v. Ohio & M. Ry. Co.*, 110 U. S. 209, 28 L. Ed. 121; *Kessler v. Ensley Co.*, 141 Fed.

130; *Kimbell v. Chicago Hydraulic Press Brick Co.*, 119 Fed. 102; *Anthony v. Campbell*, 112 Fed. 212; *Hazard v. Credit Mobilier of America*, 38 Fed. 195; *Allen v. Wilson*, 28 Fed. 677; *Pacific R. Co. v. Missouri Pac. Ry. Co.*, 12 Fed. 641; *Taylor v. South & North Alabama R. Co.*, 4 Woods 575, 13 Fed. 152.

Alabama. Where a corporation had transferred its property to another corporation for shares of stock of the latter, and an action was brought by a stockholder ten years after the transfer and two years after the stockholder became acquainted with the facts, and in the interim the property had been sold to a third party by whom it had been mortgaged, the transactions having been entered into openly and the stockholder living not far distant, although not in the state, and a statute having been enacted authorizing such transaction generally, the action could not be sustained for laches. *Cole v. Birmingham Union R. Co.*, 143 Ala. 427, 39 So. 403.

California. *Wills v. Porter*, 61 Pac. 1109.

Colorado. *Holmes v. Jewett*, 55 Colo. 187, 134 Pac. 665; *Hall v. Nash*, 33 Colo. 500, 81 Pac. 249. One who was present when transactions were reported to the stockholders, who then made no objection but did not vote, cannot complain of them after others

rule is "that while a minority of the stockholders of a corporation may maintain a bill in equity in behalf of themselves and other stockholders, for fraud, conspiracy or acts ultra vires, against a corporation, its officers and others who participate therein, when the minority stockholders have been injured or damaged by said acts, they must act promptly, and not wait an unreasonable length of time. If they postpone their complaint for an unreasonable time, they forfeit their right to equitable relief. Nothing will call a court

have changed their rights and become exposed to loss if the transaction were avoided. *Boldenweck v. Bullis*, 40 Colo. 253, 90 Pac. 634.

Connecticut. *Banks v. Judah*, 8 Conn. 145.

Georgia. *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630.

Illinois. *Levin v. Chicago Gaslight & Coke Co.*, 64 Ill. App. 393.

Indiana. *Tevis v. Hammersmith*, 170 Ind. 286, 84 N. E. 337.

Iowa. *Thompson v. Lambert*, 44 Iowa 239.

Kentucky. *Compare Covington & L. R. Co. v. Bowler's Heirs*, 9 Bush 468.

Massachusetts. *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680; *Dunphy v. Traveller Newspaper Ass'n*, 146 Mass. 495, 16 N. E. 426; *Peabody v. Flint*, 6 Allen 54.

Minnesota. *Stewart v. Erie & W. Transp. Co.*, 17 Minn. 372.

Montana. *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248.

New Jersey. *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 56 Atl. 254; *Trimble v. American Sugar-Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912; *Rabe v. Dunlap*, 51 N. J. Eq. 40, 25 Atl. 959.

New York. *Hutchinson v. Simpson*, 92 App. Div. 382, 87 N. Y. Supp. 369; *Atlantic Trust Co. v. New York City Suburban Water Co.*, 75 App. Div. 354, 78 N. Y. Supp. 120; *Marbury v. Stone*, 17 App. Div. 352, 45 N. Y. Supp. 184, aff'd 160 N. Y. 701, 57 N. E. 1116;

Warren v. Bigelow Blue Stone Co., 74 Hun 304, 26 N. Y. Supp. 649; *Hoyt v. Quicksilver Min. Co.*, 17 Hun 169; *Roberts v. New York & N. E. R. Co.*, 31 N. Y. Supp. 577.

Pennsylvania. *Com. v. Reading Traction Co.*, 204 Pa. 151, 53 Atl. 755; *Erny v. G. W. Schmidt Co.*, 197 Pa. 475, 47 Atl. 877; *Fredericks v. Pennsylvania Canal Co.*, 109 Pa. St. 50, 2 Atl. 48; *In re Watts' Appeal*, 78 Pa. St. 370; *In re Ashurst's Appeal*, 60 Pa. St. 290.

Rhode Island. *Emerson v. New York & N. E. R. Co.*, 14 R. I. 555; *Boston & P. R. Corporation v. New York & N. E. R. Co.*, 13 R. I. 260.

Tennessee. *Cullen v. Coal Creek Mining & Manufacturing Co.* (Tenn. Ch. App.), 42 S. W. 693.

Washington. *Griffith v. Seattle Consol. St. R. Co.*, 36 Wash. 627, 79 Pac. 314; *Ridpath v. Sans Poil & C. R. Ferry Transp. Co.*, 26 Wash. 427, 67 Pac. 229.

West Virginia. *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73, 16 S. E. 501.

England. *Gregory v. Patchett*, 33 Beav. 595; *Houldsworth v. Evans*, L. R. 3 H. L. 263.

See also § 2696 et seq., supra.

Laches cannot be pleaded where the act is against law and public policy. *Central Ry. Co. v. Collins*, 40 Ga. 582.

As to pleading laches or avoiding inference thereof by pleading, see §§ 4084, 4087, *infra*.

of equity into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing." ⁴⁶

This is not on the ground that the laches or acquiescence of the stockholder renders the transaction legal, but on the ground that, by reason of his laches, he is without equity. "His acquiescence does not render valid the illegal act of the corporation, but will prevent him from taking advantage of its invalidity." ⁴⁷ The defense will not find favor if made by one who himself obstructed plaintiff's assertion of the corporation's rights. ⁴⁸ Laches barring plaintiff as a stockholder will not necessarily affect his right to sue in some other right, as for instance that of a creditor. ⁴⁹

There must be knowledge, ⁵⁰ but knowledge may be presumed from opportunity to know. ⁵¹ In determining the existence or nonexistence of laches, the court will deem a stockholder to have been justified in assuming that the corporate directors would act in good faith with respect to the conduct of corporate affairs. ⁵² No fixed time can be defined beyond which delay will amount to laches. It is a question of fact, and the intervention of rights is an important test. ⁵³ If,

⁴⁶ *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630.

⁴⁷ *Alexander v. Searcy*, 81 Ga. 536 12 Am. St. Rep. 337, 8 S. E. 630.

⁴⁸ *Citizens' Savings & Trust Co. v. Illinois Cent. R. Co.*, 182 Fed. 607, rev'g 173 Fed. 556.

⁴⁹ Even if laches bars plaintiff as a stockholder to attack a transfer of the entire assets, it does not bar him as a creditor when the corporation has thus rendered itself insolvent. *Dalsheimer v. Graphic Arts Co.*, 85 N. J. Eq. 49, 97 Atl. 497.

⁵⁰ *Backus v. Brooks*, 195 Fed. 452, modifying decree 189 Fed. 922.

Knowledge of a lease without knowledge of extensions held not the basis of an estoppel or laches. *Elder v. Western Min. Co.*, 237 Fed. 966.

As to property improperly purchased from 1897 to 1900 and included in a list on which plaintiff as a director in March, 1905, negotiated a mortgage for the corporation, he was barred by acquiescence, but not as to other property not in such list, he having

no other knowledge and having sued in October, 1905. *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 83 N. E. 434, rev'g 135 Ill. App. 234.

Long delay induced by fraudulent representations of losses made by defendant held not to bar attack on a sale of the corporate property to its director and manager through an intermediary, the true facts not being ascertainable. *Ekberg v. Swedish-American Pub. Co.*, 114 Minn. 196, 130 N. W. 1029.

⁵¹ Means of knowledge suffices. *Taylor v. South & North Alabama R. Co.*, 13 Fed. 152.

President of company for six years was presumed to know its affairs. *Bergman Clay Mfg. Co. v. Bergman*, 73 Wash. 144, 131 Pac. 485.

⁵² *Brinkerhoff v. Roosevelt*, 143 Fed. 478; *Kessler & Co. v. Ensley Co.*, 129 Fed. 397; *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680.

⁵³ Held laches where rights intervened. *Smith v. Stone*, 21 Wyo. 62,

however, no prejudice has resulted from the delay, and the status is the same, the defense of laches is not available, even though delay

128 Pac. 612. See also cases in note preceding.

Long delay with knowledge of violation of contract by president. Metzger v. Knox, 77 N. Y. Misc. 271, 136 N. Y. Supp. 681, aff'd 153 N. Y. App. Div. 911, 137 N. Y. Supp. 1129.

One who bought into a controversy in 1905 cannot sue in October, 1907, three months after making protest, and six months after acceptance of a new franchise voted by the people of a city, and after making of a trust deed and sale of bonds under it, to declare the ordinance void and the acts done ultra vires. Venner v. Chicago City Ry. Co., 236 Ill. 349, 86 N. E. 266.

There is laches where suit is not brought until six months after ratification by stockholders, plaintiff having meanwhile tried unsuccessfully to sell an interest in bonds of the corporation before suing as the holder of a small stock holding bought for that purpose. Wright v. Tacoma Gas & Electric Light Co., 53 Wash. 262, 101 Pac. 865.

One year's delay after sale of property to relieve a bad financial condition, the plan having shown prospects of success and bonds having been sold to innocent third persons, was laches preventing rescission but not necessarily other remedies if there was any fraud. Marks v. Merrill Paper Co., 203 Fed. 16.

Two years and four months not laches. Just v. Idaho Canal & Improvement Co., 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

There is laches where there was a delay of two years after a written waiver of objections and action thereon. Baker v. Seattle-Tacoma Power Co., 61 Wash. 578, Ann. Cas. 1912 C 859, 112 Pac. 647.

Laches shown where all stockholders were informed of proposed sale, and a corporate mortgage was executed without objection over two years before suit. Collins v. Penn-Wyoming Copper Co., 203 Fed. 726.

Three years' delay in attacking the general manager's purchase on foreclosure sale of mining properties of speculative value is fatal. Buchler v. Black, 226 Fed. 703, aff'g decree 213 Fed. 880.

Four years while mining property was being developed under a contract. Buchler v. Black, 213 Fed. 880.

Three years after confirmation of foreclosure sale before suing to set it aside. Buchler v. Black, 213 Fed. 880.

Five years too late to sue for cancellation of stock, the transaction being open and known. Stephany v. Marsden, 76 N. J. Eq. 611, 75 Atl. 899.

Five years too late to attack salaries fixed under sanction of by-law. Klein v. Independent Brewing Ass'n, 231 Ill. 594, 83 N. E. 434, rev'g 135 Ill. App. 234.

Five and a half years while purchasers of the corporation's property made large improvements and expenditures on it. Tiffany v. Smith, 124 N. Y. Supp. 85.

Six years' waiting after making a deed and bill of sale before suing to declare it a mortgage is laches, the positions of parties having meanwhile changed. Osborne v. Morgan, 171 Ill. App. 549.

Seven years where railroad lines, in both of which plaintiff held stock, were combined. Venner v. New York Cent. & H. River R. Co., — N. Y. App. Div. —, 164 N. Y. Supp. 626.

was long,⁵⁴ while promptness is required if the property involved is of speculative or fluctuating value.⁵⁵ It does not run against an act of a continuing nature up to the time of suit.⁵⁶ Action must be begun before the administration of equitable relief has become unfeasible.⁵⁷ Ordinarily the period of limitations will be adopted,⁵⁸ but laches may in flagrant cases be complete before the time for limitations.⁵⁹

Delay from 1895 to 1904 was not laches where one railroad defendant by secret control was endeavoring to gain the property of another and was litigating through the latter the standing of present plaintiff as a stockholder. Published reports showing transfers but not the fraud inhering in them do not affect stockholders with knowledge. *Citizens Savings & Trust Co. v. Illinois Cent. R. Co.*, 182 Fed. 607, rev'g 173 Fed. 556.

Twelve years' delay held fatal. *Kelly v. Dolan*, 233 Fed. 635.

Sixteen years' delay by a minority holder after a transfer of property which proved profitable, held laches. *Whitaker v. Whitaker Iron Co.*, 238 Fed. 980.

⁵⁴ *Morgan v. King*, 27 Colo. 539, 63 Pac. 416.

Harmless delay is not laches where on discovery of fraud stockholder moved as soon as attorney could investigate and render advice. *Hughes Manufacturing & Lumber Co. v. Culver*, — Ark. —, 189 Div. 850.

Ten years' delay not laches where no status was changed and right was asserted by intervener defensively in foreclosure suit and after unsuccessful litigation as plaintiff. *Investors' Syndicate v. North America Coal & Mining Co.*, 31 N. D. 259, 153 N. W. 472.

Participation in borrowing money by the corporation with knowledge that defendants had not paid up their stock does not raise laches to sue them for refusal to call subscriptions, they having suffered no prejudice.

Bergman v. Evans, 92 Wash. 158, 158 Pac. 961.

⁵⁵ The rule of laches is especially applicable in respect of sales of mining properties. *Jones v. Bonanza Mining & Milling Co.*, 32 Utah 440, 91 Pac. 273.

Voidable deed to mining property of fluctuating value must be disaffirmed promptly or is ratified. *Holmes v. Jewett*, 55 Colo. 187, 134 Pac. 665.

Failure to take interest in a project or furnish money when it looked unpromising and asserting claim after defendant, by effort and making advances, had made a profit after it was abandoned. *Tevis v. Hammersmith*, 170 Ind. 286, 84 N. E. 337.

⁵⁶ *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

Refusal to call their own subscriptions. *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

⁵⁷ Delay in assailing stock issue for overvalued business scheme and system until administration of equitable relief had become unfeasible. *Stephany v. Marsden*, 75 N. J. Eq. 90, 71 Atl. 598.

⁵⁸ *Fleming v. Black Warrior Copper Co., Amalgamated*, 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273.

⁵⁹ Limitations applies to fraudulent mismanagement and waste, but laches may apply where circumstances are revolting to justice, though bar of limitations is not yet complete. *Fleming v. Black Warrior Copper Co., Amalgamated*, 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273.

If a stockholder acts as soon as he learns of a fraudulent or illegal transaction, and takes all reasonable steps to obtain relief within the corporation, and, as soon as he finds that he is unable to do so, brings suit to set the transaction aside, he is not chargeable with laches,⁶⁰ nor will stockholders be deemed guilty of laches where, being residents of another state, they were unaware of the fraud until a short time prior to the institution of action by them.⁶¹ It is not laches to await the outcome of other suits by stockholders to gain the same relief⁶² or while the attorney general is suing for violation of law.⁶³ A co-complainant's laches is no defense, if complainant is free from it.⁶⁴

It has been said that laches would not run against a wholly ultra vires act, but this is qualified by the fact that in the same opinion it appeared that the other party had acted solely for its own benefit, whence it might have been argued that no prejudice resulted,⁶⁵ and the better rule is to the contrary.⁶⁶ Not laches applies, but limita-

⁶⁰ *Byrne v. Schuyler Elec. Mfg. Co.*, 65 Conn. 336, 28 L. R. A. 304, 31 Atl. 833. See also *Gilman, C. & S. R. Co. v. Kelly*, 77 Ill. 426; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311; *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. (N. Y.) 553.

Minority stockholders are not guilty of laches in waiting until the day before the time set for ratification by the majority of an illegal and incomplete transfer of the corporate property before suing for an injunction. *Forrester v. Boston & M. Consol. Copper & Silver Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353.

⁶¹ *Whitney v. Hazzard*, 18 S. D. 490, 101 N. W. 346.

⁶² *Metropolitan El. Ry. Co. v. Manhattan El. Ry. Co.*, 11 Daly (N. Y.) 373, 14 Abb. N. Cas. (N. Y.) 103.

Laches is not imputed to plaintiff merely because during about twenty years he knew of former similar suits, counseled about them and contributed to them, they having failed to reach a hearing on the merits. *Bogert v.*

Southern Pac. Co., 215 Fed. 218.

⁶³ *Burrows v. Interborough Metropolitan Co.*, 156 Fed. 389.

⁶⁴ The fact that co-complainants hold stock transferred from those who were affected with laches is no defense. *Endicott v. Marvel*, 81 N. J. Eq. 378, 87 Atl. 230.

As to acquiescence or estoppel by predecessor, see *infra*, this section.

⁶⁵ Laches does not run against contract wholly ultra vires and performed by another corporation entirely for its own benefit. *Holt v. California Development Co.*, 161 Fed. 3.

⁶⁶ Stockholder was held barred where he delayed for more than ten years and until after contract for issuance of interest-bearing stock at forty cents on the dollar was executed, though it was ultra vires and also a fraud on the corporation. *Taylor v. South & North Alabama R. Co.*, 13 Fed. 152. See also cases cited *infra*, this section, to the proposition that one is not estopped to attack a wholly ultra vires act or one that is illegal because inherently bad or prohibited.

tions, where the act is one that is incapable of ratification or estoppel.⁶⁷

§ 4073. — — Estoppel by consent, acquiescence or participation.

A stockholder who participates as an officer or as a stockholder in illegal or ultra vires transactions on the part of the directors or stockholders, or consents thereto, or who, with full knowledge of the intention to engage in such transactions, acquiesces therein, instead of objecting and taking steps to prevent the same, is estopped to afterwards sue in equity to set the transactions aside; and it can make no difference that he sues on behalf of himself and other stockholders, and that there are other stockholders who might maintain the suit.⁶⁸

⁶⁷ Diversion of assets by loans to individual directors in a business corporation, it being *malum prohibitum* and incapable of ratification or estoppel which is the basis of laches. Contra where the loan was of surplus funds to an outsider. *Murray v. Smith*, 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102.

⁶⁸ *United States*. *Dimpfel v. Ohio & M. Ry. Co.*, 110 U. S. 209, 28 L. Ed. 121; *Synnott v. Cumberland Bldg. Loan Ass'n*, 117 Fed. 379; *Post v. Beacon Vacuum Pump & Electrical Co.*, 84 Fed. 371; *Holton v. Wallace*, 66 Fed. 409; *McGeorge v. Big Stone Gap Improvement Co.*, 57 Fed. 262; *Barr v. Pittsburgh Plate Glass Co.*, 51 Fed. 33; *Allen v. Wilson*, 28 Fed. 677.

Alabama. *Parsons v. Joseph*, 92 Ala. 403, 8 So. 788; *Memphis & C. R. Co. v. Grayson*, 88 Ala. 572, 16 Am. St. Rep. 69, 7 So. 122.

Colorado. Acquiescence in deed of property. *Holmes v. Jewett*, 55 Colo. 187, 134 Pac. 665.

Connecticut. *Terry v. Eagle Lock Co.*, 47 Conn. 141.

Georgia. *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240; *Cozart v. Georgia Railroad & Banking Co.*, 54 Ga. 379.

Illinois. *Leigh v. National Hollow Brake Beam Co.*, 224 Ill. 76, 79 N. E.

318; *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636, aff'g 30 Ill. App. 389.

Iowa. *Hart v. Mt. Pleasant Park Stock Co.*, 97 Iowa 353, 66 N. W. 190; *Thompson v. Lambert*, 44 Iowa 239.

Kentucky. *Browning v. Mullins*, 12 Ky. L. Rep. 41, 13 S. W. 427.

Louisiana. *Posner v. Southern Exhaust & Blow Pipe Co.*, 109 La. 658, 33 So. 641.

Maine. *Belknap v. Davis*, 19 Me. 455.

Massachusetts. *Dunphy v. Traveler Newspaper Ass'n*, 146 Mass. 495, 16 N. E. 426.

Nebraska. *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997; *Clarke v. Omaha & S. W. R. Co.*, 4 Neb. 458.

New Jersey. *Fish v. Harrison*, 87 N. J. Eq. 103, 100 Atl. 185; *Hodge v. United States Steel Corporation*, 64 N. J. Eq. 90, 53 Atl. 601; *Trimble v. American Sugar-Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912; *Rabe v. Dunlap*, 51 N. J. Eq. 40, 25 Atl. 959; *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617.

New York. *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17, aff'g 8 App. Div. 160, 40 N. Y. Supp. 499; *Barr v. New York, L. E. & W. R. Co.*, 125 N. Y. 263, 26 N. E. 145; *Murray v. Smith*, 166 App. Div. 528, 152 N. Y. Supp.

This has been held true where the corporation was not an actor but was suffering a judgment to go against it by default.⁶⁹

This doctrine prevents a stockholder who has participated as an officer or stockholder in making an ultra vires lease or other continuing contract, or in engaging in an ultra vires business, from afterwards suing in equity to set the lease or contract aside, or to enjoin the corporation from continuing such business. It would be manifestly inequitable to the corporate entity, and to other stockholders, said the Alabama court in such a case, to allow a stockholder, so long as the course in which he has set the company continues to be the corporate policy, to appeal to the courts to have that policy reversed, and the company coerced into a different line of conduct.⁷⁰ The same is true where a stockholder expressly or by his conduct subsequently ratifies the transaction.⁷¹

102; *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun 18, 16 N. Y. Supp. 448, aff'd on the opinion below in 133 N. Y. 687, 31 N. E. 627; *Parsons v. Hayes*, 14 Abb. N. Cas. 419.

Pennsylvania. *Clark v. Pittsburg Natural Gas Co.*, 184 Pa. St. 188, 39 Atl. 86; *Fredericks v. Pennsylvania Canal Co.*, 109 Pa. St. 50, 2 Atl. 48; *In re Watt's Appeal*, 78 Pa. St. 370; *Coleman v. Columbia Oil Co.*, 51 Pa. St. 74.

Tennessee. *McC Campbell v. Fountain Head R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731, 77 S. W. 1070.

Texas. Minority not present or voting is not estopped to attack a transfer of property by the corporation to its officers. *Canadian Country Club v. Johnson*, 176 S. W. 835.

Vermont. *Davenport v. Crowell*, 79 Vt. 419, 65 Atl. 557.

Washington. *Roy & Co. v. Scott, Hartley & Co.*, 11 Wash. 399, 39 Pac. 679.

Wisconsin. *Figge v. Bergenthal*, 130 Wis. 594, 110 N. W. 798, 109 N. W. 581. A stockholder will be estopped from objecting to the validity of an action on the ground of irregularity where he has participated therein as stockholder, director and president. *Graebner v. Post*, 119 Wis.

392, 100 Am. St. Rep. 890, 96 N. W. 783.

England. *Burt v. British Nation Life Assur. Ass'n*, 4 De Gex & J. 158.

⁶⁹ The stockholder cannot claim that default judgments were procured by fraud where the corporation was duly summoned and he knew of prosecution of the action, but did not come in to defend, refusing to co-operate with his fellow directors to that end. *Boldenweck v. Bullis*, 40 Colo. 253, 90 Pac. 634.

⁷⁰ *Memphis & C. R. Co. v. Grayson*, 88 Ala. 572, 16 Am. St. Rep. 69, 7 So. 122.

It has been held, however, that the fact that a corporation owning a majority of the stock of another corporation doing a similar business in the same field has illegally exercised control of the latter for six years, without objection from the minority stockholders, does not estop the latter from restraining such control in the future. *George v. Central Railroad & Banking Co.*, 101 Ala. 607, 14 So. 752.

⁷¹ *Cozart v. Georgia Railroad & Banking Co.*, 54 Ga. 379; *Maxville, W. & L. Turnpike Road Co. v. Barnes*, 14 Ky. L. Rep. 431; *Berry v. Broach*, 65 Miss. 450, 4 So. 117; *Fredericks v. Pennsylvania Canal Co.*, 109 Pa. St.

The doctrine that a stockholder is estopped to assail the organization of the corporation or its existence has already been discussed.⁷²

Where an objection already made is waived and action by the corporation follows, the stockholder is estopped.⁷³ A stockholder may not object to a plan for the sale of the corporate property after he has participated without objection in proceedings looking thereto,⁷⁴ nor deny its power to hold property which he assisted it to acquire,⁷⁵ nor assert a disability of the old corporation after taking an exchange of stock in the new one free therefrom.⁷⁶ Acceptance of dividends resulting from the act or thing complained of has in several instances been held to work an estoppel,⁷⁷ and taking benefit from contracts growing out of the ultra vires business has had the same effect.⁷⁸ One who resists a course of action cannot complain that

50, 2 Atl. 48; *Coleman v. Columbia Oil Co.*, 51 Pa. St. 74.

⁷² As to estoppel to attack organization or existence of corporation, see Chaps. 10, 11 and 14, *supra*.

⁷³ A waiver in writing of an objection previously made estops the holder after a mortgage is made and bonds sold pursuant to it. *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, Ann. Cas. 1912 C 859, 112 Pac. 647.

⁷⁴ *Carr v. Rochester Tumbler Co.*, 207 Pa. 392, 56 Atl. 945.

⁷⁵ A stockholder in a corporation who has agreed to and assisted in an arrangement whereby the corporation became possessed of certain property cannot afterwards question its power to hold the same. *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17, *aff'd* 8 N. Y. App. Div. 160, 40 N. Y. Supp. 499.

⁷⁶ Exchanging stock for that of a new corporation the articles of which gave power to make mortgages waives a provision incident to the old stock that the old corporation could not do so. *Hobbs v. Twin Falls Canal Co.*, 24 Idaho 380, 133 Pac. 899.

⁷⁷ Where a corporation organized for the purpose of manufacturing and selling brass and iron goods had for a long time engaged with profit in buying iron pipes to sell with the goods

manufactured by it, in order to complete the orders received from customers, it was held that a stockholder who made no objection to such departure from its objects, and who accepted part of the profits as dividends, was precluded from maintaining any proceeding against the officers on the ground that the dealing in iron pipes was ultra vires. *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun (N. Y.) 18, 16 N. Y. Supp. 448, *aff'd* on the opinion below in 133 N. Y. 687, 31 N. E. 627.

Accepting dividends earned under contract assailed as wasteful. *Warner v. Morgan*, 81 N. Y. Misc. 685, 143 N. Y. Supp. 516.

Doubted, whether the holder of bonus stock, who has received illegal dividends can sue in respect thereto. *Sedgwick v. Seward Development Co.*, 144 N. Y. App. Div. 455, 129 N. Y. Supp. 209.

⁷⁸ Suit held barred, by reason of participation in an ultra vires insurance of tobacco by corporation. *Gilman v. Druse*, 111 Wis. 400, 87 N. W. 557.

Stockholder barred from asserting the invalidity of a loan by the corporation in excess of its authorized indebtedness by participation in the benefits of the loan. *Traer v. Lucas*

it was not taken,⁷⁹ and one who declined to contribute to the relief of the corporation cannot complain that another did so and took an assignment of the incumbrance.⁸⁰

Mere silence of a stockholder when others state their purpose to use the funds of the corporation for an unauthorized purpose is not equivalent to participation or acquiescence, and does not estop him to object and sue to enjoin the misapplication,⁸¹ unless the action was taken at a meeting of the stockholders where, his own interests affected by it called for dissent if he deemed the action prejudicial.⁸² Where, however, a stockholder is ignorant of the wrongdoing of corporate officers, he will not be deemed to have ratified such wrongdoing by silence.⁸³

More than the mere form of an assent is required.⁸⁴ The assent or estoppel must be as broad as the thing complained of, and does not extend to ulterior unknown things,⁸⁵ or to all the antecedents or consequences of it. Thus one is not estopped to sue for a fraud by reason of having acquiesced in resultant bankruptcy proceedings nor

Prospecting Co., 124 Iowa 107, 99 N. W. 290.

⁷⁹ Resisting a suit against himself similar to that which he complains that directors would not bring against others (for subscriptions). *Von Schlemmer v. Keystone Life Ins. Co.*, 121 La. 987, 46 So. 991.

⁸⁰ A stockholder who declined to contribute to advances to preserve mortgaged corporate property cannot complain of the foreclosure of a mortgage by a director who did advance the money and took the mortgage by assignment. *Buchler v. Black*, 213 Fed. 880.

⁸¹ *Green v. Hedenberg*, 159 Ill. 489, 50 Am. St. Rep. 178, 42 N. E. 851, aff'g 55 Ill. App. 425.

⁸² *State Nat. Loan & Trust Co. v. Fuller*, 26 Tex. Civ. App. 318, 63 S. W. 552.

Sitting silently through a meeting without protest does not show nonassent. *Johnson v. United Rys. Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63.

⁸³ *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680. Participation without knowledge

works no estoppel. *Alabama Fidelity Mortgage & Bond Co. v. Dubberly*, — Ala. —, 73 So. 911.

Resolution of directors ultra vires to surrender charter is not ratified by majority holder ignorant thereof. *Hughes Manufacturing & Lumber Co. v. Culver*, — Ark. —, 189 S. W. 850.

⁸⁴ Stockholders can only attack secret profits to promoters where corporation could have done so. Accordingly complete knowledge and assent are a bar, but stockholders who in form but not in fact assented are not barred. *Arnold v. Searing*, 73 N. J. Eq. 262, 67 Atl. 831.

See, generally, Chap. 5, supra.

⁸⁵ Taking notes for stock sold does not bar action for accounting for secret profits on sale. *McManus v. Durant*, 168 N. Y. App. Div. 643, 154 N. Y. Supp. 580.

Preferred holders who received a bonus of common stock are not estopped to assail a secret bonus to promoters of which they had no knowledge. *Mason v. Carrothers*, 105 Me. 392, 74 Atl. 1030.

Selling stock as a participant to a

from suing for dissolution by reason of voting for a policy which led to it.⁸⁶ It has been held that a stockholder is not precluded from objecting and suing to enjoin an ultra vires transaction because he has consented to or acquiesced in former transactions of a similar character,⁸⁷ or unrelated ones,⁸⁸ and an act done to protect the corporation will not raise an estoppel to prevent a similar act to harm it.⁸⁹ Making a particular objection may waive others and estop the stockholder as to them.⁹⁰

The estoppel or acquiescence should be brought home to complainant, who is not necessarily affected by that of his predecessor,⁹¹ but it is clear that a person who purchases shares in a corporation with knowledge of the fact that his transferrer is estopped, by laches, participation or acquiescence, to complain of a previous ultra vires transaction or misapplication of funds, is in precisely the same position as his transferrer, and is also estopped.⁹² And the weight of authority is, that a transferee of shares is in the same position as his

holding company does not disentitle the seller retaining other stock from attacking a plan of combination as in fraud of his rights. *Hyams v. Calumet & H. Min. Co.*, 221 Fed. 529.

⁸⁶ Failure to resist bankruptcy proceedings, begun by creditors on account of a fraudulent assignment caused by defendant officers, does not waive right to sue for the fraud. *Drucklieb v. Harris*, 158 N. Y. App. Div. 873, 142 N. Y. Supp. 912.

That a member of a building and loan association has voted for an amendment to the by-laws granting to the directors power to suspend payment of dues does not necessarily estop such member from demanding a dissolution of the association where such dues have been suspended for an unreasonable length of time. *Burkheimer v. National Mut. Building & Loan Ass'n*, 59 W. Va. 209, 53 S. E. 372.

⁸⁷ *Bloxam v. Metropolitan Ry. Co.*, 3 Ch. App. 337. See also *Coquard National Linseed Oil Co.*, 171 Ill. 480, 49 N. E. 563; *Manderson v. Commercial Bank*, 28 Pa. St. 379.

⁸⁸ The fact that stockholders as-

sent to a removal of the corporate office to another state without authority did not estop the stockholders from objecting to a wrongful use of the money of the corporation thereafter. *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248.

⁸⁹ Buying in property for protection of a corporation does not estop a stockholder from suing to enjoin officers from allowing a subsequent sale. *Paxton v. Heron*, 41 Colo. 147, 124 Am. St. Rep. 123, 92 Pac. 15.

⁹⁰ Objection by a stockholder at a meeting to the policy of an act waives objection to the capacity of the meeting to consider that business. *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

⁹¹ *Continental Securities Co. v. Belmont*, 83 N. Y. Misc. 340, 144 N. Y. Supp. 801.

That a co-complainant's laches is not a bar, see *Endicott v. Marvel*, 81 N. J. Eq. 378, 87 Atl. 230.

⁹² *Parsons v. Joseph*, 92 Ala. 403, 8 So. 788; *In re Syracuse, C. & N. Y. R. Co.*, 91 N. Y. 1; *Ffooks v. South Western Ry. Co.*, 1 Smale & G. 142.

transferrer with respect to suing on account of transactions prior to the transfer, even when he is a purchaser without notice; and that he is estopped to sue, therefore, without regard to his good faith, if his transferrer was estopped.⁹³ This doctrine, of course, does not preclude a transferee of shares from enjoining ultra vires acts subsequent to the transfer. It can never be held, said Lord Chancellor Chelmsford in an English case, that the acquiescence of the original holder of stock in illegal acts of the directors of the corporation will bind a subsequent holder of that stock to submit to all future acts of the same character.⁹⁴ One taking stock by legacy is barred by a settlement made with testator.⁹⁵

§ 4074. — — Estoppel against, or ratification by corporation.

Estoppel against the corporation presents a distinct question. The text and citations in the earlier part of this section have presupposed that the asserted grievance was one of which the stockholder might have complained but for some act or inaction of his own which raised an estoppel or laches or a ratification against him. This leaves open the inquiry whether the alleged illegal or ultra vires act was one which the corporation could become estopped or disentitled to attack. Plaintiff, suing in its right, could not complain of that of which it was estopped to complain, and if it is not, neither is he, unless by some further act or inaction of his own. This is reducible to the question: What is the effect of illegal or ultra vires acts and contracts? That has been fully treated in an earlier chapter.⁹⁶ It has been held

⁹³ *Da Ponte v. Louisiana State Lottery Co.*, 1 La. Law J. 184, Fed. Cas. No. 3,569; *Clark v. American Coal Co.*, 86 Iowa 436, 17 L. R. A. 557, 53 N. W. 291; *Parsons v. Hayes*, 14 Abb. N. C. (N. Y.) 419.

Stockholders who assented to salary payments cannot complain, and those who later became such should not be allowed to recover from directors for such excess as was voted, their action being voidable only. Assignees from consenting holders cannot complain. *Matthews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645. Contra, *Parsons v. Joseph*, 92 Ala. 403, 8 So. 788. And see as to right of a subsequent transferee to sue, § 4060, supra.

⁹⁴ *Bloxam v. Metropolitan Ry. Co.*, 3 Ch. App. 337.

⁹⁵ *Babeock v. Farwell*, 245 Ill. 14, 137 Am. St. Rep. 284, 19 Ann. Cas. 74, 91 N. E. 683.

⁹⁶ See generally Chap. 37, supra.

A distinction should be pointed out. Where the stockholder sues on an individual right, the corporation might be estopped but he may be free to object. E. g., watered or unpaid stock may, as to the corporation, in the absence of inhibitory statute, be conclusively paid up and unassailable, but as to the dissenting stockholder no obstacle exists to his having relief as an individual injured by it. See elsewhere this chapter, subd. XII Watered or Fictitiously Paid up Stock, supra.

In such a suit "it is pertinent to consider what has been his conduct with regard thereto. A corporation

accordingly that if a contract or act was wholly ultra vires, estoppel will not arise to bar an attack on it,⁹⁷ and it cannot be ratified against a dissenting stockholder,⁹⁸ as where stockholders without power voted to dissolve,⁹⁹ or where the articles appointed directors without a vote, contrary to provisions of the statutes,¹ or where the other party acting thereunder was acting really for its own benefit and did not rely to its prejudice on any corporate act.²

It has also been held that, if a contract is illegal and void, as being in violation of an express prohibition, or contrary to public policy, and not merely ultra vires, the fact that a stockholder voted therefor as a director or otherwise consented or participated does not estop him from attacking its validity.³ The reason and weight of authority, however, is to the contrary,⁴ for there is nothing about a corporation that prevents rights and liabilities arising from its ultra vires and

may do acts which affect the public to its harm, inasmuch as they are per se illegal or are malum prohibitum. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interest of the stockholders. They may be made good by assent of the stockholders." Per Folger, J., in *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

For a distinction between "illegal" and "ultra vires" contracts, see *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258, 269. See also § 1511 et seq., supra.

⁹⁷*Holt v. California Development Co.*, 161 Fed. 3.

⁹⁸See infra, this section.

⁹⁹*Economy Building & Loan Ass'n v. Paris Ice Mfg. Co.*, 113 Ky. 246, 68 S. W. 21.

¹Members of a tobacco pool were not estopped by articles of incorporation of which they had no knowledge from objecting that such articles were invalid because directors were thereby designated without an election as required, and because their voting power was denied. *Lebus v. Stansifer*, 154 Ky. 444, 157 S. W. 727.

²No estoppel to object to ultra vires contract under which defendant spent money for its own benefit, though ostensibly for the corporation. *Holt v. California Development Co.*, 161 Fed. 3.

The acquiescence of a stockholder will not estop him to sue for the benefit of the corporation for wrongs committed by the managing officers against it for the benefit of another corporation of which they were also officers. *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 41 Neb. 374, 429, 59 N. W. 838.

³*Bostwick v. Chapman*, 60 Conn. 553, 24 Atl. 32.

⁴*Stewart v. Erie & W. Transp. Co.*, 17 Minn. 372, where it was held that a stockholder who consented to a contract creating a monopoly could not afterwards sue to set it aside. His rights, it was said, are determined upon the same principles as in cases where the contract is merely ultra vires. See also *Gray v. Chaplin*, 2 Russ. 126, in which the illegality was an injury to the public. The chancellor suggested that the plaintiffs could not do what it was the province of the attorney general to do.

illegal acts, any more than there is about a natural person;⁵ and the modern tendency is to avoid the earlier doctrine by denying to the corporation or a participant in such an act the right to set up an estoppel in bar of the consequent liabilities or duties begotten by it.⁶

Ratification by the corporate body acting by its majority is to be distinguished from ratification, improperly so-called, by the plaintiff stockholder. The latter, as has been seen, does not validate the act complained of and thereby extinguish a cause of action on which the corporation might otherwise have sued, but it merely deprives plaintiff of his equity to complain.⁷ Technical ratification by the corporate body is not a defense, but rather shows the absence of a cause of action, and is treated here only for convenience because of the diverse uses of the term "ratification" as just mentioned. It grows out of the power of the majority to determine matters of policy and management.⁸ It does not take away the cause of action unless the act was one within the corporate powers⁹ and those of the ratifying body,¹⁰ and will cure acts which are voidable but not wholly void or prohibited acts.¹¹ The majority cannot ratify its own

⁵ See *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258, 269, which, though not a stockholders' suit, accurately points out this distinction where the defense of ultra vires was raised by the corporation. This was cited approvingly in *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 185, which was a stockholders' suit.

⁶ See Chaps. 37 and 38, *supra*.

⁷ See *supra*, this section.

⁸ See § 4065, *supra*, and references there found calling for other parts of this work.

Compromise between two corporations with common directors, when ratified by majority of stockholders, cannot be avoided by minority. The corporation only can do that. *Continental Ins. Co. v. New York & H. R. Co.*, 187 N. Y. 225, 79 N. E. 1026, *aff'd* 103 N. Y. App. Div. 282, 93 N. Y. Supp. 27.

⁹ As to the powers of the corporation, see Chaps. 21-38, *supra*.

¹⁰ *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680.

Transfer of all property without

vote of stockholders as required, but subsequently ratified by majority stockholders, was not assailable by minority, such transfer being intra vires if regularly made. *Metcalf v. American School Furniture Co.*, 122 Fed. 115.

Sale of entire property by directors in excess of authority may be ratified by majority, such a sale being within the corporate powers. *Peters v. Waverly Water-Front Improvement & Development Co.*, 113 Va. 318, 74 S. E. 168.

¹¹ Acts voidable by reason of interest, irregularity or the like may be ratified, but not those prohibited by law or public policy. *Boldenweck v. Bullis*, 40 Colo. 253, 90 Pac. 634; *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, *Ann. Cas.* 1914 A 777, 99 N. E. 138, approved in same case on later hearing 83 N. Y. Misc. 340, 144 N. Y. Supp. 801; *Schwab v. E. G. Potter Co.*, 194 N. Y. 409, 87 N. E. 670, *aff'd* 129 N. Y. App. Div. 36, 113 N. Y. Supp. 439.

Loan of surplus funds by trading

or others' fraud upon the minority,¹² though they may bind themselves not to object.¹³ After a ratification by the corporate body dissentient stockholders can attack the transaction only for fraud or inherent illegality or want of power.¹⁴ A sale by an officer to the corporation may be disaffirmed in part, that is in so far as he obtained an excessive price on a sale to it.¹⁵ Until the stockholders as a body act or have opportunity to act in meeting, there is neither ratifica-

corporation, even if ultra vires, is not such a wrong as cannot be ratified. Otherwise where loans were to directors. *Murray v. Smith*, 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102.

This injunction was granted to prevent a consolidation wholly illegal, though it was yet to be submitted to stockholders in meeting. *William B. Riker & Son Co. v. United Drug Co.*, 79 N. J. Eq. 580, Ann. Cas. 1913 A 1190, 82 Atl. 930, rev'g 78 N. J. Eq. 319, 79 Atl. 1044.

¹² *Arizona*. *Franklin v. Havalena Min. Co.*, 16 Ariz. 200, 141 Pac. 727.

Minnesota. *Shaw v. Staight*, 107 Minn. 152, 20 L. R. A. (N. S.) 1077, 119 N. W. 951.

New Jersey. *Endicott v. Marvel*, 81 N. J. Eq. 378, 87 Atl. 230.

New York. *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, 105 N. E. 818, modifying 153 App. Div. 697, 139 N. Y. Supp. 236; *Theobald v. United States Rubber Co.*, 83 Misc. 627, 146 N. Y. Supp. 597.

Pennsylvania. *Schmid v. Lancaster Ave. Theater Co.*, 244 Pa. 373, 91 Atl. 363.

Especially not by meeting called after suit begun and dominated by wrongdoers. *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 83 N. E. 434, rev'g 135 Ill. App. 234.

Ratification by majority is no defense to bill charging fraud on plaintiff. *Dana v. Morgan*, 219 Fed. 313.

A three-fifths vote confirming the directors' action does not bar the minority's right to object to a breach of good faith by the majority. *Hyams*

v. Calumet & H. Min. Co., 221 Fed. 529.

Approval by directors of voidable sale to themselves does not bind non-consenting stockholders. *Nueces Valley Irrigation Co. v. Davis* (Tex. Civ. App.), 116 S. W. 633.

A stockholder has no such fiduciary relation to his fellows that he cannot vote on approval of a contract in which they are or may become interested, there being no fraud or waste of minority rights. *Merriman v. National Zinc Corporation*, 82 N. J. Eq. 493, 89 Atl. 764; *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1.

¹³ Ratification of fraud and misapplication binds only those stockholders who vote for it. *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138, aff'g 150 N. Y. App. Div. 298, 134 N. Y. Supp. 635, 75 Misc. 234, 133 N. Y. Supp. 560; *Schwab v. E. G. Potter Co.*, 194 N. Y. 409, 87 N. E. 670, aff'g 129 N. Y. App. Div. 36, 113 N. Y. Supp. 439.

¹⁴ Where there has been a ratification by stockholders, complainant has no ground left but fraud such as could not be ratified. *Dana v. Morgan*, 219 Fed. 313; *Cowell v. McMillin*, 177 Fed. 25; *Waters v. Horace Waters & Co.*, 130 N. Y. App. Div. 678, 115 N. Y. Supp. 432; *Westchester Fire Ins. Co. v. Syracuse, B. & N. Y. R. Co.*, 97 N. Y. Misc. 471, 161 N. Y. Supp. 759; *Warner v. Morgan*, 81 N. Y. Misc. 685, 143 N. Y. Supp. 516.

¹⁵ A sale by an officer to the cor-

tion nor disaffirmance, and the voidable act of directors remains voidable notwithstanding the filing of a bill by stockholders.¹⁶

§ 4075. — **Compromise or settlement.** Compromise, unlike estoppel, does not depend on knowledge of a particular grievance, and includes all that is within the terms of the settlement.¹⁷

§ 4076. — **Limitation of action.** When a legal right pertaining to the corporation is asserted, the statute of limitations will apply, but if the substance is equitable, the bar, if any, will come from laches.¹⁸ Limitations and not laches applies to actions based on fraudulent waste or to acts which are incapable of ratification.¹⁹ The limitations applicable to the particular actions which the corporation may bring against its stockholders or officers and directors, and which may therefore be applicable when a stockholder sues in its rights, are discussed in the appropriate portions of this work, and they should be consulted. As to limitations of actions against third persons or corporations, a general treatise on limitations should be consulted. A suit to relieve the corporation from fraudulent abstraction of its funds by officers is one for relief on the ground of fraud, as to which the bar runs from the time of discovery²⁰ and the existence of a

poration in breach of his trust may be disaffirmed in so far as the price was excessive, and he be made to account for that. *Peerson v. Gray*, 184 Ala. 312, 63 So. 467.

¹⁶ While a directors' contract with themselves is voidable at the election of the corporation, the filing of a bill by a dissenting stockholder does not make it void. It is still voidable until a stockholders' meeting affirms or disaffirms. There is no presumption of ratification from mere lapse of time without a meeting to consider it. *Endicott v. Marvel*, 81 N. J. Eq. 378, 87 Atl. 230.

¹⁷ Actual knowledge of the claim released is not essential. *Babcock v. Farwell*, 245 Ill. 14, 137 Am. St. Rep. 284, 19 Ann. Cas. 74, 91 N. E. 683.

¹⁸ Limitation rather than laches bars an action to recover from directors the value of stock exchanged with another corporation of which they were also directors and by it do-

nated to them. The right is a legal right to recover. *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721, modifying 150 N. Y. App. Div. 715, 135 N. Y. Supp. 789.

A cause of action for directors' negligence barred at law to the corporation is also barred in equity. *Kelly v. Dolan*, 233 Fed. 635.

¹⁹ *Fleming v. Black Warrior Copper Co.*, Amalg. matd., 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273; *Murray v. Smith*, 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102.

²⁰ *Fleming v. Black Warrior Copper Co.*, Amalgamated, 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273.

Not on "liability created by law." *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

All material facts must be known before the statute runs on a bill for fraud. *Investors' Syndicate v. North America Coal & Mining Co.*, 31 N. D. 259, 153 N. W. 472.

competent person to sue;²¹ and one stockholder is not barred because another discovered the fraud earlier²² and is chargeable with laches,²³ nor is the bar complete against the corporation so long as it is under disability to sue by reason of the delinquents' control.²⁴ A bar to relief does not bar a pure defense made by way of intervention.²⁵

§ 4077. — Bad motive or want of substantial interest. It is a general rule that, if a stockholder comes into a court of equity in the bona fide character of a stockholder to enjoin or set aside ultra vires transactions on the part of the directors or a majority of the stockholders, or to obtain relief for fraud or other injuries to the corporation, and shows a right to relief, the court cannot properly inquire into his motive in prosecuting the suit.²⁶ It was said by Lord Chancellor Westbury in an English case: "I have nothing to do with the motives of plaintiffs suing in this court. If they come here in a bona fide character, the reason for their coming here is a matter beyond the province of a court of justice to inquire into."²⁷

²¹ Executor of insane stockholder against whom statute never began is not barred. *Fleming v. Black Warrior Copper Co., Amalgamated*, 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273.

²² *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

²³ Demurrer that action is barred is bad where pleadings show that plaintiff may be guilty of laches but intervener is not barred. *Fleming v. Black Warrior Copper Co., Amalgamated*, 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273.

²⁴ *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

²⁵ That the statute applying to "relief on the ground of fraud" has no application to pure defenses without relief made by an intervener, see *Investors' Syndicate v. North America Coal & Mining Co.*, 31 N. D. 259, 153 N. W. 472.

²⁶ *Central R. Co. v. Collins*, 40 Ga. 582; *Elkins v. Camden & A. R. Co.*, 26 N. J. Eq. 5; *Continental Securities Co. v. Belmont*, 83 N. Y. Misc. 340,

144 N. Y. Supp. 801; *Lewisohn Bros. v. Anaconda Copper Min. Co.*, 26 N. Y. Misc. 613, 623, 56 N. Y. Supp. 807; *Ramsey v. Gould*, 57 Barb. (N. Y.) 398; *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1; *Seaton v. Grant*, 2 Ch. App. 459; *Forrest v. Manchester, S. & L. Ry. Co.*, 4 De Gex, F. & J. 126.

Improper motive is not a defense where relief is based on right and not on the favor of equity. *Pollitz v. Wabash R. Co.*, 150 N. Y. App. Div. 715, 135 N. Y. Supp. 789, aff'd 207 N. Y. 113, 100 N. E. 721.

A litigious purchase and obstructive purpose is no defense to suit against defendants "illegally pursuing" an ultra vires act. Civil Code § 2224; *Macon Gas Co. v. Richter*, 143 Ga. 397, 85 S. E. 112. Compare, however, *Clark v. American Coal Co.*, 86 Iowa 436, 17 L. R. A. 557, 53 N. W. 291; *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. St. 401.

²⁷ *Forrest v. Manchester, S. & L. Ry. Co.*, 4 De Gex, F. & J. 126.

As we have seen in a former section, the fact that the plaintiff purchased his stock for the purpose of bringing suit does not preclude him, if there was a real purchase,²⁸ but a person cannot sue as a stockholder unless he is the bona fide owner of the stock upon which his right to sue is based. He cannot sue if the transfer to him was merely nominal, and not in good faith, but merely for vexatious purposes.²⁹

According to the weight of authority a stockholder must sue in good faith as such, and for the company, and not as the mere puppet of, and for the interest of, a rival company. By the weight of authority, therefore, although there seem to be some decisions or dicta to the contrary, a suit by a stockholder on behalf of himself and other stockholders should be dismissed if it appears that he does not sue in good faith in the interest of the other stockholders, or in his own interest as a stockholder, but solely in the interest of a rival corporation, in which he is also a stockholder, by its direction, and under an agreement by it to indemnify him for costs.³⁰ It is not

²⁸ See § 4060, *supra*.

²⁹ *Moore v. Silver Valley Min. Co.*, 104 N. C. 534, 10 S. E. 679; *McDonnell v. Grand Canal Co.*, 3 Ir. Ch. 578.

Mere interloper or trouble seeker. *O'Connor v. Virginia Passenger & Power Co.*, 46 N. Y. Misc. 530, 92 N. Y. Supp. 525.

³⁰ *Forrest v. Manchester, S. & L. Ry. Co.*, 4 De Gex, F. & J. 126. In this case the directors of the rival corporation directed the institution of the suit, and indemnified the plaintiff against costs. Lord Chancellor Westbury said: "It has been a very wholesome doctrine of this court that one shareholder having in view the legitimate purposes of the company may be permitted in this court to maintain a suit on behalf of himself and the other shareholders of the company, but the principle upon which that constructive representation of the shareholders is permitted indisputably requires that the suit shall be a bona fide one, faithfully, truthfully, sincerely directed to the benefit and the interests of those

shareholders whom the plaintiff claims a right to represent. But can I permit a man who is the puppet of another company to represent the shareholders of the company against whom he desires to establish the interests and benefits of a rival scheme? That would be entirely contrary to the principle upon which this constructive representation has been permitted to be founded. When the plaintiff sues in that capacity any personal exception to the plaintiff remains, and it would be in direct contradiction of every principle of truth and justice if I permitted a man to come here clothed in the garb of a shareholder of company A., but who is in reality a shareholder in company B., and has no sympathy whatever with, no real purpose of promoting the interests of the other company. Such a thing would be so much at variance with the principles of a court of equity that it would be impossible for it to entertain a suit of that description which is a mere mockery, a mere illusory proceeding." And see to the same effect, *Beshoar v. Chappell*, 6

very material that plaintiff purchased more stock *pendente lite* and served a supplemental complaint.³¹

When a stockholder sues to enjoin the directors of a corporation from applying its assets to purposes not authorized by its charter or to prevent or redress other wrongs, his right to relief is not in any way affected by the fact that he holds little stock in the corporation, so that his share (in equity) of the amount which it is proposed to misapply, or the extent of his injury, is comparatively trivial. Notwithstanding this, he has the same right as the largest stockholder to insist that the assets of the corporation shall not be diverted from the objects for which it was created. The maxim *de minimis non curat lex* does not apply.³² But such facts may bear upon the equi-

Colo. App. 323, 40 Pac. 244; *Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. (N. Y.) 157.

One who holds no stock except nominally will not be permitted to maintain suit against a corporation where the real purpose is to cause injury in the interest of a rival concern. *Breeze v. Lone Pine-Surprise Consol. Min. Co.*, 39 Wash. 602, 81 Pac. 1050.

In a New York case, an injunction *pendente lite*, granted in a suit by a stockholder to restrain the company from leasing its property, was dissolved, where it appeared that the plaintiff was not suing in good faith for the protection of his own rights, but at the instigation and in the interest of a rival corporation. *Jenkins v. Auburn City Ry. Co.*, 27 N. Y. App. Div. 553, 50 N. Y. Supp. 852. Compare *Lewisohn Bros. v. Anaconda Copper Min. Co.*, 26 N. Y. Misc. 613, 623, 56 N. Y. Supp. 807.

In an Illinois case, where it appeared that a bill by a stockholder to dissolve a corporation was filed in pursuance of an agreement with the officers of other corporations against which the corporation sought to be dissolved had an important suit pending, and that the object was to dissipate rather than to dissolve the assets, it was held that the bill should be dismissed. *Watson v. Le Grand*

Roller Skating Rink Co., 177 Ill. 203, 52 N. E. 317.

Compare, however, *Central R. Co. v. Collins*, 40 Ga. 582; *Sandford v. Catawissa, W. & E. R. Co.*, 24 Pa. St. 378, 64 Am. Dec. 667, and *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1, which are apparently to the contrary.

If a suit to prevent an *ultra vires* establishment in a foreign state is in good faith, it is immaterial that plaintiffs procured funds from rival interests with a selfish purpose to prevent competition. *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

³¹ *Continental Securities Co. v. Belmont*, 83 N. Y. Misc. 340, 144 N. Y. Supp. 801.

³² *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 How. (U. S.) 381, 16 L. Ed. 488; *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 5; *Gifford v. New Jersey R. & Transp. Co.*, 10 N. J. Eq. 171; *Kean v. Johnson*, 9 N. J. Eq. 401; *Seaton v. Grant*, 2 Ch. App. 459; *Tomkinson v. South-Eastern Ry. Co.*, 35 Ch. Div. 675; *Charlton v. Newcastle & C. Ry. Co.*, 5 Jur. (N. S.) 1096; *Beman v. Rufford*, 1 Sim. (N. S.) 550; *Armstrong v. Toronto Church Society*, 13 Grant Ch. (Can.) 552. Compare *Greenough v. Alabama Great South-*

ties by which he maintains his right to sue,³³ when his case is not founded on positive right.³⁴

It does not necessarily follow that because a corporation has become insolvent, and after debts are paid no surplus will remain for distribution among stockholders, that the stockholders have no status to maintain action to prevent wrongs to the corporation. "Such a doctrine," said the court, "would permit the holders of the majority stock to wreck a corporation and, when the holders of the minority stock ask the court to intervene, to forestall the action of the court by proclaiming the insolvency of the company and the consequent lack of interest in the outcome on part of those seeking the court's action."³⁵

§ 4078. — Interference with internal policy and management or with discretion of officers and directors. In accordance with the rule that the injurious or unwise exercise of managerial discretion is not actionable, if free from fraud, abuse or illegality,³⁶ it is a good de-

ern R. Co., 64 Fed. 22; Dannmeyer v. Coleman, 11 Fed. 97; Benedict v. Western U. Tel. Co., 9 Abb. N. Cas. (N. Y.) 214.

Allegation of ownership of \$3,100 par value of stock held sufficient on demurrer. Howard v. National Telephone Co., 182 Fed. 215.

"The right of the stockholder to sue exists because of special injury to him for which otherwise he is without redress. If his interest is trifling and the injury thereto of no consequence, he cannot sue to compel righting of wrongs to the corporation." Home Fire Ins. Co. v. Barber, 67 Neb. 644, 60 L. R. A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024.

³³ Smallness of the damage resulting to plaintiff was considered against him in a federal suit to annul a contract compounding pension rights with a retiring bank president. Heinz v. National Bank of Commerce in St. Louis, 237 Fed. 942.

The fact that plaintiffs are a small minority (6,617 shares out of 270,000) is pertinent on determining their equities relatively to the oth-

ers, though it is not a bar to relief. Aldrich v. Union Bag & Paper Co., 81 N. J. Eq. 244, 87 Atl. 65.

A subsequent buyer for purpose of suing to resist a plan favored by over 99 per cent of stockholders must make out a very clear case. General Inv. Co. v. Bethlehem Steel Corporation, 87 N. J. Eq. 234, 100 Atl. 347.

Want of substantial interest presumed of a subsequent purchaser who did not allege a substantial market value of stock when purchased. Johnson v. United Rys. Co. of St. Louis, 227 Mo. 423, 127 S. W. 63.

³⁴ The relative benefits and injuries to come from a proposed disaffirmance of an act (stock issue at less than par) will not be weighed against complainant, who is a small holder and but little injured, if the act is wholly prohibited and contrary to law. Carver v. Southern Iron & Steel Co., 78 N. J. Eq. 81, 78 Atl. 240, intimating that the same would be true of a suit by a nominal plaintiff.

³⁵ Davies v. Monroe Waterworks & Light Co., 107 La. 145, 31 So. 694.

³⁶ See § 4065, supra.

fense that interference with the internal policy and management of the corporation will be entailed by the relief sought, and the court will decline to entertain a suit having that end or effect,³⁷ or it will mold its relief so as to limit it to an operation which will not so interfere.³⁸ For a like reason (and other reasons) jurisdiction over a foreign corporation is frequently declined.³⁹

§ 4079. Jurisdiction of action or suit. The action must be in a court having jurisdiction of either the parties or the subject-matter,⁴⁰ and such suits are within the jurisdiction of equity,⁴¹ if there is no adequate legal remedy.⁴²

The courts are indisposed to entertain actions involving any visitatorial power over foreign corporations or any judicial interference with their internal management. This is, however, rather an abnegation of power on grounds of inconvenience than a want of jurisdiction. It rests on reasons peculiar to foreign corporations, of which courts have undoubted jurisdiction, given the requisite procedure to acquire it. The whole matter is treated in the chapter relating to foreign corporations,⁴³ but where the foreign corporation

³⁷ *Bergman Clay Mfg. Co. v. Bergman*, 73 Wash. 144, 131 Pac. 485; *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

A bill to assume management by means of a receiver will not lie. *Toomey v. First Mortgage Trust Co.*, — Tex. Civ. App. —, 177 S. W. 539.

It is no defense where inequity to stockholders is planned. *Smith v. Westchester Bronxville Realty Co.*, 78 N. Y. Misc. 75, 137 N. Y. Supp. 690. And see generally the cases cited under § 4065, *supra*.

³⁸ See § 4090 *et seq.*, *infra*, in this subdivision.

³⁹ See § 4079, *infra*.

⁴⁰ Jurisdiction of person intervening held sufficient though all other parties were nonresident and subject-matter was foreign. *Grant v. Greene Consol. Copper Co.*, 169 N. Y. App. Div. 206, 154 N. Y. Supp. 596.

A suit to restrain enforcement of an invalid state statute for regulation of rates is not a suit against the state of which there is no jurisdiction.

Perkins v. Northern Pac. Ry. Co., 155 Fed. 445; *Poor v. Iowa Cent. Ry. Co.*, 155 Fed. 226.

⁴¹ Equity has jurisdiction of such suits when well pleaded, and writ of prohibition was accordingly denied. *State v. McQuillin*, 260 Mo. 164, 168 S. W. 924.

Where action by stockholders against officers for fraud in use of corporate property prays for a money judgment only, the case may be one where there exists adequate remedy at law, and a court of equity may therefore be without jurisdiction. *Godfrey v. McConnell*, 151 Fed. 783. See also § 4053, *supra*, § 4090, *infra*.

⁴² Where the bill seeks solely for damages for fraud in causing the corporation to become indebted, the legal remedy is adequate, and suit in the federal courts in equity will not lie. *Godfrey v. McConnell*, 151 Fed. 783.

⁴³ See chapter on Foreign Corporations, *infra*.

If the corporation is foreign, the courts will not take jurisdiction af-

appears and submits it cannot challenge jurisdiction.⁴⁴ The opinion is expressed in New York, that "no doubt, in a proper case, the courts of this state will entertain jurisdiction of a representative action by resident stockholders on behalf of a foreign corporation,"⁴⁵ but it will not do so to restore a merged and extinguished corporation to its existence and franchises,⁴⁶ nor to adjudicate foreign land titles.⁴⁷

It is now well settled that, where the necessary diversity of citizenship exists, the federal courts have jurisdiction of a suit by a stockholder, on behalf of himself and other stockholders, to prevent or redress injuries to the corporation.⁴⁸ Either the existence of a federal

fecting the internal management of its affairs, even if there is corporate property within the jurisdiction. *Holmes v. Jewett*, 55 Colo. 187, 134 Pac. 665; *Kelly v. Thomas*, 234 Pa. 419, 51 L. R. A. (N. S.) 122, 83 Atl. 307; *McCloskey v. Snowden*, 212 Pa. 249, 108 Am. St. Rep. 867, 61 Atl. 796; *Madden v. Penn Elec. Light Co.*, 181 Pa. St. 617, 38 L. R. A. 638, 37 Atl. 817.

Suit should be at the domicile in order to enjoin officers from improperly disposing of its assets; but property in the jurisdiction may be protected pendente lite. *Moneuse v. Riley*, 40 N. Y. Misc. 110, 81 N. Y. Supp. 325.

Equity has jurisdiction to annul a merger agreement though one of the corporations is foreign and is served only by publication. *Knapp v. Supreme Commandery, United Order Golden Cross of World*, 121 Tenn. 212, 118 S. W. 390.

Where no visitatorial power was involved but the relief was merely to compel resident directors to make restitution, and all parties were before the court, it properly retained jurisdiction to render a personal decree. *Babeock v. Farwell*, 245 Ill. 14, 137 Am. St. Rep. 284, 19 Ann. Cas. 74, 91 N. E. 683. See also *Ganzer v. Rosenfeld*, 153 Wis. 442, 141 N. W. 121.

Suit for accounting from resident

directors of Delaware corporation having its property in Mexico and place of business and books in Illinois may be had in latter state. *Voorhees v. Mason*, 245 Ill. 256, 91 N. E. 1056, rev'g 148 Ill. App. 647.

⁴⁴ *Fleming v. Black Warrior Copper Co., Amalgamated*, 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273.

⁴⁵ *Miller v. Quincy*, 179 N. Y. 294, 72 N. E. 116; *Howe v. New York, N. H. & H. R. Co.*, 142 N. Y. App. Div. 451, 126 N. Y. Supp. 1090; *Jacobs v. Mexican Sugar Refining Co.*, 104 N. Y. App. Div. 242, 93 N. Y. Supp. 776; *Ernst v. Rutherford & B. S. Gas Co.*, 38 N. Y. App. Div. 388, 56 N. Y. Supp. 403.

⁴⁶ *Howe v. New York, N. H. & H. R. Co.*, 142 N. Y. App. Div. 451, 126 N. Y. Supp. 1090.

⁴⁷ But as the action is personal and not in rem, the court is not deprived of jurisdiction because the injunction prayed will indirectly affect land in another state. *Reed v. Hollingsworth*, 157 Iowa 94, 135 N. W. 37.

Where cancellation of a lease is the object of the suit, it does not involve the title to the land lying in a foreign country. *Jacobs v. Mexican Sugar Refining Co.*, 104 N. Y. App. Div. 242, 93 N. Y. Supp. 776.

⁴⁸ *Doctor v. Harrington*, 196 U. S. 579, 49 L. Ed. 606; *Greenwood v. Union Freight R. Co.*, 105 U. S. 13,

question or diversity of citizenship will sustain jurisdiction of federal courts.⁴⁹ A formal demand on the board of directors to bring suit followed by a formal refusal cannot confer jurisdiction on a federal court on the ground of diversity of citizenship, where the demand and refusal by the directors are made simply to secure the fact of diverse citizenship. "It is the duty of the court, for jurisdictional purposes, to ascertain the necessary parties to the suit," said the court, "and align them upon the one side or the other in conformity with their true interests and attitude, irrespective of their designations in the bill."⁵⁰ Cases begun in state courts may be removed

26 L. Ed. 961; *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. Ed. 401; *Consumers' Gas Trust Co. v. Quinby*, 137 Fed. 882; *McKee v. Chautauqua Assembly*, 124 Fed. 808; *Louisville Trust Co. v. Stone*, 107 Fed. 305; *Barnes v. Kornegay*, 62 Fed. 671; *Pond v. Vermont Valley R. Co.*, 12 Blatchf. 280, Fed. Cas. No. 11,265. See also *Citizens' Savings & Trust Co. v. Illinois Cent. R. Co.*, 205 U. S. 46, 51 L. Ed. 703.

⁴⁹ *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Howard v. National Tel. Co.*, 182 Fed. 215; *Larabee v. Dolley*, 175 Fed. 365, aff'd 219 U. S. 121, 55 L. Ed. 123; *Lindsley v. Natural Carbonic Gas Co.*, 162 Fed. 954; *Perkins v. Northern Pac. Ry. Co.*, 155 Fed. 445.

Where there is a federal question, jurisdiction exists, and the issue of collusion to confer it by arrangement of parties cannot arise. *Simpson v. Union Stock Yards Co. of Omaha*, 110 Fed. 799.

In order that the federal courts may have jurisdiction, the plaintiff and the defendants must be citizens of different states. If the plaintiff and some of the defendants, or some of the plaintiffs and some of the defendants, are citizens of the same state, there is no jurisdiction. *East Tennessee, V. & G. R. R. v. Grayson*, 119 U. S. 240, 30 L. Ed. 382; *Central R. Co. of New Jersey v. Mills*, 113 U.

S. 249, 28 L. Ed. 949; *Leary v. Columbia River & P. S. Nav. Co.*, 82 Fed. 775; *Wilder v. Virginia, T. & C. Steel & Iron Co.*, 46 Fed. 676; *Bell v. Donohoe*, 177 Fed. 710. And see *Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624.

It is no objection that some stockholders are not residents of the district wherein they are sued, the plaintiffs being residents of other states and the corporation of the district and the property being there. *Schultz v. Diehl*, 217 U. S. 594, 54 L. Ed. 896 (mem. dec.); *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 44 L. Ed. 647.

As to amount in controversy, see *Carpenter v. Knollwood Cemetery*, 198 Fed. 297; *Larabee v. Dolley*, 175 Fed. 365, aff'd 219 U. S. 121, 55 L. Ed. 123.

⁵⁰ *Kelly v. Dolan*, 218 Fed. 966; *Elkins v. Chicago*, 119 Fed. 957.

Where there is no actual antagonism between parties, the alignment is all on one side, and there is no jurisdiction. *Stephens v. Smartt*, 172 Fed. 466.

The plaintiff cannot give the court jurisdiction by omitting a necessary party defendant who is a citizen of the same state. *Wilder v. Virginia, T. & C. Steel & Iron Co.*, 46 Fed. 676; *Douglas v. Richmond & D. R. Co.*, 106 N. C. 65, 10 S. E. 1048.

Suit must be in a state court when the presence of a party who is indispensable destroys diversity. *Car-*

to federal courts under U. S. Judicial Code, Sec. 28.⁵¹ Jurisdiction

son v. Allegany Window Glass Co., 189 Fed. 791.

On the question of jurisdiction, indispensable parties must be brought in, and if federal jurisdiction exists, the case can go on without other parties. Especially is it unnecessary to bring them in where ouster of jurisdiction would result. Kuchler v. Greene, 163 Fed. 91. So making a stockholder a party plaintiff is not required if it will defeat the jurisdiction. Pond v. Vermont Valley R. Co., 12 Blatchf. 280, Fed. Cas. No. 11,265. Nor can the jurisdiction be defeated by other stockholders coming in as plaintiffs. Stewart v. Dunham, 115 U. S. 61, 29 L. Ed. 329.

Jurisdiction appears where parties are diverse citizens, one being a non-resident corporation but there being property in the district as to which title is to be quieted (Act of Congress, March 3, 1875). Howard v. National Tel. Co., 182 Fed. 215.

In a suit in the federal court by a nonresident stockholder to enjoin violation of corporate duty by the directors, plaintiff was acting with certain minority stockholders who paid a portion of the expense of the suit and who resided in the same state as that of the corporation, the main portion of the stockholders and directors being opposed to the suit. It was held that by the facts above stated the jurisdiction of the federal court was not affected. New Albany Waterworks v. Louisville Banking Co., 122 Fed. 776.

The corporation is regarded as a material defendant for the purpose of jurisdictional diversity whenever its controlling persons are opposed to the object sought by plaintiff. Verner v. Great Northern R. Co., 209 U. S. 24, 52 L. Ed. 666; Doctor v. Harrington, 196 U. S. 579, 49 L. Ed. 606; Central R. Co. of New Jersey v. Mills,

113 U. S. 249, 28 L. Ed. 949; Greenwood v. Union Freight R. Co., 105 U. S. 13, 26 L. Ed. 961; Whitaker v. Whitaker Iron Co., 238 Fed. 980; Hyams v. Calumet & H. Min. Co., 221 Fed. 529; Howard v. National Tel. Co., 182 Fed. 215; Kelly v. Mississippi River Coaling Co., 175 Fed. 482; Groel v. United Elec. Co. of New Jersey, 132 Fed. 252; De Neufville v. New York & N. Ry. Co., 81 Fed. 10; Hutton v. Joseph Bancroft & Sons Co., 77 Fed. 481.

Where there is no basis for suit by the stockholder rather than the corporation, it cannot be aligned against him and the bill will be demurrable and dismissible for want of jurisdiction. Hirsch v. Independent Steel Co. of America, 196 Fed. 104, appeal dismissed 225 U. S. 698, 56 L. Ed. 1263. Contra, a corporation of the same state as plaintiff is a necessary defendant where it is controlled by a nonresident corporation and the suit cannot be removed because the controversy is not "wholly" between diverse citizens. Douglas v. Richmond & D. R. Co., 106 N. C. 65, 10 S. E. 1048.

⁵¹ Removal is allowable where jurisdictional diversity or other jurisdictional ground exists. Sidway v. Missouri Land & Live Stock Co., 116 Fed. 381; Fox v. Mackay, 60 Fed. 4; Gann v. Northeastern R. Co., 57 Fed. 417; Wilder v. Virginia, T. & C. Steel & Iron Co., 46 Fed. 676; Shumway v. Chicago & I. R. Co., 4 Fed. 385.

Defendant with same interest as complainant is aligned with him. Hutton v. Joseph Bancroft & Sons Co., 77 Fed. 481.

Separable controversies may be removed if as to them there is such diversity. Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. Ed. 1122; Pollitz v. Wabash R. Co., 176 Fed. 333, rev'g 167 Fed. 145; Campbell v. Milliken, 119 Fed. 981; McGinniss

does not depend on compliance with the 94th Rule of Equity,⁵² except to align the parties⁵³ and exclude collusion,⁵⁴ and is unaffected by the fact that plaintiff acquired the shares for the purpose of suing.⁵⁵ Like the state courts the federal courts will decline jurisdiction over the internal affairs of a foreign corporation.⁵⁶

§ 4080. Parties plaintiff. When a stockholder sues in equity to enforce a right belonging to the corporation, or to enjoin or redress an injury to the corporation, all the stockholders are interested in the result of the suit. It is not for his own benefit alone, but for the benefit of all the stockholders, and it must therefore be brought on behalf of the complainant, and all other stockholders other than such, if any, as are made defendants,⁵⁷ but the failure to do this may

v. Boston & M. Consol. Copper & Silver Min. Co., 119 Fed. 96; Hanover Nat. Bank v. Credits Commutation Co., 118 Fed. 110; Lamm v. Parrot Silver & Copper Co., 111 Fed. 241; Fox v. Mackay, 60 Fed. 4; Wilder v. Virginia, T. & C. Steel & Iron Co., 46 Fed. 676.

⁵² Noncompliance with 94th Rule does not oust jurisdiction, but simply exposes the complaint to dismissal or proper objection for want of right to maintain it. Jurisdiction is distinct from the right to maintain a particular suit. Venner v. Great Northern R. Co., 209 U. S. 24, 52 L. Ed. 666.

⁵³ In so far as it affects the alignment of parties the rule goes to the jurisdiction as well as the merits. If no diversity can be predicated on the allegations, there can be no jurisdiction. Gage v. Riverside Trust Co., 156 Fed. 1002.

A motion to vacate an order for substituted service will raise the question whether plaintiff shows any right to maintain the suit and whether it is good in substance, because if no good cause of action is pleaded and the 94th Rule is not satisfied, there cannot be such diversity as jurisdiction requires. Gage v. Riverside Trust Co., 156 Fed. 1002.

⁵⁴ Collusion will not be inferred from the bare fact that the corporation is willing to have the relief as prayed for. Poor v. Iowa Cent. Ry. Co., 155 Fed. 226.

⁵⁵ Jurisdiction is not ousted by reason of the fact that shares were transferred to plaintiff to sue in federal courts. In re Cleland, 218 U. S. 120, 54 L. Ed. 962; O'Neil v. Walcott Min. Co., 174 Fed. 527, 27 L. R. A. (N. S.) 200.

⁵⁶ Leary v. Columbia River & P. S. Nav. Co., 82 Fed. 775. See, generally, the chapter on Foreign Corporations, *infra*.

⁵⁷ **Alabama.** Jefferson County Sav. Bank v. Francis, 115 Ala. 317, 23 So. 48.

California. Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

Georgia. McAfee v. Zettler, 103 Ga. 579, 30 S. E. 268.

New Hampshire. March v. Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

New York. Continental Securities Co. v. Belmont, 75 Misc. 234, 133 N. Y. Supp. 560, aff'd 150 App. Div. 298, 134 N. Y. Supp. 635, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138.

England. Taylor v. Salmon, 4 Mylne & C. 134.

A suit in which the plaintiff prays

be waived,⁵⁸ and the suit is maintainable if any of the plaintiffs is competent.⁵⁹ Other stockholders may come into such a suit to take the benefit of the proceedings and decree, not to oppose and nullify them.⁶⁰ No formal order making them parties is required when they come in and by leave file a petition.⁶¹ Under the federal practice they need not all be brought in if very numerous.⁶²

§ 4081. Parties defendant—The corporation, officers and other stockholders. When a stockholder sues to set aside or enjoin ultra vires transactions, or to enforce any right belonging to the corporation, or to redress or enjoin any injury to the corporation, the corporation is a necessary party defendant, so that any judgment rendered may be binding upon it; and if it is not made a party, the bill or complaint is demurrable. "Such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be

relief which will inure to the benefit of all the stockholders, although in form a suit in behalf of the plaintiff alone, is in behalf of all, and any stockholder may become a party plaintiff on application. *Wood v. Union Gospel Church Bldg. Ass'n*, 63 Wis. 9, 22 N. W. 756. See also *Flynn v. Brooklyn City R. Co.*, 9 N. Y. App. Div. 269, 41 N. Y. Supp. 566, 158 N. Y. 493, 53 N. E. 520.

The corporation is not a necessary plaintiff. *Reed v. Hollingsworth*, 157 Iowa 94, 135 N. W. 37.

⁵⁸ Failure to sue on behalf of other stockholders is a mere defect of parties, and is waived if objection is not taken by answer or demurrer. *Stewart v. Erie & W. Transp. Co.*, 17 Minn. 372; *Hiscock v. Lacy*, 9 N. Y. Misc. 578, 30 N. Y. Supp. 860.

⁵⁹ *Central Ry. Co. v. Collins*, 40 Ga. 582.

In absence of demurrer for non-joinder or misjoinder of parties, the complaint will stand if any of plain-

tiffs has a right to maintain the suit. *Holmes v. Camp*, — N. Y. App. Div. —, 162 N. Y. Supp. 1014.

Incapacity of plaintiff to maintain the suit is no objection where other competent stockholders have come in. *Carver v. Southern Iron & Steel Co.*, 78 N. J. Eq. 81, 78 Atl. 240.

⁶⁰ *Forbes v. Memphis, E. P. & P. R. Co.*, 2 Woods 323, Fed. Cas. No. 4,926; *Wood v. Union Gospel Church Bldg. Ass'n*, 63 Wis. 9, 22 N. W. 756.

As to intervention, see also § 4055, supra.

⁶¹ *Coltrane v. Templeton*, 106 Fed. 370.

⁶² Under New Equity Rule 38, very numerous parties need not all be brought in, where it will be almost impossible, but one may sue for all and the court may proceed to decree. So held of an insolvent mutual savings and loan corporation which was to be wound up and distribution made. *In re Dennett*, 221 Fed. 350.

done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit, involving precisely the same subject-matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation."⁶³ Another

⁶³ *Davenport v. Dows*, 18 Wall. (U. S.) 626, 21 L. Ed. 938.

As supporting this principle see in addition the following decisions:

United States. *Strang v. Edson*, 198 Fed. 813; *Morshead v. Southern Pac. Co.*, 123 Fed. 350; *Putnam v. Ruch*, 56 Fed. 416, 54 Fed. 216; *Bell v. Donohoe*, 17 Fed. 710; *Taylor v. Holmes*, 14 Fed. 498; *Foote v. Linck*, 5 McLean 616, Fed. Cas. No. 4,913.

Colorado. *Peck v. Peck*, 33 Colo. 421, 80 Pac. 1063.

Connecticut. *Allen v. Curtis*, 26 Conn. 456.

Georgia. *Weslosky v. Quarterman*, 123 Ga. 312, 51 S. E. 426.

Illinois. *Bruschke v. Nord Chicago Schuetzen Verein*, 145 Ill. 433, 34 N. E. 417.

Indiana. *Carter v. Ford Plate Glass Co.*, 85 Ind. 180.

Kentucky. *Shawhan v. Zinn*, 79 Ky. 300.

Maine. *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 54 Me. 173; *Hersey v. Veazie*, 24 Me. 9, 41 Am. Dec. 364.

Massachusetts. *Converse v. United Shoe Mach. Co.*, 209 Mass. 539, 95 N. E. 929.

Missouri. *Gruen v. Schoeffer*, 7 Mo. App. 587.

Montana. *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

New Jersey. *Barry v. Moeller*, 68 N. J. Eq. 488, 59 Atl. 97; *Elkins v.*

Camden & A. R. Co., 36 N. J. Eq. 241.

New York. *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Greaves v. Gouge*, 69 N. Y. 154; *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 571, 573, 8 Am. Rep. 571; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Bell v. Mali*, 11 How. Pr. 254; *Cunningham v. Pell*, 5 Paige 607; *Robinson v. Smith*, 3 Paige 222, 233, 24 Am. Dec. 212, 217.

North Carolina. *Douglas v. Richmond & D. R. Co.*, 106 N. C. 65, 10 S. E. 1048.

Oklahoma. *Starr v. Heald*, 28 Okla. 792, 116 Pac. 188.

South Carolina. *Charleston Insurance & Trust Co. v. Sebring*, 5 Rich. Eq. 342.

Tennessee. *Deaderick v. Wilson*, 8 Baxt. 108; *Black v. Huggins*, 2 Tenn. Ch. 780.

Virginia. *Mount v. Radford Trust Co.*, 93 Va. 427, 25 S. E. 244.

West Virginia. *Crumlish's Adm'r v. Shenandoah Valley R. Co.*, 28 W. Va. 623.

England. *Bagshaw v. Eastern U. Ry. Co.*, 7 Hare 114.

Where property is to be recovered for the corporation it is indispensable. *Lawrence v. Southern Pac. Co.*, 180 Fed. 822. So in action for depriving it of its property. *Starr v. Heald*, 28 Okla. 792, 116 Pac. 188.

A subordinate corporation must be made party to a bill by its minority stockholder to restrain the controlling

accurate statement of the reason for this is: "Such corporation is said to be a necessary party because its rights are involved in the litigation, which would necessarily be fruitless unless the corporation and the stockholders represented by it, other than the plaintiffs are bound thereby. Some text-writers and some cases go farther and hold such corporation to be an indispensable party, 'not simply on the general principles of equity pleading, in order that it may be bound by the decree, but in order that the relief when granted may be awarded to it, as a party to the record, by the decree,' or, as it is otherwise expressed, because the relief asked for 'must be worked out by or through' the corporation."⁶⁴ An exception to this has been made in the case of a dissolved corporation.⁶⁵

The corporation must be served as well as named a defendant.⁶⁶ That the petition contains a prayer that the court appoint an officer or some other appropriate person as trustee for the corporation to receive and hold whatever may be found due it does not render it unnecessary that the corporation be made a party.⁶⁷

corporation from voting the majority of stock in elections of directors. *Hyams v. Old Dominion Co.*, 209 Fed. 808, modifying 204 Fed. 681 in another respect.

New Equity Rule 39 does not enable the court to proceed without the corporation though it is beyond the district. *Hyams v. Old Dominion Co.*, 204 Fed. 681.

That the corporation is a necessary party in an action under the Michigan statute, see *McMillan v. Miller*, 177 Mich. 511, 143 N. W. 631; *Coxe v. Hart*, 53 Mich. 557, 19 N. W. 183, both citing *Cicotte v. Anciaux*, 53 Mich. 227, 18 N. W. 793.

The corporation or a director may be added as new parties under the procedure for that purpose. See § 4082, *infra*.

Where a receiver had been appointed and was made a party, the objection was not good unless made by demurrer. *Barry v. Moeller*, 68 N. J. Eq. 483, 59 Atl. 97.

⁶⁴ 3 Pom. Eq. Jur. § 1095, and see *Kidd v. New Hampshire Traction Co.*, 72 N. H. 273, 66 L. R. A. 574, 56 Atl.

465. See also *Black v. Huggins*, 2 Tenn. Ch. 780.

A foreign receiver who has no extra-territorial powers or rights need not be made a defendant. *Reed v. Hollingsworth*, 157 Iowa 94, 135 N. W. 37.

⁶⁵ A foreign corporation is not a necessary party to an action brought by one of its stockholders, on behalf of himself and the others, against a domestic corporation having property or debts owing or belonging to the foreign corporation, where the bill shows that the latter has ceased to use its franchise and been dissolved. *Crumlish's Adm'r v. Shenandoah Valley R. Co.*, 28 W. Va. 623.

As to effect of dissolution on such suits, see § 4057, *supra*.

⁶⁶ Merely naming, without serving, the corporation as defendant in a suit against a minority of its directors for wrongdoing does not suffice, though it is averred to be useless to make request to sue. *Kelly v. Thomas*, 234 Pa. 419, 51 L. R. A. (N. S.) 122, 83 Atl. 307.

⁶⁷ *Deming v. Beatty Oil Co.*, 72 Kan. 614, 84 Pac. 385.

If a suit brought by a stockholder on behalf of himself and the other stockholders is based upon fraudulent or wrongful acts or neglect on the part of the directors or other stockholders, they must be made parties defendant, so that they may have an opportunity to defend, and so that redress or relief may be given against them,⁶⁸ but if no relief is sought against them they are unnecessary.⁶⁹

68 United States. *Ribon v. Chicago, R. I. & P. R. Co.*, 16 Wall. 446, 21 L. Ed. 367; *Ervin v. Oregon Ry. & Nav. Co.*, 27 Fed. 625; *Taylor v. Holmes*, 14 Fed. 498.

Alabama. *Tutwiler v. Tuscaloosa Coal, Iron & Land Co.*, 89 Ala. 391, 7 So. 398.

California. *Moyle v. Landers*, 21 Pac. 1133.

Georgia. *East Rome Town Co. v. Nagle*, 58 Ga. 474.

Michigan. *Westcott v. Minnesota Min. Co.*, 23 Mich. 145.

Missouri. *Slattery v. St. Louis & N. O. Transp. Co.*, 91 Mo. 217, 60 Am. Rep. 245, 4 S. W. 79.

New York. *Gray v. Fuller*, 17 App. Div. 29, 44 N. Y. Supp. 883. Compare *Anderton v. Wolf*, 41 Hun 571.

Holders of the illegal stock, voting of which is to be restrained, must be joined as defendants. *Jones v. Nassau Suburban Home Co.*, 53 N. Y. Misc. 63, 103 N. Y. Supp. 1089.

69 The directors are not necessary parties in a suit to enjoin the corporation from doing an ultra vires act, or to set aside an ultra vires act, for they merely represent the corporation. *Pioneer Gold Mining Co. v. Baker*, 20 Fed. 4; *Allen v. New Jersey Southern R. Co.*, 49 How. Pr. (N. Y.) 14; *Wood v. Union Gospel Church Bldg. Ass'n*, 63 Wis. 9, 22 N. W. 756; *Winch v. Birkenhead, L. & C. J. Ry. Co.*, 5 De Gex & S. 562; *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare 114.

Where the suit is against the corporation and majority stockholders, and the directors were merely the defendants' instruments, and no relief

is sought against them, the directors need not be made parties. *Woodroof v. Howes*, 88 Cal. 184, 26 Pac. 111. See also *Eldred v. American Palace Car Co.*, 99 Fed. 168; *Morse v. Bay State Gas Co.*, 91 Fed. 944.

The officers who have diverted as sets as alleged are the only necessary individual parties in a derivative suit for an accounting. Stockholders who are not charged with participation in the wrong are not proper or necessary parties, though they might be proper parties to intervene or to come in with plaintiff suing for all others. *McCrea v. Robertson*, 192 N. Y. 150, 84 N. E. 960, aff'g 114 N. Y. App. Div. 77, 99 N. Y. Supp. 694.

On a suit to compel reimbursement of the corporation held as responsible superior of tort-feasant directors, the treasurer who was not party in it except to pay the judgment is not a proper party. *Hill v. Murphy*, 212 Mass. 1, 40 L. R. A. (N. S.) 1102, Ann. Cas. 1913 C 374, 98 N. E. 781.

Other stockholders not sued for relief cannot be joined as defendants to oppose the suit, it being for the benefit of them as well as of plaintiffs. *Hay v. Brookfield*, 160 N. Y. App. Div. 277, 145 N. Y. Supp. 543.

The majority holders are not necessary defendants. *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

Other stockholders should not be impleaded as defendants to prevent multiplicity, unless there are allegations that other suits are threatened. *McCrea v. Robertson*, 192 N. Y. 150, 84 N. E. 960, aff'g 114 N. Y. App.

The same rule is also applicable to agents of the corporation.⁷⁰ Where liability is joint and several,⁷¹ as in an action by stockholders against directors for wrongful appropriation of corporate property during their several separate terms of office, it is not essential that all the parties guilty of fraud be joined.⁷²

§ 4082. — Third persons or corporations involved in controversy.

All third persons or corporations whose rights are to be adjudged or against whom relief is sought are necessary parties.⁷³ Where a stockholder brings suit to compel the corporation to sell certain lands and distribute the proceeds, and the corporation answers that the land has been sold to a third party along with other lands, although by mistake the land in question was omitted from the deed, the grantee of the corporation should be made a party to the suit.⁷⁴ Hence if the subject-matter of the suit is an agreement, transfer or conveyance between the corporation acting by its directors or managers and some other corporation or some other person, strangers to the corporation, it is proper and necessary to make such other corporation or person a party defendant to the suit, "because that other

Div. 77, 99 N. Y. Supp. 694.

There is a misjoinder where some director defendants were not directors at the time of certain wrongs complained of, and so are not liable. *Moran v. Vreeland*, 81 N. Y. Misc. 664, 143 N. Y. Supp. 522.

Under a statute providing that one having adverse interests may be made a party defendant, a stockholder may not maintain action against the president and other stockholders for the refunding of moneys alleged to have been unlawfully obtained from the corporation, since the interests of the stockholder in such case are not adverse to those of the plaintiff. *McCrea v. McClenahan*, 114 N. Y. App. Div. 70, 99 N. Y. Supp. 689.

⁷⁰ The registrar of stock or transfer agent is not a necessary party to a suit to avoid the stock issue. *Poltitz v. Wabash R. Co.*, 142 N. Y. App. Div. 755, 127 N. Y. Supp. 782.

⁷¹ *Sigwall v. City Bank*, 82 S. C. 382, 64 S. E. 398.

⁷² *Barry v. Moeller*, 68 N. J. Eq. 483, 59 Atl. 97.

⁷³ The holder of legal title is necessary party where stockholder sues in right of corporation for damage to property. Otherwise, if the alleged injury is to his own stock or to distributable assets belonging to him. *Bogert v. Southern Pac. Co.*, 215 Fed. 218.

Subsidiary corporations affected by a contract to be set aside are not necessary parties where they are owned wholly by defendant corporation. *Ross v. Quinnessee Iron Min. Co.*, 227 Fed. 337.

A liquidator of a bank, ex officio, is not a proper plaintiff unless he is a stockholder of defendant. Neither is he a proper plaintiff as assignee of a stockholder who had parted with his stock and retained only a personal nonassignable right. *Clarkson v. Walpole Rubber Co.*, 156 N. Y. App. Div. 869, 142 N. Y. Supp. 502.

⁷⁴ *Pinchback v. Bessemer Min. & Mfg. Co.*, 137 N. C. 171, 49 S. E. 106. See also, generally, *Mumford v. Ecuador Development Co.*, 111 Fed. 639.

corporation or person has an interest, and a great interest, in arguing the question and having it decided, once for all, whether the agreement in question is really within the powers or without the powers of the corporation of which the corporator is a member." ⁷⁵ Furthermore, such other corporation or person will not be bound by the decree that may be rendered, unless made a party. ⁷⁶

Where suit is brought by a stockholder to protect the interests of the corporation, the allegation being that the stock of the first corporation has been transferred to the second corporation without

⁷⁵ **United States.** *Ribon v. Chicago, R. I. & P. R. Co.*, 16 Wall. 446, 21 L. Ed. 367.

Massachusetts. *Peabody v. Flint*, 6 Allen 52.

New Jersey. *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 241.

New York. *Meyers v. Scott*, 50 Hun 603, 2 N. Y. Supp. 753.

England. *Salomons v. Laing*, 12 Beav. 377; *Hare v. London & N. W. Ry. Co.*, 1 Johns. & H. 252; *Sir G. Jessel, M. R., in Russell v. Wakefield Waterworks Co.*, L. R. 20 Eq. 474.

An unconscionable contract, being merely voidable, cannot be annulled without the other party to the contract being a party defendant. *Col-lins v. Penn-Wyoming Copper Co.*, 203 Fed. 726.

Purchaser or recipient is not proper party defendant unless implicated. *McManus v. Durant*, 151 N. Y. App. Div. 663, 136 N. Y. Supp. 223.

In a suit by a stockholder to compel restitution of assets alleged to have been fraudulently transferred to the defendants, it is not necessary to join as parties defendant the persons by or through whom the transfer was made, or a person who holds some of the assets as a mere depositary, and subject to the orders of the defendants, when no relief is sought against them. *Eldred v. American Palace-Car Co.*, 99 Fed. 168.

The other party to a contract to be set aside is a necessary party. *Col-*

lins v. Penn-Wyoming Copper Co., 203 Fed. 726.

In an action to set aside a note of the corporation executed by the directors to a bank, the bank is a necessary party: *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248.

Bankers who have agreed to purchase notes when issued are not proper parties to a suit to restrain payment of dividends out of the proceeds. They would be, however, if the suit was to cancel their contract. *Holmes v. St. Joseph Lead Co.*, 84 N. Y. Misc. 278, 147 N. Y. Supp. 104, aff'd 163 N. Y. App. Div. 885, 147 N. Y. Supp. 1117.

Security holders must be joined if the securities are to be adjudged invalid. *Pollitz v. Wabash R. Co.*, 142 N. Y. App. Div. 755, 127 N. Y. Supp. 782.

On a bill to cancel patent licenses because gratuitous and thus wasteful, the licensees are necessary defendants. *Hayden v. Perfection Cooler Co.*, 217 Fed. 171.

In an action to enforce a restrictive trade agreement contained in an agreement for the purchase of stock, the nominal purchaser is not a necessary party, where the sale was fully executed and his functions ended. *Olson v. Ostby*, 178 Ill. App. 165.

⁷⁶ *Morshead v. Southern Pac. Co.*, 123 Fed. 350; *Fleming v. Black Warrior Copper Co., Amalgamated*, 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273; *Tipton v. Postal Clerks Inv.*

due consideration, it is proper to name as one of the defendants a person to whom the second corporation has transferred shares of stock of the first corporation so wrongfully obtained, such person having taken with knowledge of the facts;⁷⁷ and it has been ruled that all stockholders of a consolidated corporation are necessary parties to a suit to annul the consolidation brought by holders of stock in one of the constituent corporations.⁷⁸

If a corporation is in the hands of a receiver at the time of a stockholder's suit, the receiver, as he represents the corporation, is a necessary party.⁷⁹

New parties may be added in the usual mode.⁸⁰

Where suit is brought by minority stockholders against corporate officers for misappropriation of corporate funds, the bill will not be dismissed because certain third parties were equally guilty with the corporate officers, inasmuch as the officers must be held liable to respond for their own wrongdoing.⁸¹

§ 4083. Pleading and procedure—In general. The general rules of pleading are not proper matter in this connection, nor are those which are applicable alike to all actions by or against the corporation. This and the next three sections are therefore narrowed to such pleading as belongs specially to a stockholder's suit. Nevertheless, in view of the principle that every such suit must state a cause of action on which the corporation might sue, it is essential

Ass'n, — Tex. Civ. App. —, 173 S. W. 562.

⁷⁷ *Montgomery Traction Co. v. Harmon*, 140 Ala. 505, 37 So. 371.

⁷⁸ *Alabama Fidelity Mortgage & Bond Co. v. Dubberly*, — Ala. —, 73 So. 911.

⁷⁹ *Porter v. Sabin*, 149 U. S. 473, 37 L. Ed. 815; *Holton v. Wallace*, 77 Fed. 61, aff'g 66 Fed. 409. And see *Swope v. Villard*, 61 Fed. 417.

Foreign receiver. *Seagrist v. Reid*, 171 N. Y. App. Div. 755, 157 N. Y. Supp. 979.

Receiver, though discharged, has title to a cause of action to set aside a fraudulent foreclosure, and must be made a party so that corporate creditors may be represented. *Michel v. Betz*, 108 N. Y. App. Div. 241, 95 N. Y. Supp. 844.

Receivers of other corporations, leasing the property, are not proper parties unless they were connected with the lease complained of. *Moran v. Vreeland*, 81 N. Y. Misc. 664, 143 N. Y. Supp. 522

As to effect of receivership on right to sue, see § 4056, *supra*.

⁸⁰ A foreign federal receiver (appointed ancillary receiver within the state) should be made party on motion where he has possession of, though not title to, the corporate property with authority to intervene in actions and conserve its property and the action is one to recover from directors a sum belonging to the corporation. *Seagrist v. Reid*, 171 N. Y. App. Div. 755, 157 N. Y. Supp. 979.

⁸¹ *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680.

to observe carefully not only all the rules of pleading that apply to actions or defenses by corporations, but also all those that have to do with setting out the particular cause of action or defense or the facts involved therein.⁸²

The pleadings should be in the name of the party making them, for a stockholder, merely as such, has no authority, and is absolutely without the power to file a bill or answer in the name of or for the corporation so as to make it a party. He cannot do so even by leave of court, for a corporation cannot be made a party in such a way. The only remedy of the stockholder, so as to bring the corporation before the court, is by a bill in equity, or cross-bill, in his own behalf, or in behalf of himself and other stockholders, making the corporation a party defendant, as explained in the preceding sections.⁸³ The complaint should be on behalf of all similarly situated stockholders who wish to come in with plaintiff.⁸⁴

Distinct and multifarious matters,⁸⁵ such as derivative and individual causes of action⁸⁶ cannot be united in one count or com-

⁸² Consult standard works on that subject. As to rules applicable to actions by or against corporations generally, see Chap. 47, *supra*.

⁸³ *Bronson v. La Crosse & M. R. Co.*, 2 Wall. (U. S.) 283, 17 L. Ed. 725; *Hughes Manufacturing & Lumber Co. v. Culver*, — Ark. —, 189 S. W. 850; *Hannah v. Union Consol. Warehouse Co.*, 144 Ga. 291, 86 S. E. 1085; *Cornell v. Sims*, 111 Ga. 828, 36 S. E. 627.

⁸⁴ See § 4080, *supra*.

⁸⁵ *Burrows v. Interborough Metropolitan Co.*, 156 Fed. 389; *Robinson v. DeLuxe Motor Car Co. of New Jersey*, 170 Mich. 163, 135 N. W. 897.

⁸⁶ *Backus v. Brooks*, 195 Fed. 452, modifying decree 189 Fed. 922; *Brock v. Poor*, 216 N. Y. 387, 111 N. E. 229, rev'g 167 N. Y. App. Div. 784, 798, 800, 153 N. Y. Supp. 332; *Witherbee v. Bowles*, 142 N. Y. App. Div. 407, 126 N. Y. Supp. 954, rev'd 201 N. Y. 427, 95 N. E. 27, on ground that complaint did not so unite two causes; *Brown v. Utopia Land Co.*, 118 N. Y. App. Div. 364, 103 N. Y. Supp. 50; *Scharf v. Warren-Scharf Asphalt Pav.*

Co., 5 N. Y. App. Div. 439, 39 N. Y. Supp. 197; *Smith v. Oklahoma Supply Co.*, 46 Okla. 776, 149 Pac. 879.

A complaint will be regarded as wholly individual and not derivative, and therefore as good against demurrer, where it alleges a fraudulent increase of stock to deprive plaintiffs of control and seeks reinstatement of their control, and where most of the allegations are appropriate to that theory, though there are also allegations which would be appropriate in a derivative action for the corporation. *Witherbee v. Bowles*, 201 N. Y. 427, 95 N. E. 27, rev'g 142 N. Y. App. Div. 407, 126 N. Y. Supp. 954.

Action to enforce trust agreement with stockholders held individual and not derivative, allegations appropriate to latter form of action being regarded as surplusage. *Brock v. Poor*, 167 N. Y. App. Div. 798, 153 N. Y. Supp. 342.

Failure of the president to divide moneys as agreed among plaintiff and other stockholders presents a distinct cause of action from that for divert-

plaint, unless to avoid multiplicity,⁸⁷ or where one cause is merely a subsidiary of the other,⁸⁸ and if there are two or more causes of action, they should be separately pleaded as the procedural law requires.⁸⁹

ing moneys from the corporation. *McCrea v. McClenahan*, 114 N. Y. App. Div. 70, 99 N. Y. Supp. 689, aff'd 192 N. Y. 150, 84 N. E. 960.

In a derivative action to recover wasted assets, a cause of action for dissolution and receivership cannot be joined. *Nevins v. Brooklyn Citizen* (N. Y. Misc.), 157 N. Y. Supp. 96.

A statutory right of action in stockholders for dividends paid out of capital cannot be joined in a bill to recover from defendant directors secret profits. *Fleisher v. West Jersey Securities Co.*, 84 N. J. Eq. 55, 92 Atl. 575.

While an incidental cause may be added to such a bill, it is not proper to add an individual cause for deceit to plaintiff. *Price v. Union Land Co.*, 187 Fed. 886.

⁸⁷ Where the same relief may properly be granted under a bill to a minority stockholder and to the corporation, and the purpose of the suit by the minority stockholder is in his own behalf and in that of the corporation, and the two claims are based on the same facts, they may be united in one bill. In the case at bar the basis of the complaint was loss due to wrongful acts of the majority. The prayer was in the alternative to have one of the constituent corporations to a consolidation rehabilitated or for a lien upon the property of his constituent corporation and upon the consolidated corporation. Clearly, therefore, the grounds for sustaining both the claim in behalf of complainant individually and the corporation were based on the same facts and the relief sought was the same in each case. Since it is one of the functions of a court of equity to avoid a multiplicity

of suits, there would seem to be no reason why in such case a court of equity should compel the pleader to prove the same facts in two separate cases. *Jones v. Missouri-Edison Elec. Co.*, 144 Fed. 765.

⁸⁸ To a bill for restoration of property may be added an incidental cause for rescission of an exchange of the defrauded corporation's stock for bonds of the other, and for reinstatement as stockholders plaintiffs. Such is not multifarious. *Price v. Union Land Co.*, 187 Fed. 886.

A bill may seek recovery by the corporation against directors as subsidiary to the main purpose of adjusting the equities between plaintiff, a defrauded stockholder, and directors and for a personal decree against them after distribution on winding up. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

⁸⁹ Allegations of neglect by directors can be combined in the same complaint with allegations of a conspiracy to injure the corporation. *Fleitmann v. Werner*, 174 N. Y. App. Div. 781, 161 N. Y. Supp. 650.

Stating two reasons or grounds why an action is illegal (e. g., ultra vires and personal interest of directors) does not make two causes of action to set aside or restrain the acts alleged. *Pollitz v. Wabash R. Co.*, 142 N. Y. App. Div. 755, 127 N. Y. Supp. 782.

Failure to separate them indicates a purpose of pleading only one cause of action; and hence added allegations which are proper but might also be proper in statutory actions to remove officers, etc., will not stamp the complaint as one stating two causes. Addition of an ill-founded prayer does not alter this result. *Brahm v. M. C.*

It is not multifarious to allege the means whereby the thing complained of was done, though it involves several acts, some of them ordinarily wrongs in themselves.⁹⁰ Joined causes must affect all plaintiffs or some common right of all of them,⁹¹ and unconnected causes affecting different defendants cannot be joined.⁹² In an action

Gehl Co., 132 Wis. 674, 112 N. W. 1097.

⁹⁰ Allegations of a conspiracy to defraud when merely a means does not make an improper joinder with an action to recover sums abstracted and to enjoin further payments. *Simon v. Weaver*, 143 Wis. 330, 127 N. W. 950.

A cause of action is single which seeks to restore to the corporation and have sold for the stockholders diverse properties, all alleged to have been illegally acquired with corporate money and to be held by various defendants. *Venner v. Great Northern Ry. Co.*, 117 Minn. 447, 136 N. W. 271.

⁹¹ *Kickbusch v. Ruggles*, 105 S. C. 525, 90 S. E. 163.

⁹² Wrongful assignment of bonds to a director instead of returning them to his corporation is a distinct cause from alleged wrongful acquisition of other bonds by another director by means of purchase of notes carrying them as collateral. *O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y. 46, 76 N. E. 1082, rev'g 107 N. Y. App. Div. 630, 95 N. Y. Supp. 1149. The trial court, on a motion to state separately and number causes of action, deemed this same complaint to be bad because the cause of action was not one accruing to the corporation, and for that reason denied the motion. *O'Connor v. Virginia Passenger & Power Co.*, 45 N. Y. Misc. 228, 92 N. Y. Supp. 161.

Injury to the business of one company is a cause distinct from depreciation of the value of stock held by it in another company, a subsidiary, due to wrongs against that company. They cannot be united. *Fleitmann v.*

Werner, 174 N. Y. App. Div. 781, 161 N. Y. Supp. 650.

Diverse causes cannot be united by alleging that they were the outcome of a conspiracy. *Fleitmann v. Werner*, 174 N. Y. App. Div. 781, 161 N. Y. Supp. 650.

Addition of cause for treble damages under anti-trust act makes multifarious a bill which prays relief against unlawful transfer of all property. *Metcalf v. American School-Furniture Co.*, 108 Fed. 909.

Not multifarious in seeking to enjoin attorney general and railroad commission from promulgating and enforcing confiscatory rates under a statute, though their acts and functions are distinct, both however assuming to act under the same invalid statute. *Perkins v. Northern Pac. Ry. Co.*, 155 Fed. 445.

In suit by a testamentary trustee holding corporate stock to compel the corporate officers to account for misapplication of corporate funds, and to have them enjoined from performance of corporate duties and for their removal, prayer may not be made, also, that the president of a co-executor with the plaintiff account to the estate, inasmuch as the suit is based upon the relation between the defendants and the corporation. *Hirsch v. Jones*, 115 N. Y. App. Div. 156, 100 N. Y. Supp. 687.

A bill by a stockholder of a bank is not demurrable as stating two causes of action where it asks for an accounting on the part of the directors and the appointment of a receiver for a bank in process of liquidation under resolution of the

against directors brought by a stockholder, there is no improper joinder although part of the directors have been guilty of wrongful acts and another part of them merely guilty of failure to properly perform their duties.⁹³

The prayer should be framed to ask relief only such as the complaint warrants and only against parties before the court.⁹⁴

The usual practice as to amendments is followed, allowing them to supply or cure deficiencies⁹⁵ if seasonably asked for.⁹⁶

New parties may be added by amendment conformable to the practice and the rules of court.⁹⁷

§ 4084. — Alleging cause of action and plaintiff's right as stockholder. "It is quite plain that the complaint in such an action should set forth but two things: First, the cause of action in favor of the corporation, which should be stated in exactly the same manner and with the same detail of facts as would be proper in case the corporation itself had brought the action; second, the facts which entitle the plaintiff to maintain the action in place of the corporation,

stockholders. *Matthews v. Bank of Allendale*, 60 S. C. 183, 38 S. E. 437.

A bill to annul acceptance of a new franchise and an ordinance granting it is multifarious if relief is sought on distinct grounds with which a defendant city is not connected. *Venner v. Chicago City Ry. Co.*, 236 Ill. 349, 86 N. E. 266.

⁹³ *Young v. Equitable Life Assur. Society*, 49 N. Y. Misc. 347, 99 N. Y. Supp. 446.

⁹⁴ Portion of prayer asking relief against persons not made parties may be regarded as surplusage on demurrer to complaint. *O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y. 46, 76 N. E. 1082, rev'g 107 N. Y. App. Div. 630, 95 N. Y. Supp. 1149.

As to what relief may be had, see § 4090 et seq., *infra*.

⁹⁵ Amendments must not change the character and object of the original suit or the asserted liability from some to part of defendants. *Whitaker v. Whitaker Iron Co.*, 238 Fed. 980.

Amendment to supply formal allegations of demand and refusal or equivalent, will ordinarily be allowed

rather than to dismiss on demurrer. *Clark v. Marks*, 111 Me. 218, 88 Atl. 718.

Amendment to offer restitution held properly allowed in discretion. *Anderson v. Scandia Min. Syndicate*, 26 S. D. 558, 128 N. W. 1016.

Amendment should be allowed to eliminate a multifarious cause. *Backus v. Brooks*, 195 Fed. 452, modifying 189 Fed. 922.

⁹⁶ Second amendment to implead a defendant denied because of delay. *North v. Union Savings & Loan Ass'n*, 59 Ore. 483, 117 Pac. 822.

⁹⁷ Under New Equity Rule 19, which leaves it to discretion of court, an amendment adding a party was allowed, notwithstanding his interest might have been known when the bill was filed. *Whitaker v. Whitaker Iron Co.*, 238 Fed. 980.

Under a code provision empowering necessary parties to be brought in, the corporation may be so joined if omitted. *Kickbusch v. Ruggles*, 105 S. C. 525, 90 S. E. 163. A director may be added as new party though not apparently within the district or subject

that he is a stockholder therein, and that the corporation itself has either refused or unreasonably failed to bring the action. Ordinarily no other allegations are necessary or material."⁹⁸ These should be averred definitely and with certainty and particularity and not as conclusions or inferences,⁹⁹ though great particularity is not re-

to service, if before appearance day he may be found within it. *Whitaker v. Whitaker Iron Co.*, 238 Fed. 980.

⁹⁸ *Kavanaugh v. Commonwealth Trust Co.*, 181 N. Y. 121, 73 N. E. 562, aff'g 99 N. Y. App. Div. 620, 91 N. Y. Supp. 1099. To the same effect see *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138, aff'g 150 N. Y. App. Div. 298, 134 N. Y. Supp. 635, 75 N. Y. Misc. 234, 133 N. Y. Supp. 560; *O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y. 46, 76 N. E. 1082, rev'g 107 N. Y. App. Div. 630, 95 N. Y. Supp. 1149; *Fleitmenn v. Werner*, 174 N. Y. App. Div. 781, 161 N. Y. Supp. 650; *Clubb v. Cook*, 161 N. Y. App. Div. 775, 147 N. Y. Supp. 94; *Weingreen v. Michelsbacher*, 139 N. Y. App. Div. 931, 124 N. Y. Supp. 41; *Kolb v. Mortimer*, 135 N. Y. App. Div. 542, 120 N. Y. Supp. 543; *Cummings v. Brown*, 122 N. Y. App. Div. 505, 107 N. Y. Supp. 498.

Complaint based on breach of agreement to form corporation and employ plaintiff as officer with agreed share of profits, held bad. *Abbott v. Harbeson Textile Co.*, 162 N. Y. App. Div. 405, 147 N. Y. Supp. 1031.

Allegation that a contract is contrary to terms of an earlier agreement of settlement made by directors pursuant to recommendations of a committee of stockholders does not show an ultra vires act, but a breach of contract. *Holmes v. St. Joseph Lead Co.*, 84 N. Y. Misc. 278, 147 N. Y. Supp. 104, aff'd 163 N. Y. App. Div. 885, 147 N. Y. Supp. 1117.

An allegation that an outstanding

loan agreement will be violated by issuing new notes is demurrable where the contract as set out does not restrain the making of the proposed notes or conflict therewith, and where the injury, if any, is conjectural. *Holmes v. St. Joseph Lead Co.*, 84 N. Y. Misc. 278, 147 N. Y. Supp. 104, aff'd 163 N. Y. App. Div. 885, 147 N. Y. Supp. 1117.

Allegations of refusal of directors to enforce a lease against defaulting lessees, whereby a mortgage on the property came to be foreclosed, and refusal of the lessor corporation's directors to sue, set up a cause of action. *Moran v. Vreeland*, 81 N. Y. Misc. 664, 143 N. Y. Supp. 522.

Complaint held sufficient to state cause of action for fraudulent diversion of assets and avoidance of liability on subscriptions. *Smith v. Oro Grande Mines Co.*, 161 N. Y. App. Div. 914, 145 N. Y. Supp. 768.

Allegation of fraud, misappropriation or wrongdoing by individual defendants is essential; failure to keep accounts such as plaintiff approves is not enough. *Clubb v. Cook*, 161 N. Y. App. Div. 775, 147 N. Y. Supp. 94.

Complaint held sufficient to allege that defendant promoter's contract was for its benefit, was adopted by it when formed and that it refused to sue for enforcement. *Cummings v. Brown*, 122 N. Y. App. Div. 505, 107 N. Y. Supp. 498.

Must allege the wrong to the corporation and its refusal to sue. *Caffall v. Bandera Tel. Co.*, — Tex. Civ. App. —, 136 S. W. 105.

⁹⁹ A recital in a complaint that the affairs of the corporation have been

quired as to details in the possession or knowledge of the adverse party.¹ In a removed suit the bill must satisfy the federal rules and practice.²

General or inferential charges of fraud and conspiracy,³ or ultra

arbitrarily and wrongfully manipulated by the defendant, and that he has denied and disputed a right to certain stock in plaintiff, constitute conclusions of law rather than statements of fact. *Petty v. Emery*, 96 N. Y. App. Div. 35, 88 N. Y. Supp. 823.

The fact of the transfer complained of and the control exerted should be definitely stated and not left to inference. *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

Greater definiteness will not be required to compel the pleading of an additional ground of liability to one already stated, nor to subserve what a bill of particulars will do, nor at the instance of defendant who is not ignorant, merely to import matter for a demurrer into the complaint. *Meredith v. Art Metal Const. Co.*, 97 N. Y. Misc. 69, 161 N. Y. Supp. 1.

In exceptional cases "further and better particulars" may be required under New Equity Rule 20, to the end that it may appear therefrom that the bill is vexatious and that it should be dismissed. *Whitaker v. Whitaker Iron Co.*, 238 Fed. 980.

¹ It is unnecessary that minority stockholders suing to set aside a contract made by the majority stockholders alleged to be in fraud of the corporation set out the contract in *haec verba*. Especially is this true where the contract is in the possession of a majority and its exact wording is unknown to the minority. *Mumford v. Ecuador Development Co.*, 111 Fed. 639.

² *Hitchings v. Cobalt Central Mines Co.*, 189 Fed. 241; *Venner v. Great Northern Ry. Co.*, 153 Fed. 408.

³ "Fraud" and "conspiracy" as

mere epithets do not suffice. *Burns v. National Mining, Tunnel & Land Co.*, 23 Colo. App. 545, 130 Pac. 1037; *Brandt v. McIntosh*, 47 Mont. 70, 130 Pac. 413; *North v. Union Savings & Loan Ass'n*, 59 Ore. 483, 117 Pac. 822.

Fraud or wrong between allied corporations must be alleged by facts and not by epithets or as a conclusion. Common control is not enough. *Smith v. Chase & Baker Piano Mfg. Co.*, 197 Fed. 466.

Fraud in selling property of a losing corporation must be alleged. *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

Unless facts of fraud are well pleaded, a bill merely alleging a fraudulent scheme to reduce capital stock and issue bonds for it, so that one stockholder would be put in a position of control, is bad. *Allen v. Francisco Sugar Co.*, 193 Fed. 825.

Not enough to allege that by "conspiracy" all the stock was issued in payment for oil leases, such an issue being lawful if fair. *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

Allegation that controlling corporation "conspired," etc., is insufficient if the facts alleged show nothing unlawful or fraudulent. *McGinnis v. Amalgamated Copper Co.*, 45 N. Y. Misc. 106, 91 N. Y. Supp. 591.

Facts of mismanagement for personal gain must be set out. *Brandt v. McIntosh*, 47 Mont. 70, 130 Pac. 413.

Allegation that contract "was made in bad faith," if a conclusion of law, is good when coupled with averments of reasons for making it which bespeak fraud. *Dana v. Morgan*, 219 Fed. 313.

It is insufficient in a bill by a stockholder to set aside a transfer of stock

vires or illegality,⁴ or of issue of illegal stock,⁵ or payment of illegal dividends,⁶ or of wrongful refusal to sue⁷ will not suffice. Allegations of nonfeasance or omission should aver that ability or opportunity existed to do the omitted act.⁸ Waste or misuse of funds should be alleged without leaving it to inference that the loss or

in exchange for property to allege that the property was not in fact equal in value to the par value of the stock. It is essential that there be allegations setting out that the directors knew of such difference in value at the time, or other matter indicating that the exchange was in some manner tainted with fraud. The fact that subsequent conditions have shown the disparity in value will not be considered by the court. *Kimbell v. Chicago Hydraulic Press Brick Co.*, 119 Fed. 102.

An allegation that complainant's stock was sold and bought in by the wrongdoing defendants under execution sale at an inadequate price and with intent to deprive him of his standing as a stockholder does not show fraud, and a general charge that it was fraud does not help it. *Empire Realty Co. v. Harton*, 176 Ala. 99, 57 So. 763.

Where the issue of bonds at a discount is legal, if fair, it must be alleged that the defendant who got them bore such a relation to the corporation that it was wrong to gain an advantage. *MacQuoid v. Queens Estates*, 143 N. Y. App. Div. 134, 127 N. Y. Supp. 867.

⁴Allegations in a suit by a stockholder for corporate mismanagement, which aver that the authorized business of the company is the buying, refining and selling of sugar, but that the corporate funds are being diverted to the purchase, roasting and sale of coffee, does not sufficiently show the course of action complained of to be ultra vires. Such averment is but a conclusion of the complainant. Proper

pleading requires the setting out of that portion of the corporate articles which state its corporate purposes. *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912.

A lease which by statute is void until authorized by a majority of the stockholders cannot be regarded as being voidable until the majority formally repudiates it and, therefore, as requiring an allegation that they have done so. *Elder v. Western Min. Co.*, 237 Fed. 966.

⁵A complaint alleging illegal issuance of a membership certificate in a co-operative business association to minors should show that minority continued at time of filing suit. *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530.

⁶Knowledge should be alleged where payment of dividends while insolvent is charged. *North v. Union Savings & Loan Ass'n*, 59 Ore. 483, 117 Pac. 822.

In an action for conspiracy to impair value of stock by declaring a "scrip dividend" of 340 per cent bearing interest, it must be alleged that there were not sufficient profits then undivided. *Bankers' Trust Co. v. R. E. Dietz Co.*, 157 N. Y. App. Div. 594, 142 N. Y. Supp. 847.

⁷It should be alleged why the refusal of the board to sue was wrong. Particularity is requisite. The inference that refusal was on grounds of discretion or policy should be overcome. *Poor v. Iowa Cent. Ry. Co.*, 155 Fed. 226.

⁸Allegation of purchase under foreclosure pursuant to a scheme to acquire the corporate property and that

misapplication will occur⁹ or that there was waste or improvidence.¹⁰ It need not be alleged that the wrongdoing complained of had the effect of making the corporation insolvent.¹¹ The relationship of defendants to the corporation and the wrong must be alleged.¹² The complaint need not offer equity, if none appears to be due.¹³ If rescis-

it suffered default in the suit to foreclose, with no allegation that it had funds with which to pay, is deficient. *Michel v. Betz*, 108 N. Y. App. Div. 241, 95 N. Y. Supp. 844.

⁹ An allegation of waste in selling chattel mortgaged property too cheap should also aver that the debtor is insolvent. *Moss v. Goodhart*, 47 Mont. 257, 131 Pac. 1071.

Allegation that directors are proposing to borrow money on notes at 90 per cent in order to pay dividends is not equivalent to pleading a purpose of paying illegal dividends when no surplus exists. *Holmes v. St. Joseph Lead Co.*, 84 N. Y. Misc. 278, 147 N. Y. Supp. 104, aff'd 163 N. Y. App. Div. 885, 147 N. Y. Supp. 1117.

An amendment which alleges a threat and intent to pay dividends based on a pretended but unreal surplus does not save such complaint, where the issue of notes is ostensibly to provide money for the corporation. Issuing the notes is not equivalent to declaring dividends out of the proceeds when received. *Holmes v. St. Joseph Lead Co.*, 84 N. Y. Misc. 278, 147 N. Y. Supp. 104, aff'd 163 N. Y. App. Div. 885, 147 N. Y. Supp. 1117.

It need not appear by the complaint that anything will remain to plaintiff, the corporation being in a receiver's hands, where there is an allegation of the fraudulent diversion of property worth more than all the indebtedness. *Reed v. Hollingsworth*, 157 Iowa 94, 135 N. W. 37.

¹⁰ A bill to impeach and rescind an agreement by which a large street railway corporation financed its floating debt when it was apparently insolvent should show that financial

conditions and the like made it an improvident or wasteful policy. *Johnson v. United Rys. Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63.

A description of the value of the property as in the present tense does not show that a previous sale for much less was below value then. *North v. Union Savings & Loan Ass'n*, 59 Ore. 483, 117 Pac. 822.

An allegation of the value of a mortgage rather than its face amount is necessary to a charge that it was wrongfully taken without giving an equivalent. *North v. Union Savings & Loan Ass'n*, 59 Ore. 483, 117 Pac. 822.

¹¹ It is not material that the corporation remains solvent after the acts complained of. The breach of trust by defendant directors is the gist of the action. *Kleinschmidt v. American Min. Co.*, 49 Mont. 7, 139 Pac. 785.

¹² It must be alleged that defendants charged with mismanagement were directors with power to do the wrong. *Brown v. Utopia Land Co.*, 118 N. Y. App. Div. 364, 103 N. Y. Supp. 50.

Allegation that defendants "are directors" and in the portion of the complaint next referring to them that "said officers and directors" did the wrongs complained of, shows that defendants were directors at that time. *North v. Union Savings & Loan Ass'n*, 59 Ore. 483, 117 Pac. 822.

¹³ Such an offer in the complaint is not necessary if it does not appear that defendant ever paid anything or did anything under the contract to be rescinded. It may be required on hearing. *Franklin v. Havalena Min. Co.*, 16 Ariz. 200, 141 Pac. 727.

sion is sought, the possibility of restoring the status quo must appear.¹⁴ Wherever a foreign law is necessary to sustain the charge of wrongdoing and make out the cause of action it must be pleaded.¹⁵

Even where averments of a negative character are necessarily involved thereby, the facts should be affirmatively pleaded. Thus, such bill should contain averment that there has been no acquiescence in the wrongdoing either by the stockholder instituting the suit or by those who have preceded him in interest;¹⁶ and the presumption of legal and regular procedure by the corporation must be overcome;¹⁷ but defenses like estoppel, assent, laches and the like need not be anticipated and negated by complainant.¹⁸ It should appear to be a derivative suit and not an individual one.¹⁹

¹⁴ Where a financial readjustment is accomplished by the agreement complained of, there should be allegations showing that the restoration of the status quo is possible, in order to sustain relief by rescission. *Johnson v. United Rys. Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63.

¹⁵ A contract assailed as ultra vires and illegal must appear to be so under the law, and if it be a law of another state, it must be pleaded. *Vener v. New York Cent. & H. River R. Co.*, 160 N. Y. App. Div. 127, 145 N. Y. Supp. 725, aff'g 81 N. Y. Misc. 298, 143 N. Y. Supp. 211.

Allegation that foreign corporation has been dissolved and "has no legal existence at the present time" is a conclusion of law, it being presumed that foreign law is like that of the forum whereby the existence continues for the purpose of prosecuting actions, etc. *Elmergreen v. Weimer*, 138 Wis. 112, 119 N. W. 836.

¹⁶ *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340, 48 Afl. 912.

Where the facts alleged in a bill by a stockholder in an action to set aside an agreement of the corporation alleged to have been fraudulent indicated facts which should have put the stockholder on inquiry, the defense of laches was not avoided, where there

had been a delay of eight years after the agreement had been entered into, by a mere general allegation that the stockholder, until a few weeks prior to the commencement of the action, was uninformed as to the matters pleaded. *Edwards v. Mercantile Trust Co.*, 124 Fed. 381.

Allegation that certain shares did not consent to a tripartite agreement and that plaintiff's predecessors did not, is insufficient where, with other allegations, the inference is that they were at the meeting but were silent, no protest being alleged. *Johnson v. United Rys. Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63.

Mere delay apparent on the bill need not be explained, but only such as imports laches. *Wills v. Nehalem Coal Co.*, 52 Ore. 70, 96 Pac. 528.

¹⁷ It is presumed that a stockholders' meeting was legally called unless the contrary is alleged. *Johnson v. United Rys. Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63.

¹⁸ *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138, aff'g 150 N. Y. App. Div. 298, 134 N. Y. Supp. 635, 75 N. Y. Misc. 234, 133 N. Y. Supp. 560; *Pollitz v. Gould*, 202 N. Y. 11, 94 N. E. 1088.

¹⁹ If the allegations substantially state a cause accruing to the corpora-

If two or more corporations appear to have suffered injury, the pleading should show for which the suit is brought.²⁰ A holding corporation or a principal corporation is, for the purpose of such a suit, distinct from the constituent or subsidiary corporation, and the complaint must be framed to state a cause of action accruing to that corporation which was injured.²¹ Pleading a wrong by directors or officers of a subsidiary corporation in an action against those of the controlling corporation is insufficient.²²

The cause of action must be stated against all of the individuals who are made defendants, or else an improper joinder of defendants will appear on the face of the complaint.²³ Thus, a complaint in an action by a stockholder against officers and directors for fraud on the corporation may be demurrable as to a particular defendant director, where, although such defendant be a director at the time the suit is brought, it does not appear from the complaint that the defendant was a director at the time of the bringing of the suit or that he had any connection with the fraud set forth in the complaint and the fraud complained of had been consummated long prior to his election as a director.²⁴

tion, it suffices, though the pleader characterizes it as one to himself. *De Neufville v. New York & N. R. Co.*, 81 Fed. 10.

²⁰ Should ascribe cause to that corporation for which suit is brought, if more than one corporation is involved. *Meredith v. Art Metal Const. Co.*, 97 N. Y. Misc. 69, 161 N. Y. Supp. 1.

²¹ Demurrer sustained where stockholders of holding corporation sued for secret profits made by promoters out of purchase and sale of the constituent corporations. *Blum v. Whitney*, 185 N. Y. 232, 77 N. E. 1159, aff'd 111 N. Y. App. Div. 922, 96 N. Y. Supp. 1114.

²² If the alleged wrong was by directors of a subsidiary company, a complaint against directors of a controlling company is bad where it does not show that they had part in it or were neglectful in exerting control. *Holmes v. St. Joseph Lead Co.*, 168 N. Y. App. Div. 688, 154 N. Y. Supp. 513, aff'd 217 N. Y. 619, 111 N. E. 1088.

²³ Directors of other lessee corporations cannot be impleaded without allegations of wrongdoing on their part or the receipt of the property of the particular corporation; and their duty to their own corporations is not a promise for the lessor's benefit, so that on that ground joinder is proper. *Moran v. Vreeland*, 81 N. Y. Misc. 664, 143 N. Y. Supp. 522.

The purchaser of stock which defendants have sold at a secret profit to themselves is not a proper defendant on a bare allegation that it had "knowledge of and responsibility for" the sale. *McManus v. Durant*, 151 N. Y. App. Div. 663, 136 N. Y. Supp. 223.

The bill must state a cause of action against impleaded third persons. *Beckett v. Planters' Compress & Bonded Warehouse Co.*, 107 Miss. 305, 65 So. 275.

²⁴ *Mulheran v. Gebhardt*, 93 N. Y. App. Div. 98, 86 N. Y. Supp. 941.

The plaintiff's character as stockholder must be alleged,²⁵ and that he sustained that character when he demanded that suit be brought,²⁶ or that by operation of law shares have come to him from one who did,²⁷ that plaintiff, a subsequent purchaser, has a substantial interest,²⁸ and in some jurisdictions, especially the federal, also the essential fact that he was such before the grievance arose of which he complains.²⁹ A complaint by a stockholder for wrongs to the corporation is defective where it shows that the plaintiff no longer holds stock.³⁰ It is not material nor relevant what depreciation befell plaintiff's stock, or by what details or methods he became a stock-

²⁵ *Fry v. Rush*, 63 Kan. 429, 65 Pac. 701.

A liquidator holding legal title to stock by virtue of his office must allege that he is owner or holder of it. *Clarkson v. Walpole Rubber Co.*, 156 N. Y. App. Div. 869, 142 N. Y. Supp. 502.

In the case of a dissolved corporation, it must be alleged that plaintiff was a stockholder when suit was begun. An allegation that he was one at the time of dissolution leaves open the inference that he has since ceased to be. *Elmergreen v. Weimer*, 138 Wis. 112, 119 N. W. 836.

Allegation of intent to defraud "plaintiff and other stockholders" implies that plaintiff was stockholder, and is good unless assailed by uncertainty. *North v. Union Savings & Loan Ass'n*, 59 Ore. 483, 117 Pac. 822.

Alleging that paid up shares were "issued" to plaintiff does not suffice, where the inference also appears that he gave nothing for them. *Proctor v. Piedmont Portland Cement & Lime Co.*, 134 Ga. 391, 67 S. E. 942.

Alleging that plaintiff is a member of the board of directors does not show that he is a stockholder, where the statute or by-law does not require directors to be stockholders. *Wright v. Floyd*, 43 Ind. App. 546, 86 N. E. 971.

²⁶ Should sufficiently aver that

plaintiff was stockholder when demand to sue was made and refused. *Holmes v. Camp*, — N. Y. App. Div. —, 162 N. Y. Supp. 1014. See also § 4058 et seq., *supra*.

²⁷ Must show that he was then stockholder or that the shares since devolved on him by operation of law. *Bimber v. Calivada Colonization Co.*, 110 Fed. 58.

²⁸ In the absence of allegations of a substantial market value of shares purchased after the wrong complained of, it may, on demurrer, be taken that the value was small and plaintiff's interest speculative. *Johnson v. United Rys. Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63.

Where corporation is insolvent it must appear that plaintiff will have an expectant distributive share after creditors are satisfied. *Williams v. Neville*, 98 Miss. 268, 53 So. 594.

²⁹ Allegations held sufficient. *Tevis v. Hammersmith*, 31 Ind. App. 281, 66 N. E. 912, *aff'd* 161 Ind. 74, 67 N. E. 672. Denying rehearing of 31 Ind. App. 281, 66 N. E. 79.

As to federal rule, see § 4069, *supra*, and cases thereunder. Pleading compliance with federal rules, see § 4086, *infra*.

³⁰ *Dudley v. Armenia Ins. Co.*, 115 N. Y. App. Div. 380, 100 N. Y. Supp. 818.

holder,³¹ as a statement relative to the method of acquisition would be simply evidentiary.³²

Under New Federal Equity Rule 25 the names and residences of others for whom plaintiff sues must be set out.³³

§ 4085. — Allegations as to demand and refusal of corporation to sue. The right of a stockholder to sue in equity to prevent or redress injuries to the corporation, as shown in the preceding sections, is not unlimited, but depends upon his inability to obtain relief through the corporation or its officers. The right to sue is primarily in the corporation; and in order that a stockholder may sue in his own name, he must show in his bill or complaint that he has made every reasonable effort, in good faith, to obtain relief within and through the corporation by requesting the directors or other officers to sue or take other proper steps, and, on their refusal to do so, by applying to the stockholders; or else he must show that such a request and application would be useless because the directors and majority of the stockholders are themselves guilty of the wrongs complained of, or because the directors refuse to act, or are guilty of the wrongs, and there is no time or power to call a meeting of the stockholders, or because the majority of the stockholders are parties to or approve the wrongs, etc. Without such a showing as this,³⁴ a bill or complaint by a stock-

³¹ It is irrelevant what plaintiff paid for his stock or whether it has depreciated because of the acts complained of. *Kavanaugh v. Commonwealth Trust Co.*, 181 N. Y. 121, 73 N. E. 562, aff'g 99 N. Y. App. Div. 620, 91 N. Y. Supp. 1099; *Kolb v. Mortimer*, 135 N. Y. App. Div. 542, 120 N. Y. Supp. 543.

In action for accounting to redress payment of excessive and illegal salaries, voluminous allegations as to purchases by the corporation, purchases of stock by defendants to obtain control, the devolution of the estates of parents of the parties, etc., were stricken as irrelevant. *Welcke v. Trageser*, 131 N. Y. App. Div. 731, 116 N. Y. Supp. 166.

Allegations of fraud inducing plaintiff to purchase stock are irrelevant in an action for waste and misappro-

priation. *Sedgwick v. Seward Development Co.*, 144 N. Y. App. Div. 455, 129 N. Y. Supp. 209.

³² *Gowdy Gas Well, Oil & Mineral Water Co. v. Patterson*, 29 Ind. App. 261, 64 N. E. 485.

³³ *Whitaker v. Whitaker Iron Co.*, 238 Fed. 980.

³⁴ *United States. Stewart v. Washington Steamship Co.*, 187 U. S. 466, 47 L. Ed. 261; *Dimpfel v. Ohio & M. R. Co.*, 110 U. S. 209, 28 L. Ed. 121; *Detroit v. Dean*, 106 U. S. 537, 27 L. Ed. 300; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Brinckerhoff v. Roosevelt*, 131 Fed. 955; *Universal Savings & Trust Co. v. Stoneburner*, 113 Fed. 251; *Savings & Trust Co. of Cleveland, Ohio v. Bear Valley Irr. Co.*, 112 Fed. 693; *McGeorge v. Big Stone Gap Improvement Co.*, 57

holder, where the injury is to the corporation, is demurrable. Such

Fed. 262; *Putnam v. Ruch*, 56 Fed. 416, 54 Fed. 216; *Allen v. Wilson*, 28 Fed. 677; *Foot v. Cunard Min. Co.* 17 Fed. 46; *Bill v. Western U. Tel. Co.*, 16 Fed. 14; *Taylor v. Holmes*, 14 Fed. 498; *Daunmeyer v. Coleman*, 11 Fed. 97.

Alabama. *Crow v. Florence Ice & Coal Co.*, 143 Ala. 541, 39 So. 401; *Montgomery Traction Co. v. Harmon*, 140 Ala. 505, 37 So. 371; *Johns v. McLester*, 137 Ala. 283, 97 Am. St. Rep. 27, 34 So. 174; *Louisville & N. R. Co. v. Neal*, 128 Ala. 149, 29 So. 865; *Johnson v. National Building & Loan Ass'n*, 125 Ala. 465, 82 Am. St. Rep. 257, 28 So. 2; *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 59 Am. St. Rep. 140, 21 So. 315; *Bell v. Montgomery Light Co.*, 103 Ala. 275, 15 So. 569; *Mack v. De Bardeleben Coal & Iron Co.*, 90 Ala. 396, 9 L. R. A. 650, 8 So. 150; *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L. R. A. 605, 16 Am. St. Rep. 81, 7 So. 108; *Merchants' & Planters' Line v. Waganer*, 71 Ala. 581.

California. *Waymire v. San Francisco & S. M. Ry. Co.*, 112 Cal. 646, 44 Pac. 1086; *Woodroof v. Howes*, 88 Cal. 184, 26 Pac. 111; *Ashton v. Dashaway Ass'n*, 84 Cal. 61, 7 L. R. A. 809, 23 Pac. 1091, 22 Pac. 660; *Moyle v. Landers' Adm'r*, 83 Cal. 579, 23 Pac. 798; *Bacon v. Irvine*, 70 Cal. 221, 11 Pac. 646; *Cogswell v. Bull*, 39 Cal. 320.

Colorado. *Morgan v. King*, 27 Colo. 539, 63 Pac. 416; *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46; *Ide v. Bascomb*, 18 Colo. App. 415, 72 Pac. 62; *Smith v. Buckley*, 18 Colo. App. 227, 70 Pac. 958.

Georgia. *Steele Lumber Co. v. Laurens Lumber Co.*, 98 Ga. 329, 24 S. E. 755; *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630; *Henry v. Elder*, 63 Ga. 347; *Ware v. Bazemore*, 58 Ga. 316.

Iowa. *Schoening v. Schwenk*, 112

Iowa 733, 84 N. W. 916; *Dillon v. Lee*, 110 *Iowa* 156, 81 N. W. 245.

Kansas. *Fry v. Rush*, 63 Kan. 429, 65 Pac. 701; *Home Min. Co. v. McKibben*, 60 Kan. 387, 56 Pac. 756; *Atchison, T. & S. F. R. Co. v. Board Com'rs Sumner County*, 51 Kan. 617, 33 Pac. 312.

Kentucky. *Gilman v. German Lithographic Stone Co.*, 152 Ky. 606, 153 S. W. 996; *Shawhan v. Zinn*, 79 Ky. 300.

Maine. *Clark v. Marks*, 111 Me. 218, 88 Atl. 718; *Ulmer v. Maine Real-Estate Co.*, 93 Me. 324, 45 Atl. 40; *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 54 Me. 173; *Smith v. Poor*, 40 Me. 415, 63 Am. Dec. 672; *Hersey v. Veazie*, 24 Me. 9, 41 Am. Dec. 364.

Maryland. *Booth v. Robinson*, 55 Md. 419.

Massachusetts. *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680; *Doherty v. Mercantile Trust Co.*, 184 Mass. 590, 69 N. E. 335; *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97, 44 N. E. 112; *Dunphy v. Traveller Newspaper Ass'n*, 146 Mass. 495, 16 N. E. 426; *Brewer v. Boston Theatre*, 104 Mass. 378.

Michigan. *Talbot v. Scripps*, 31 Mich. 268.

Minnesota. *Hodgson v. Duluth, H. & D. R. Co.*, 46 Minn. 454, 49 N. W. 197; *Morrill v. Little Falls Mfg. Co.*, 46 Minn. 260, 48 N. W. 1124; *Mealey v. Nickerson*, 44 Minn. 430, 46 N. W. 911.

Missouri. *Vogeler v. Punch*, 205 Mo. 558, 103 S. W. 1001; *Loomis v. Missouri Pac. R. Co.*, 165 Mo. 469, 65 S. W. 962; *Butler v. Hydro-Pneumatic Sprinkler & Manufacturing Co.*, — Mo. App. —, 190 S. W. 921.

Montana. *Moss v. Goodhart*, 47 Mont. 257, 131 Pac. 1071; *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

allegations are required in suit for a religious as well as for a secular

New Jersey. Appleton v. American Malting Co., 65 N. J. Eq. 375, 54 Atl. 454; Siegman v. Maloney, 65 N. J. Eq. 372, 54 Atl. 405; Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250.

New York. Barr v. New York, L. E. & W. R. Co., 125 N. Y. 263, 26 N. E. 145; Greaves v. Gouge, 69 N. Y. 154; Weber v. Wallerstein, 111 App. Div. 693, 97 N. Y. Supp. 846; Polhemus v. Polhemus, 108 App. Div. 353, 95 N. Y. Supp. 325; Loewenstein v. Diamond Soda Water Mfg. Co., 94 App. Div. 383, 88 N. Y. Supp. 313; Miller v. Barlow, 78 App. Div. 331, 79 N. Y. Supp. 964; Boaz v. Sterlingworth Ry. Supply Co., 68 App. Div. 1, 73 N. Y. Supp. 1039; Fitchett v. Murphy, 46 App. Div. 181, 61 N. Y. Supp. 182, rev'g 26 Misc. 544; Flynn v. Brooklyn City R. Co., 9 App. Div. 269, 41 N. Y. Supp. 566, 158 N. Y. 493, 53 N. E. 520; O'Connor v. Virginia Passenger & Power Co., 46 Misc. 530, 92 N. Y. Supp. 525; Browne v. Smith, 44 Misc. 575, 90 N. Y. Supp. 204; Corning v. Barrett, 22 Misc. 241, 48 N. Y. Supp. 1013; Vanderbilt v. Garrison, 3 Abb. Pr. 361; House v. Cooper, 30 Barb. 157, 16 How. Pr. 292; Forbes v. Whitlock, 3 Edw. Ch. 446; Robinson v. Smith, 3 Paige 222, 24 Am. Dec. 212.

North Carolina. Coble v. Beall, 130 N. C. 533, 41 S. E. 793; Moore v. Silver Valley Min. Co., 104 N. C. 534, 10 S. E. 679.

Oklahoma. Smith v. Oklahoma Supply Co., 46 Okla. 776, 149 Pac. 879; Starr v. Heald, 28 Okla. 792, 116 Pac. 188.

Pennsylvania. Law v. Fuller, 217 Pa. 439, 66 Atl. 754; McCloskey v. Snowden, 212 Pa. 249, 108 Am. St. Rep. 867, 61 Atl. 796; Wolf v. Pennsylvania R. Co., 195 Pa. St. 91, 45 Atl. 936; South-West Natural Gas Co. v. Fayette Fuel-Gas Co., 145 Pa. St. 13, 23 Atl. 224; Holton v. New Castle Ry.

Co., 138 Pa. St. 111, 20 Atl. 937.

Rhode Island. Hazard v. Durant, 11 R. I. 195.

South Carolina. Wenzel v. Palmetto Brewing Co., 48 S. C. 80, 26 S. E. 1; Latimer v. Richmond & D. R. Co., 39 S. C. 44, 17 S. E. 258.

South Dakota. Whitney v. Hazzard, 18 S. D. 490, 101 N. W. 346.

Tennessee. Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; Boyd v. Sims, 87 Tenn. 771, 11 S. W. 948; Black v. Huggins, 2 Tenn. Ch. 780; Deaderick v. Wilson, 8 Baxt. 108.

Texas. Cates v. Sparkman, 73 Tex. 619, 15 Am. St. Rep. 806, 11 S. W. 846.

Virginia. Virginia Passenger & Power Co. v. Fisher, 104 Va. 121, 51 S. E. 198; Mount v. Radford Trust Co., 93 Va. 427, 25 S. E. 244.

Washington. Elliott v. Puget Sound Wood Products Co., 52 Wash. 637, 101 Pac. 228.

West Virginia. Rathbone v. Parkersburg Gas Co., 31 W. Va. 798, 8 S. E. 570; Park v. Ulster & K. Petroleum Co., 25 W. Va. 108.

Wisconsin. Doud v. Wisconsin, P. & S. Ry. Co., 65 Wis. 108, 56 Am. Rep. 620, 25 N. W. 533.

England. Gray v. Lewis, 8 Ch. App. 1050; Foss v. Harbottle, 2 Hare 461; Russell v. Wakefield Waterworks Co., L. R. 20 Eq. 474; Mozley v. Alston, 1 Phil. Ch. 800.

Allegations with notice and demand set out held sufficient. Continental Securities Co. v. Belmont, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138.

It must state a good cause of action against the corporation defendant, joined for refusal to sue, that is, it must allege that it had a good cause of action against the other defendants and that it refused to sue thereon. Grant v. Greene, 126 N. Y.

corporation.³⁵ Further allegations are necessary to satisfy the federal practice in this regard,³⁶ but such rules do not afford a test for state suits.³⁷

The refusal necessarily shown by the pleadings of the stockholder will be either express or implied. If the stockholder attempt to set out express refusal, it may be shown by statements of the corporate officers or by the resolutions of the board of directors. If the stockholder rely upon implied refusal, he may set out the course of conduct of the corporation, omitting or neglecting to take the necessary steps to protect the corporate interests.³⁸ It must be alleged that a request was made on the full board or a ruling majority of the governing officers, for it cannot be presumed that officers, requested to act, had the power to do so unless they were such.³⁹ Ability to comply with the request must be specifically alleged if it depends on the existence of facts which are not presumed.⁴⁰

Although a request upon the directors or other governing body of a corporation by a stockholder for redress of grievances before he sues is not necessary when the corporate management is in the control of the guilty parties, or when such a request would be fruitless for any other reason, the bill or complaint must allege with par-

App. Div. 750, 111 N. Y. Supp. 386, rev'g 59 N. Y. Misc. 1, 111 N. Y. Supp. 1089.

³⁵ Horst v. Traudt, 43 Colo. 445, 96 Pac. 259.

³⁶ As to pleading compliance with federal equity rules, see § 4086, *infra*.

³⁷ The cases applying them should not be followed by state courts. Wills v. Nehalem Coal Co., 52 Ore. 70, 96 Pac. 528.

³⁸ Kavanaugh v. Commonwealth Trust Co., 45 N. Y. Misc. 295, 92 N. Y. Supp. 233. See also Bowne v. Smith, 44 N. Y. Misc. 575, 90 N. Y. Supp. 204.

The allegations must be tantamount to a refusal, and not merely to inaction following notice that an act was illegal. Flynn v. Brooklyn City R. Co., 9 N. Y. App. Div. 269, 41 N. Y. Supp. 566, *aff'd* 158 N. Y. 493, 53 N. E. 520.

³⁹ That several officers refused does not show that the corporation refused, where it does not appear how many

officers there were. Brandt v. McIntosh, 47 Mont. 70, 130 Pac. 413.

That a majority of directors refused to sue. Deveny v. Hart Coal Co., 63 W. Va. 650, 60 S. E. 789.

An allegation that one of the defendants guilty of the fraudulent or wrongful acts complained of is the president and treasurer of the corporation, and is, and for a long time has been, the owner or controller of a majority of the shares of stock, and by reason thereof has chosen the directors, etc., does not show sufficient excuse for failure of the complaining stockholder to apply to the directors to move in the interest of the corporation. Dunphy v. Traveller Newspaper Ass'n, 146 Mass. 495, 16 N. E. 426; Brewer v. Boston Theatre, 104 Mass. 378.

⁴⁰ If requested action required funds, existence of available funds must be alleged. Brandt v. McIntosh, 47 Mont. 70, 130 Pac. 413.

ticularity the facts which excuse such request.⁴¹ It is insufficient that his complaint merely allege that such demand would have been unavailing. It is not for the stockholder, but for the court, to decide the necessity for such demand.⁴² In order to show a control hostile to plaintiff's suit it is necessary to state the composition of the directorate,⁴³ or the majority holdings,⁴⁴ or that a wrong was done by them in the thing sued for.⁴⁵ General allegations that wrongdoers "dominate" the directors,⁴⁶ or elected them or caused their election,⁴⁷ or inferential allegations that some of them have common interests and are friendly

⁴¹ *Louisville & N. R. Co. v. Neal*, 128 Ala. 149, 29 So. 865; *Jasper Land Co. v. Wallis*, 123 Ala. 652, 26 So. 659; *Bell v. Montgomery Light Co.*, 103 Ala. 275, 15 So. 569; *Brewer v. Boston Theatre*, 104 Mass. 378; *Flynn v. Brooklyn City R. Co.*, 9 N. Y. App. Div. 269, 41 N. Y. Supp. 566, aff'd 158 N. Y. 493, 53 N. E. 520.

Allegation of demand on directors to sue and refusal by them is sufficient, especially where it also appears that the wrongdoer controlled them. *Kleinschmidt v. American Min. Co.*, 49 Mont. 7, 139 Pac. 785.

Allegations of a complete domination by the majority holder, defendant, and the suspension of business, sale of property to himself, and intention to defraud plaintiffs, suffice without express allegation that demand would have been useless. *Kickbusch v. Ruggles*, 105 S. C. 525, 90 S. E. 163.

⁴² *Montgomery Traction Co. v. Harmon*, 140 Ala. 505, 37 So. 371; *Northern Trust Co. v. Snyder*, 113 Wis. 516, 90 Am. St. Rep. 867, 89 N. W. 460.

⁴³ Not excused by fact that defendant president was controlling stockholder. It should appear who the directors were and how they stood. *Law v. Fuller*, 217 Pa. 439, 66 Atl. 754.

⁴⁴ One alleging himself to be a stockholder in the "Doe Run" company may sue for it without demand on it, where he also alleges that the

"St. Joseph" company holds 97 per cent of its stock and is interested adversely. *Holmes v. Camp*, — N. Y. App. Div. —, 162 N. Y. Supp. 1014.

In a suit to cancel stock issued for services it must be alleged either that the corporation refused to sue or that defendant holder of stock was in control. *Vogeler v. Punch*, 205 Mo. 558, 103 S. W. 1001, followed by *Butler v. Hydro-Pneumatic Sprinkler & Manufacturing Co.*, — Mo. App. —, 190 S. W. 921.

⁴⁵ It is not enough to allege that an "unconscionable" contract was made, where no wrongdoing is shown. *McCoy v. Gas Engine & Power Co.*, 135 N. Y. App. Div. 771, 119 N. Y. Supp. 864.

⁴⁶ It does not suffice to allege generally that defendants "dominate" present directors, where the wrong, if any, was done by former directors. The charge of collusion or control should be explicit. *O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y. 46, 76 N. E. 1082, rev'g 10 N. Y. App. Div. 630, 95 N. Y. Supp. 1149.

⁴⁷ Allegations that certain directors were elected "at the behest of and as the tool and instrument of" the other wrongdoing directors, do not show that they are united in hostility with the wrongdoers to plaintiff's suit, and do not excuse want of demand. *Herriek v. Dempster*, 73 N. J. Eq. 145, 75 Atl. 810, following *Siegmán v. Maloney*, 65 N. J. Eq. 372, 54 Atl. 405.

towards defendants⁴⁸ will not suffice; and it must appear that the hostile control continued to the time of the suit.⁴⁹

Resort to the stockholders need not be alleged in a state suit as distinguished from a federal suit, for the reason that they are not the governing body which has the power of direct control and management; but if the subject-matter of complaint is within the government and control of the stockholders, then a request to them and their refusal to sue should be alleged.⁵⁰ A further distinction is made that if fraud or ultra vires or waste is the gravamen of the stockholder's complaint, he need not allege a resort to stockholders even under the federal rule, but must do so if the acts complained of were of management or policy which by ratification of stockholders would be valid.⁵¹

§ 4086. — Allegations under 94th Equity Rule (New Equity Rule 27) in federal courts. The purpose of the rule⁵² is to prevent col-

⁴⁸ "The allegations of the bill must be certain and unmistakable in setting forth facts which show that it would have been useless to ask the directors or the corporation to act." *Bartlett v. New York, N. H. & H. R. Co.*, 226 Mass. 467, 115 N. E. 976, following earlier decision in same case 221 Mass. 530, 109 N. E. 452, wherein it was held insufficient to allege that ten defendants "are still directors of said corporation and influential in its councils" and that they and "other directors closely associated and affiliated in financial matters constitute a majority of the board of directors controlling the action and policy of the corporation," there being twenty-three directors and no positive allegation of corrupt confederation of a majority of them.

On a second demurrer after amendment the addition of general allegations of knowledge by directors in office when the bill was filed were held not sufficient to cure the bill, nor was an allegation of actions taken by a later board of different personnel, and allegation of later action by stockholders refusing to sue. *Bartlett v. New York, N. H. & H. R. Co.*, 226 Mass. 467, 115 N. E. 976.

Alleging removal of one of the managing officers and the friendliness of the other towards defendants does not show demand futile. *Osborne v. Morgan*, 171 Ill. App. 549.

⁴⁹ An allegation of domination and control up to the time of dissolution does not show its existence thereafter during the statutory continued existence of the corporation. *Elmergreen v. Weimer*, 138 Wis. 112, 119 N. W. 836.

⁵⁰ *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138, aff'g 150 N. Y. App. Div. 298, 134 N. Y. Supp. 635, 75 N. Y. Misc. 234, 133 N. Y. Supp. 560.

Complaint for injunction against sale of property must show that plaintiffs are minority and cannot control action. *Brandt v. McIntosh*, 47 Mont. 70, 130 Pac. 413.

⁵¹ *Continental Securities Co. v. Belmont*, 150 N. Y. App. Div. 298, 134 N. Y. Supp. 635, aff'd 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138.

⁵² New Equity Rule 27 (printed supra § 4069, and also in 198 Fed. xxv) is the same as former 94th Rule, adding only the words, "or the rea-

lusive suits by a stockholder to enforce corporate rights, and adds nothing to what was previously substantially required by rules of correct pleading.⁵³

Under this rule a bill is demurrable if it fails to allege that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share has since devolved upon him by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it would otherwise have no cognizance.⁵⁴ It is also demurrable if it fails to show with particularity, as required by the rule, efforts on the part of the plaintiff to secure action by the directors or trustees, or the shareholders, and the causes of his failure to obtain such action, so as to

sons for not making such effort" to procure the corporate authorities to act.

⁵³ *Groel v. United Elec. Co. of New Jersey*, 132 Fed. 252.

As explaining the federal rule, see *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Delaware & H. Co. v. Albany & S. R. Co.*, 213 U. S. 435, 53 L. Ed. 862. In the latter case it is shown that futile request to sue need not be pleaded.

⁵⁴ *Taylor v. Holmes*, 127 U. S. 489, 32 L. Ed. 179; *Dimpfel v. Ohio & M. R. Co.*, 110 U. S. 209, 28 L. Ed. 121; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Robinson v. West Virginia Loan Co.*, 90 Fed. 770; *United Elec. Securities Co. v. Louisiana Elec. Light Co.*, 68 Fed. 673; *Dannmeyer v. Coleman*, 11 Fed. 97.

Under approval of a majority of the stockholders, the directors had made a lease of the corporate property to a third party, such action having been taken at a meeting duly called for that purpose. A minority stockholder brought action against the corporation and said third party to have the lease canceled. The court stated that whether such minority stockholder was attacking the lease upon the ground of fraud on the part of the directors, or because it was beyond their powers, that the suit must be deemed

to be instituted in the right of the corporation. It was therefore necessary that the bill contain allegations showing the right of such minority stockholder to maintain the suit in a federal court within the provisions of Equity Rule 94. *Dickinson v. Consolidated Traction Co.*, 114 Fed. 232.

Though the allegations are not very direct, they suffice if the requirements of the rule be fairly met by allegations that there was no collusion and that there would be opposition to the suit. *Price v. Union Land Co.*, 187 Fed. 886.

Allegation in effect that plaintiff was a stockholder when the suit was begun comes short of the 94th Rule, since the act complained of must have preceded that. And it will not be assumed that he became a shareholder "by operation of law" merely on allegation that he was "registered." *Hitchings v. Cobalt Central Mines Co.*, 189 Fed. 241.

When the corporation is in a statutory receivership and compliance with Rule 27 is pleaded, the issue of possible collusion is out of the case. *Kelly v. Dolan*, 218 Fed. 966.

A full review of cases decided under the rule on sufficiency of the showing will be found in *Heinz v. National Bank of Commerce in St. Louis*, 237 Fed. 942, holding the complaint

show a right to sue,⁵⁵ or the reasons for not making such effort.⁵⁶ It is not necessary, however, that it shall show a request upon the directors or other shareholders to sue or take other action, if it shows that they are the parties guilty of the wrongs complained of, or that, for any other reason, such a request would have been useless; but it must particularly set forth the facts excusing failure to make such a request.⁵⁷

Within the provisions of this rule the jurisdiction of the federal court is not affected, nor is it deemed established that the suit is collusive by the fact that a stockholder, in bringing suit, is acting in concert with the corporation or other stockholders who are citizens of the same state as the corporation and who have paid part of the

insufficient because no effort to move stockholders was shown or any reason for not so resorting to them.

⁵⁵ *Walthen v. Jackson Oil & Refining Co.*, 235 U. S. 635, 59 L. Ed. 395; *Memphis City v. Dean*, 8 Wall. (U. S.) 64, 19 L. Ed. 326; *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. Ed. 401; *Hitchings v. Cobalt Central Mines Co.*, 189 Fed. 241; *Burrows v. Interborough Metropolitan Co.*, 156 Fed. 389; *Ball v. Rutland R. Co.*, 93 Fed. 513; *Edwards v. Bay State Gas Co.*, 91 Fed. 942; *Robinson v. West Virginia Loan Co.*, 90 Fed. 770; *Clarke v. Eastern Building & Loan Ass'n*, 89 Fed. 779; *Hutton v. Joseph Bancroft & Sons Co.*, 83 Fed. 17; *De Neufville v. New York & N. Ry. Co.*, 81 Fed. 10; *Church v. Citizens' St. R. Co.*, 78 Fed. 526; *Holton v. Wallace*, 77 Fed. 61; *Ziegler v. Lake St. El. R. Co.*, 76 Fed. 662, *aff'd* 69 Fed. 176; *Swope v. Villard*, 61 Fed. 417; *Whitney v. Fairbanks*, 54 Fed. 985; *Putnam v. Ruch*, 54 Fed. 216, 56 Fed. 416; *Weidenfeld v. Allegheny & K. R. Co.*, 47 Fed. 11; *Squair v. Lookout Mountain Co.*, 42 Fed. 729; *McHenry v. New York, P. & O. R. Co.*, 22 Fed. 130; *Foote v. Cunard Min. Co.*, 17 Fed. 46; *Bill v. Western U. Tel. Co.*, 16 Fed. 14; *Taylor v. Holmes*, 14 Fed. 498, *aff'd* 127 U. S. 489, 32 L. Ed. 179; *Dannmeyer v. Coleman*, 11 Fed. 97. Com-

pare *Old Colony Trust Co. v. Dubuque Light & Traction Co.*, 89 Fed. 794.

Where collusion is denied and demand is obviously useless the rule is satisfied. *Bigelow v. Calumet & H. Min. Co.*, 155 Fed. 869.

See the above cases as to the sufficiency of a bill in this respect.

⁵⁶ Sufficient, that defendants are in absolute control and are beneficiaries of the contract assailed. *Ross v. Quinnesec Iron Min. Co.*, 227 Fed. 337.

⁵⁷ *Hyams v. Calumet & H. Min. Co.*, 221 Fed. 529; *Howard v. National Tel. Co.*, 182 Fed. 215; *Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co.*, 136 Fed. 710; *Harrison v. Thomas*, 112 Fed. 22; *Eldred v. American Palace-Car Co.*, 99 Fed. 168; *Berwind v. Canadian Pac. Ry. Co.*, 98 Fed. 158; *Ball v. Rutland R. Co.*, 93 Fed. 513; *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299; *Excelsior Pebble Phosphate Co. v. Brown*, 74 Fed. 321; *Young v. Alhambra Min. Co.*, 71 Fed. 810; *Earle v. Seattle, L. S. & E. Ry. Co.*, 56 Fed. 909; *Sellers v. Phoenix Iron Co.*, 13 Fed. 20; *County of Tazewell v. Farmers' Loan & Trust Co.*, 12 Fed. 752; *Pond v. Vermont Val. R. Co.*, 12 Blatchf. 280, Fed. Cas. No. 11,265.

A bill which shows an application to the directors or controlling officers to resist enforcement of confiscatory

expenses of the action, where it appears that the purposes of the bill are opposed by the majority stockholders and directors.⁵⁸

The rule applies when a bill which was not originally a stockholder's bill becomes such by amendment.⁵⁹ It does not require that a bill by a stockholder shall be verified by oath, where the suit is instituted in a state court and removed later to the federal court.⁶⁰

§ 4087. — Answers, replies and other pleadings. The capacity of the plaintiff may be tested by demurrer, if apparent on the face of the pleadings, otherwise by plea or answer,⁶¹ but not by demurrer after answer is in,⁶² and unless taken by demurrer such objections, e. g., that resort to the corporation or reason for making no effort in that respect are not alleged, will be waived.⁶³ If the complaint alleges causes not pertaining alike to all of the plaintiffs, it fails to state a cause of action, and therefore such misjoinder may be reached by general demurrer.⁶⁴ An objection that the complaint is

rate laws and regulations, and their refusal because of fear of incurring excessive penalties imposed by law, shows a sufficient compliance with the 94th Equity Rule. *Perkins v. Northern Pac. Ry. Co.*, 155 Fed. 445.

As to the sufficiency of a stockholder's bill in this respect, see the cases above cited.

⁵⁸ *Consumers' Gas Trust Co. v. Quinby*, 137 Fed. 882.

Contribution to costs or co-operation by other stockholders does not make the suit collusive, *New Albany Waterworks v. Louisville Banking Co.*, 122 Fed. 776; nor does refusal of the corporation to sue in the state court so that plaintiff could make a case in the federal court. *Mills v. Chicago*, 127 Fed. 731.

⁵⁹ When a dissolution suit is made a stockholders' suit by amendment the 94th Rule applies. *Worth Mfg. Co. v. Bingham*, 116 Fed. 785.

⁶⁰ *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. 280.

⁶¹ *Goodbody v. Delaney*, 80 N. J. Eq. 417, 83 Atl. 988.

⁶² A demurrer contained in the answer is overruled by it, and the law

questions presented must be determined on facts brought out by the answer. Hence demurrer after answer will not test the capacity of plaintiff to sue. *Goodbody v. Delaney*, 80 N. J. Eq. 417, 83 Atl. 988.

The capacity of new plaintiffs coming in after answer should be challenged by the answer or amendment thereof, and not by demurrer. *Goodbody v. Delaney*, 80 N. J. Eq. 417, 83 Atl. 988.

⁶³ That the objection that the plaintiff made no effort to obtain relief within or through the corporation goes to his capacity to sue, and is waived if not raised by demurrer, see *Wood v. Union Gospel Church Bldg. Ass'n*, 63 Wis. 9, 22 N. W. 756.

A defective allegation of the reason for not making demand is waived by failure to demur. *Hagood v. Smith*, 162 Ala. 512, 50 So. 374.

⁶⁴ Special demurrer for misjoinder is not essential. *Kickbusch v. Rugles*, 105 S. C. 525, 90 S. E. 163.

Where the corporation is named as party defendant but has not been served, demurrer will not reach the defect, but relief affecting it may have

not entitled in the name of plaintiff and all others similarly situated must be taken by demurrer or answer, if at all.⁶⁵ In the new federal equity practice motion to dismiss will raise questions, such as non-joinder, which were formerly assailable by demurrer.⁶⁶ By a federal rule, an allegation of fraud must be denied by answer when a plea is also put in.⁶⁷ Defenses of estoppel, laches and the like are to be made by answer⁶⁸ showing the facts thereof.⁶⁹ Where suit is brought by stockholders against officers for an accounting, it is proper for the defense to set out that the stock held by plaintiffs was received without consideration from one of the defendants who had consented to the issuance of the stock and securities, since such defense shows want of equity in the claim of plaintiffs in demanding that the officers account in a respect in which all were equally guilty.⁷⁰

A reply is not necessary where it would join no issue because the facts cannot be disputed,⁷¹ but if replication or reply is made it should

to be deferred until service. *Reed v. Hollingsworth*, 157 Iowa 94, 135 N. W. 37.

⁶⁵ *North v. Union Savings & Loan Ass'n*, 59 Ore. 483, 117 Pac. 822, questioning, however, whether such entitling is essential.

⁶⁶ Under New Equity Rule 29, non-joinder of the corporation as defendant may be reached by motion to dismiss. *Hyams v. Old Dominion Co.*, 204 Fed. 681.

⁶⁷ In a stockholders' suit specially charging fraud, the 32nd Equity Rule requires that pleas to such part be accompanied by an answer denying the fraud. *Sims v. United Wireless Tel. Co.*, 179 Fed. 540, decided before promulgation of new equity rules, which see.

⁶⁸ Estoppel is a matter of defense which need not be negated. *Pollitz v. Gould*, 202 N. Y. 11, 38 L. R. A. (N. S.) 988, Ann. Cas. 1912 D 1098, 94 N. E. 1088; *Continental Securities Co. v. Belmont*, 75 N. Y. Misc. 234, 133 N. Y. Supp. 560, aff'd 150 N. Y. App. Div. 298, 134 N. Y. Supp. 635, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138.

⁶⁹ Answer to allegations of ultra

vires stock issue is good, where it shows it to have been intra vires, though voidable because there was a transaction with another corporation having common directors, and where it alleges a ratification by stockholders afterwards. *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721, modifying 150 N. Y. App. Div. 715, 135 N. Y. Supp. 789.

Allegations held sufficient to rebut laches in suing to cancel stock. *Anderson v. Scandia Min. Syndicate*, 26 S. D. 558, 128 N. W. 1016, holding stockholder not chargeable with knowledge from stock books that there was an illegal issue.

⁷⁰ *Ward v. Smith*, 95 N. Y. App. Div. 432, 88 N. Y. Supp. 700. See also *Warren v. Robison*, 25 Utah 205, 70 Pac. 989.

Defense that plaintiff is not bona fide stockholder or is lacking in equities, see §§ 4071-4077, *supra*.

⁷¹ A supplemental answer setting up appointment of a receiver requires no reply from plaintiff who has impleaded the receiver by motion. *Seagrist v. Reid*, 171 N. Y. App. Div. 755, 157 N. Y. Supp. 979.

be such as that it will directly traverse the plea or answer.⁷²

The corporate defendant in joining with other defendants in a demurrer or answer may run the risk of neutralizing one of the defenses that it could make, and care should be taken in so doing. Thus it was argued and seriously debated whether a ground of demurrer, that the complaint showed no resort to the corporation for redress, was not waived by joining in the further ground that no cause of action in favor of the corporation against the other defendants was shown. The second ground involved an admission, it was claimed, that the corporation would not have sued if request had been made, because it deemed that there was nothing to sue for.⁷³

A defense grounded on the 94th Equity Rule puts in issue only the right of plaintiff to maintain the action and not the existence of a cause of action on behalf of the corporation.⁷⁴ When any issue of fact is left on the pleadings the motion for judgment on the pleadings, allowed by some of the codes, cannot be entertained; hence when the reply and answer join on a ratification which the majority has no power to make, such motion must be denied.⁷⁵

A cross-bill should not tender issues already joined by bill and answer,⁷⁶ and a bad bill may be cured by allegations in the cross-bill,⁷⁷ but a cross-bill will not cure the bill if it does not supply the missing allegations essential to the cause of action.⁷⁸

Supplemental pleadings are proper to set up matters germane to

⁷² Replication held not a direct traverse of a plea that the corporation received the benefit of proceeds of a loan by its officers. *Burns v. National Mining, Tunnel & Land Co.*, 23 Colo. App. 545, 130 Pac. 1037.

⁷³ The court though regarding this as a debatable question denied the contention in obedience to precedent. *Herrick v. Dempster*, 73 N. J. Eq. 145, 75 Atl. 810, on the authority of *Siegmán v. Maloney*, 65 N. J. Eq. 372, 54 Atl. 405.

⁷⁴ "A defense under [the] rule does not deny the alleged grievances of the corporation, but the stockholder's authority to redress them. It does not contest the existence of a cause of action, but complainants' right to sue for its enforcement." *Gage v. Riverside Trust Co.*, 156 Fed. 1002.

⁷⁵ Fraud in using corporate funds for personal gain was alleged, to which ratification by stockholders was pleaded and that denied by reply. Such fraud cannot be ratified. *Theobald v. United States Rubber Co.*, 83 N. Y. Misc. 627, 146 N. Y. Supp. 597.

⁷⁶ Cross-bill should not tender issues made and joined on bill and answer. *Trendley v. Illinois Traction Co.*, 241 Mo. 73, 145 S. W. 1.

⁷⁷ A cross-bill by the corporation will not cure deficiencies in the bill if it sets up a different ground of action. *Vogeler v. Punch*, 205 Mo. 558, 103 S. W. 1001.

⁷⁸ Neither bill nor cross-bill contained allegations showing that a stock issue in payment for organization services was fraudulent or over their value. *Vogeler v. Punch*, 205 Mo. 558, 103 S. W. 1001.

the original complaint which have occurred since it was filed or of which plaintiffs then had no knowledge,⁷⁹ but a cause of action cannot be supplied by supplemental bill alleging the essential votes and resolutions.⁸⁰

An unconnected grievance⁸¹ or an individual right cannot be counterclaimed in such an action, as it is against plaintiff in a different right.⁸²

§ 4088. Burden of proof, presumptions and evidence. Very few cases applying the general law of evidence in any way at all peculiar to stockholders' suits will be found. A few novel or illustrative ones are collected in the foot notes following.

In an earlier section it was seen that the suit is based on a cause of action pertaining to the corporation primarily, and to the plaintiff secondarily because it would not or could not sue. These causes must both be pleaded and proved. The plaintiff therefore has the burden of proving each of the elements of each cause of action⁸³ just as if the corporation were suing.⁸⁴

⁷⁹ A defense arising after issue joined should be made under chancery practice of New Jersey, by cross-bill or supplemental answer in the nature of cross-bill. *McAlpin v. Universal Tobacco Co.* (N. J. Ch.), 57 Atl. 418.

Matter relevant to an individual action cannot supplement a derivative one, and vice versa. *Brewster v. F. G. Brewster Co.*, 138 N. Y. App. Div. 139, 122 N. Y. Supp. 1019.

⁸⁰ Votes and resolutions since the original bill cannot be added by supplemental bill to make out a cause of action which it failed to make out. A new bill is necessary. *Bartlett v. New York, N. H. & H. R. Co.*, — Mass. —, 115 N. E. 976.

⁸¹ In a suit to cancel stock held by an officer, the corporation cannot counterclaim to assert its rights in realty or to remove the officer. They neither arise "out of the contract or transaction" declared on nor are "connected with the subject of the action." *Brahm v. M. C. Gehl Co.*, 132 Wis. 674, 112 N. W. 1097.

⁸² *Baum v. Sporborg*, 146 N. Y. App. Div. 537, 131 N. Y. Supp. 267.

⁸³ See generally the cases cited supra under §§ 4061-4070.

⁸⁴ Though the form of the action is equitable the proof of the cause of action is the same as if the corporation itself had brought the action at law. *Kavanaugh v. Commonwealth Trust Co.*, 64 N. Y. Misc. 303, 118 N. Y. Supp. 758.

Must prove the fraud alleged. *Continental Securities Co. v. Belmont*, 83 N. Y. Misc. 340, 144 N. Y. Supp. 801.

Must prove that defendants exceeded their authority. *Hughes Manufacturing & Lumber Co. v. Culver*, — Ark. —, 189 S. W. 850.

Must prove that borrowing defendants did not pay reasonable interest on loans by corporation to them. *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 83 N. E. 434, rev'g 135 Ill. App. 234.

Where the suit is representative, evidence of a corporate wrong in the election objected to is essential. *Du-*

The facts making up each of the numerous causes of action which a corporation may be entitled to prosecute, or the defenses which are open to it, properly belong in other parts of this work or in other treatises on other branches of the law, which should be consulted.⁸⁵ In like manner presumptions should be traced out to the subject-matter to which they particularly belong, or else to the general law of evidence, and there investigated.⁸⁶

The demand to sue and the refusal must be proved as alleged.⁸⁷ Unless *prima facie* they are *ultra vires*, acts are presumed to be *intra vires*, regular and legal. Accordingly plaintiff has the burden of showing that they are not so;⁸⁸ and in a suit attempted by minority stockholders in behalf of the corporation, fraud on the part of the managing board will not be presumed.⁸⁹ Defendants have the burden of justifying their *prima facie* unlawful acts,⁹⁰ or payments to themselves,⁹¹ or of establishing their affirmative defenses.⁹² Where a contract or a consolidation or other transaction has been entered into by

senberry v. Sagamore Development Co., 164 N. Y. App. Div. 573, 150 N. Y. Supp. 229.

⁸⁵ E. g., for the substantive law on the right to sue directors for waste, see Chap. 42, *supra*. As to the facts making out a right to rescind a contract or transfer for fraud or mistake, see some standard work on contracts, sales, vendor and purchaser, or the like.

⁸⁶ E. g., the presumptions as to the corporate powers are discussed in Chap. 21 *et seq.*

⁸⁷ Stockholders suing to redress an injury to the corporation are not entitled to recover if their allegation that they requested the corporation to institute suit, and it refused, is denied and not proved. Dillon v. Lee, 110 Iowa 156, 81 N. W. 245.

Evidence as to demand held insufficient. Holmes v. Jewett, 55 Colo. 187, 134 Pac. 665.

See generally cases cited, *supra*, under §§ 4068, 4085.

⁸⁸ See generally, Chap. 21, *supra*.

The burden is on plaintiff to establish that a pension plan of a national bank was *ultra vires*, or that compro-

mise of a particular pension claim was unlawful. Heinz v. National Bank of Commerce in St. Louis, 237 Fed. 942.

⁸⁹ Dickinson v. Consolidated Traction Co., 119 Fed. 871.

⁹⁰ Judgment of directors in a preliminary stage as to value of property for which stock is to be issued is of weight but not conclusive, and a discrepancy should be explained by them. The burden is not on complainant. Donald v. American Smelting & Refining Co., 62 N. J. Eq. 729, 48 Atl. 771, 1116.

⁹¹ Defendants who as directors paid so called "additional salaries" to themselves have the burden of justifying such payments by showing the services reasonably worth the amounts paid. Godley v. Crandall & Godley Co., 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236, *aff'd* 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818. See also § 2774 and § 2780, *supra*.

⁹² It cannot be presumed that stock was not represented at a meeting merely from the fact that some stockholders were absent. Smith v. Stone, 21 Wyo. 62, 128 Pac. 612.

defendants having an interest which conflicts with that of the corporation, it is for them to show that it was fair and free from fraud;⁹³ and when trust funds are traced to their hands they have the burden of accounting for them.⁹⁴ A third person in possession of alleged corporate assets does not sustain this burden unless some fraud is imputable to him.⁹⁵

In an accounting suit, where accounting has been ordered, the accountant should produce books or evidence on which to state the account.⁹⁶

The judicial cognizance which federal courts take of the laws of all the states dispenses with proof of the law of another state when involved in such a suit,⁹⁷ and may base presumptions thereon.⁹⁸ The assent of other stockholders to the transaction assailed,⁹⁹ or a ratification by stockholders in meeting since the act was done,¹ or refusal of the corporation to sue may be inferred from conduct.²

⁹³ Where contract is between corporations having common directors, the burden is on them, knowing all the facts, to show that it was fair and free from fraud. *Ross v. Quinnesec Iron Min. Co.*, 227 Fed. 337; *Geddes v. Anaconda Copper Min. Co.*, 197 Fed. 860.

A holding company which voted for a consolidation, injurious to two companies in which it held a smaller proportion of stock, but favorable to nine in which it held a larger proportion or a control, has the burden of proving it fair. *Hyams v. Calumet & H. Min. Co.*, 221 Fed. 529.

Dealings by officers and directors with corporation in which they have an interest, see generally Chap. 42, *supra*.

⁹⁴ *Kreitner v. Burgweger*, 174 N. Y. App. Div. 48, 160 N. Y. Supp. 256. See also Chaps. 42 and 43, *supra*.

⁹⁵ *Ebling v. Nekarda*, 148 N. Y. App. Div. 193, 132 N. Y. Supp. 309.

⁹⁶ As to burden of proof on accounting where apparently correct books are produced, see *Scofield v. Marinette Saw Mill Co.*, 153 Ill. App. 469.

⁹⁷ Federal courts judicially notice corporation laws and statutes of other

states than that in which they sit. *Metcalf v. American School Furniture Co.*, 122 Fed. 115.

⁹⁸ A federal court sitting in Pennsylvania takes cognizance of the laws of New York, and thus may infer that a receiver is a statutory one. *Kelly v. Dolan*, 218 Fed. 966.

⁹⁹ That no other stockholder has objected to a contract or sought to intervene in suit affords an inconclusive inference that they do not object. *Carson v. Allegany Window Glass Co.*, 189 Fed. 791.

¹ Ratification by stockholders is not inferred from mere lapse of time without a meeting which was apprised of the action of the officers in question. *Endicott v. Marvel*, 81 N. J. Eq. 378, 87 Atl. 230.

² "The plaintiff's right to maintain this action is derivative and wholly based on the failure of the corporation to do its duty in prosecuting an action to recover corporate assets. The breach of duty must be shown by an intentional determination by the corporation not to bring the action. Such determination can be shown by an express refusal on the part of the corporation to commence the action. It may frequently occur

Any competent evidence tending to show the fairness or propriety of the acts complained of, or the injuriousness of them ought to be received.³ Thus denial of information is admissible.⁴ Conversations evincive of assent or acquiescence are not receivable against plaintiff where they relate to similar but distinct transactions, which are not challenged.⁵

An order for examination of defendants before trial, allowed by some statutes, should not be general but should specify the particular subjects thereof.⁶

The weight and sufficiency of evidence are determined by rules of general law⁷ and the special requirements of proof in cases of specific enforcement of parol contracts and the like.⁸

that a corporation will neither refuse to commence the action nor proceed to act. A determination not to commence the action can be reached without giving expression to such determination, and the failure to give expression to its determination should not affect the right of stockholders to proceed in behalf of the corporation. The breach of duty is not necessarily dependent upon any expression of purpose by the corporation. Where a corporation so unreasonably neglects and fails to bring an action that such neglect and failure amounts to a refusal to act the breach of duty which must be shown before an action is commenced by a stockholder will be established as if an express refusal to act had been shown. A matter of sufficient importance to demand an action in the name of the corporation or by a stockholder or stockholders in its behalf to recover corporate assets, lost or in danger of being lost by the fraud or neglect of its officers and agents, would require consideration followed by appropriate official or corporate action and the preparation of papers before an action could be commenced. What would be an unreasonable delay by the corporation after a demand that an action be commenced would vary in nearly every case," *Kavanaugh v. Commonwealth*

Trust Co. of New York, 103 N. Y. App. Div. 95, 92 N. Y. Supp. 543.

Proof of demand held insufficient where based on record affording no inference that one was made. *Butler v. Hydro-Pneumatic Sprinkler & Manufacturing Co.*, — Mo. App. —, 190 S. W. 921.

³ *Moss v. Goodhart*, 47 Mont. 257, 131 Pac. 1071.

⁴ Withholding information and obstructing investigation by minority is a mark of bad faith. *Kreiter v. Burgweger*, 174 N. Y. App. Div. 48, 160 N. Y. Supp. 256.

⁵ *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818, modifying 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236. Query, whether conversations of a decedent are admissible against his legal representative standing as plaintiff in a stockholder's suit. *Id.*

⁶ *Seagrist v. Reid*, 171 N. Y. App. Div. 755, 157 N. Y. Supp. 979.

⁷ Under the laws of New York a minority stockholder suing to prevent injury to the corporation may be permitted to examine corporate officers under proper circumstances. *Rosenbaum v. Rice*, 36 N. Y. Misc. 410, 73 N. Y. Supp. 714.

⁸ Consult treatises on Evidence.

⁹ Contracts made orally for the benefit of the corporation to serve as

Whether a case has been made out is much more often a question of the substantial sufficiency of the facts than one of the sufficiency of the proof of them. This has been treated herein as a part of the substantive law of corporations.⁹

§ 4089. Conduct and control of action; discontinuances and compromises. The responsibility for and control of the suit rests with the original plaintiff,¹⁰ but since the action is representative of other interests than plaintiff's, it follows that plaintiff has only such control as he would have of any other representative action. He cannot deal with the action in bad faith towards the other persons or interests to be affected by the judgment or bound by it, or terminate it without their consent,¹¹ or unreasonably delay its progress, they not consenting.¹² The plaintiff's relation to the suit is like that of a guardian ad litem. He must prosecute the action, once it is begun, for the benefit of all concerned, and cannot effect a settlement as to his own interest and then terminate the action.¹³ Other plaintiffs, who

president, to buy its products, and to procure loans for it, cannot be specifically enforced at suit of a stockholder to whom they were made without clear proof. *Fleming v. Riegel*, 90 S. C. 109, 72 S. E. 888.

⁹The question, "What is sufficient evidence," etc., is usually but a form of asking if the facts proved or admitted make out a case or a defense. For cases on the sufficiency of evidence in this sense, see preceding sections.

¹⁰Dietum that incoming plaintiffs have no control and cannot interfere until decree is made. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637.

¹¹*Tremain v. Guardian Mut. Life Ins. Co.*, 11 Hun (N. Y.) 286; *Manning v. Mercantile Trust Co.*, 37 N. Y. Misc. 215, 75 N. Y. Supp. 168; and see *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663. But see *Allen v. New Jersey Southern R. Co.*, 49 How. Pr. (N. Y.) 14.

So in creditors' bill. *Johnson v. Miller*, 96 Fed. 271; *Hirshfield v. Fitz-*

gerald, 157 N. Y. 166, 46 L. R. A. 839, 51 N. E. 997; *Salisbury v. Binghampton Pub. Co.*, 85 Hun (N. Y.) 99, 32 N. Y. Supp. 652.

The chancery rule is that leave to dismiss may be denied if plaintiff "is not wholly dominus litis." *Daniell Ch. Pr.* [8th Ed.] 485.

He cannot do so after decree, or if others have come in as parties. *Fletcher Eq. Pl. & Pr.* § 562, p. 578.

On the other hand, the corporation may not collusively dismiss its action in fraud of the stockholders. *National Power & Paper Co. v. Rossman*, 122 Minn. 355, 532, Ann. Cas. 1914 D 830, 142 N. W. 818, 822.

¹²*Manning v. Mercantile Trust Co.*, 37 N. Y. Misc. 215, 75 N. Y. Supp. 168.

¹³Stipulation to dismiss appeal as to two wrongdoing defendants, who had paid plaintiff was denied and the parties were relegated to application to court to sanction their compromise. *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

have come in may have an order on proper terms turning the suit over to their control where the original plaintiffs abandon it.¹⁴

It seems that a substitution of the corporation should be made, if at all, in the trial court.¹⁵ The corporation cannot end or abort the suit by a settlement against consent of plaintiffs.¹⁶

§ 4090. Judgment and nature of relief allowable—In general. The general nature, form and measure of relief, being the same as the corporation might have had if it had sued, is matter for treatment in other parts of this work.¹⁷ Relief must conform to the pleadings and be confined to the cause pleaded¹⁸ and the parties of whom jurisdiction was had,¹⁹ and if there is a dismissal for want of parties, it should be

¹⁴ They were required to indemnify original plaintiffs against any further expense incurred in the progress of the suit. *McAlpin v. Universal Tobacco Co.* (N. J. Ch.), 57 Atl. 418.

Will not be required to reimburse the original plaintiff while the suit is yet pending, but will be required to secure ratable reimbursement when proper costs and expenses become known by ending of the suit. *Manning v. Mercantile Trust Co.*, 37 N. Y. Misc. 215, 75 N. Y. Supp. 168.

¹⁵ Motion to substitute corporation for plaintiff was denied on appeal, with leave to renew motion before trial court. *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

¹⁶ Attempted settlement between corporation and its assignee for benefit of creditors. *Standard Home & Savings Ass'n v. Jones*, 64 Ohio St. 147, 59 N. E. 885.

Original plaintiffs cannot settle and dismiss case after others come in. *McAlpin v. Universal Tobacco Co.* (N. J. Ch.), 59 Atl. 418.

While the directors may discontinue a suit begun by a former board, it may be prevented at the instance of intervening stockholders. *Eagle Iron Co. v. Colyar*, 156 Fed. 954.

¹⁷ See generally Chap. 47, *supra*, on Actions by and Against Corporation,

and references there found to specific remedies.

As to extraordinary legal remedies applying to corporations and their officers, see Chap. 49, on Quo Warranto, and Chap. 50, on Mandamus, *supra*, and also see the chapters treating of subjects where such remedies may be resorted to, e. g., mandamus to compel exhibition of books on demand, see Chap. 46.

Mandamus to compel calling of an election and an accounting was apparently sustained as a proper remedy without objection in *O'Hara v. Williamstown Cemetery Co.*, 133 Ky. 828, 119 S. W. 234. See also §§ 1632, 3285, *supra*.

¹⁸ Judgment of recovery for waste in paying illegal salaries must include only those within the alleged period. *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818, modifying 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236.

¹⁹ *Morshead v. Southern Pac. Co.*, 123 Fed. 850.

May adjudge property rights within state where foreign corporation is party. *Fleming v. Black Warrior Copper Co., Amalgamated*, 15 Ariz. 1, 136 Pac. 273; *Tipton v. Railway Postal Clerks Inv. Ass'n*, — Tex. Civ. App. —, 173 S. W. 562.

without prejudice.²⁰ Relief will be exactly the same as the corporation might have had if it had been plaintiff,²¹ all wrongdoers being held equally liable,²² and is not confined to redress against officers and directors as such.²³

Only nominal damages should be allowed where no loss to the corporation has occurred from irregular action.²⁴ Thus, on compelling a call of unpaid subscriptions, the full amount and not merely as much as may be required to pay existing creditors will be decreed.²⁵

Direct relief to the stockholders cannot properly be adjudged,²⁶ unless possibly when a dissolution or other exceptional fact war-

²⁰ *Hayden v. Perfection Cooler Co.*, 217 Fed. 171.

²¹ *Collins v. Penn-Wyoming Copper Co.*, 203 Fed. 726.

Statutory liability of directors for debts cannot be enforced unless the statute enables the corporation to enforce it. *Collins v. Penn-Wyoming Copper Co.*, 203 Fed. 726; *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

²² Each conspirator, whenever he came into the scheme is liable for acts of all. *Meredith v. Art Metal Const. Co.*, 97 N. Y. Misc. 69, 161 N. Y. Supp. 1.

²³ Recovery may be had against those who were not officers if any of the property forming the "trust fund" came to them by the wrong doing. Hence it may be decreed against defendants who received avails of fraudulent waste, though they were not directors or officers of the corporation at the time. *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818, modifying 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236.

²⁴ Only nominal damages were proper where the sale of a railroad property was illegally conducted, but full value was paid and the corporation was in debt for more than it would have brought at forced sale and was hopelessly insolvent. *Thoman v. Mills*, 159 Mich. 402, 124 N. W. 33.

²⁵ Where the action is against di-

rectors for refusing to call their own unpaid subscriptions, the corporation going on is entitled to the full amount. *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

²⁶ Judgment should run to corporation, not to plaintiffs. *Ebling v. Nekarda*, 148 N. Y. App. Div. 193, 132 N. Y. Supp. 309.

Since the action is representative of the corporation and not individual, the proper relief against directors in an action to set aside an issue of bonds as ultra vires is to adjudge them to pay to the corporation all the damage sustained by their illegal action, and not merely to pay to the plaintiff the cost of his stock. *Politz v. Wabash R. Co.*, 167 N. Y. App. Div. 669, 152 N. Y. Supp. 803.

It is improper to adjudge that surplus money abstracted under cover of salaries should be divided among stockholders. It should go to the corporation. *Miller v. Crown Perfumery Co.*, 125 N. Y. App. Div. 881, 110 N. Y. Supp. 806, modifying 57 N. Y. Misc. 383, 109 N. Y. Supp. 760.

Accounting must be to corporation. *Voorhees v. Mason*, 245 Ill. 256, 91 N. E. 1056, rev'g 148 Ill. App. 647.

Cannot require accounting to plaintiff as individual. *Berger v. National Architects' Bronze Co.*, 173 N. Y. App. Div. 680, 160 N. Y. Supp. 331.

Plaintiff cannot have a lien on the property of the corporation, where the

rants²⁷ or where circuitry of action and multiplied litigation will thus be avoided.²⁸ Equal protection should be afforded all stockholders; and other parties should be protected and relieved according to their rights,²⁹ charging the delinquents according to the time and measure of their delinquency.³⁰ To such ends, as an incident of relief, a trust may be declared in property,³¹ or a specific performance

wrong, if any, was done by control exerted by individual defendants for the other defendant corporation. *Smith v. Chase & Baker Piano Mfg. Co.*, 197 Fed. 466.

²⁷ Judgment dividing diverted moneys among stockholders cannot be rendered if the corporation has not been dissolved. *McCrea v. McClenahan*, 114 N. Y. App. Div. 70, 99 N. Y. Supp. 689, aff'd 192 N. Y. 150, 84 N. E. 960.

²⁸ It has been held in effect that, where corporate funds have been misapplied, instead of being distributed as dividends, as in the fraudulent payment of excessive salaries to certain stockholders, and suit is brought in equity by injured stockholders to compel an accounting both with the company and with the complainants, the court may, by its decree, compel the payment directly to the complainants of their share of the moneys misappropriated, instead of decreeing repayment into the corporate treasury, and making it probably necessary for the complainants to resort to another suit to compel the payment of a dividend. *Eaton v. Robinson*, 19 R. I. 146, 29 L. R. A. 100, 32 Atl. 339, 31 Atl. 1058. And see *Brown v. De Young*, 167 Ill. 549, 47 N. E. 863, aff'g 66 Ill. App. 212; *Davis v. Gemmell*, 73 Md. 530, 21 Atl. 712; *Fougeray v. Cord*, 50 N. J. Eq. 185, 24 Atl. 499.

²⁹ All stockholders, and creditors as well, should be protected by the decree where winding-up will be the result of the suit and where the stockholders are similarly situated in that some seek protection and others who

parted with their stock seek reinstatement. In *re Dennett*, 221 Fed. 350.

³⁰ On rescinding a sale to the corporation at a false value, the wrongdoing directors should be charged with the excess over real value and interest thereon, or should have option of a reconveyance on payment of the purchase price with interest on the excess. *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 83 N. E. 434, rev'g 135 Ill. App. 234.

Where the action was for failure to call their own subscriptions on demand of plaintiff, and money had previously been borrowed by the corporation which might not have been needed if defendants had paid up, it was proper to charge them with interest on their unpaid portions only from the time of demand on them. *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

³¹ An affiliated corporation may be declared a trustee of assets which have come to it. In *re Dennett*, 221 Fed. 350.

A trust may be impressed on property acquired by defendant officers by throwing the corporation into bankruptcy and buying in, and if they have frustrated such relief by conveyance pendente lite, damages by way of compensation may be adjudged to the corporation. *Drucklieb v. Harris*, 84 N. Y. Misc. 291, 147 N. Y. Supp. 298.

Trust cannot be impressed on property unless the corporate assets can be traced specifically to it. *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340.

may be decreed,³² or rescission, cancellation and restitution of property or illegal stock may be ordered.³³ That several defendant directors alleged to have participated wrongfully in sales of the corporate property in violation of their trust are chargeable for different periods will not bar relief, inasmuch as the court may adapt its decree to the particular periods of the directorship of the several defendants.³⁴ Title to corporate office may be determined as an incident to relief though ordinarily equity declines such questions;³⁵ and officers cannot be removed, if there is an exclusive remedy by statute for that purpose.³⁶ The federal courts can grant relief against enforcement of a state judgment though they are forbidden by statute to vacate it.³⁷

³² When suing for wrong to the corporation the judgment should either be for damages or for specific performance which would pay or transfer property to the corporation. *Lawrence v. Southern Pac. Co.*, 180 Fed. 822.

³³ Even if there was fraud in a contract, it does not follow that it will be set aside on application of a minority stockholder. If it would be more detrimental than advantageous to other innocent stockholders, the court will not interfere. Much less will it do so if disaster to the corporation would result. *Carson v. Allegany Window Glass Co.*, 189 Fed. 791.

Rescission of a sale of property will not be decreed if the equities of other stockholders do not appear, so that it may be as much of an injustice to them as a relief to plaintiff. *Binnely v. Cumberland Ely Copper Co.*, 183 Fed. 650.

If equity requires it, a return of illegally issued stock by the defendant corporation to the third party may be ordered in a suit against directors for an accounting. *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138, aff'g 150 N. Y. App. Div. 298, 134 N. Y. Supp. 635, 75 N. Y. Misc. 234, 133 N. Y. Supp. 560.

Where the property of a corporation

has been transferred by the managing stockholders and directors, who held the legal title to the property as trustees, to another corporation, fraudulently and with connivance of certain other parties, the redress of the complainant stockholders is either rescission or accounting according to the circumstances of the particular case. *Kidd v. New Hampshire Traction Co.*, 72 N. H. 273, 66 L. R. A. 574, 56 Atl. 465.

Cancellation of an illegal stock issue is necessary to adequate relief where the issue is in violation of statutory law and threatens the credit and dividend paying capacity of the corporation and the remedy at law to recover the unpaid portion of par value, thereby ratifying the issue, is not adequate. *Howard v. National Tel. Co.*, 182 Fed. 215.

³⁴ *Barry v. Moeller*, 68 N. J. Eq. 483, 59 Atl. 97.

³⁵ Usurping officers may be ordered to account for waste and misappropriation and such further relief may be given as required. *Sheehy v. Barry*, 87 Conn. 656, 89 Atl. 259. See also § 1825 et seq., supra.

³⁶ Officers can be removed only in action by attorney general under Code Civ. Proc. §§ 1781, 1782, 1811. *Welcke v. Trageser*, 131 N. Y. App. Div. 731, 116 N. Y. Supp. 166.

³⁷ Where relief is sought against a

Plaintiff may have a lien for counsel fees on the property recovered,³⁸ but it has been held improper to adjudge a lien to plaintiff's counsel.³⁹

§ 4091. — Injunction, receivership and accounting; dissolution. Injunctions, receiverships and accounting suits for the purpose of winding up the corporation and distributing its assets, or for the purpose of adjusting and protecting rights during a period of insolvency, or for other similarly distinct objects, are not germane to this context. Such suits, as far as pertinent to the law of corporations, have their treatment in other parts of this work to which reference should be made for such precedents or analogies as they may afford.⁴⁰ Nevertheless all of these equitable remedies will be applied in a stockholders' suit as incident to the main object thereof, or as the principal relief when appropriate.⁴¹

An application by minority stockholders for an injunction to restrain a threatened wrong to the corporation will not be granted where that which they seek to attain has already been accomplished, either by prior judicial proceedings or by action taken by the officers against whom complaint is made.⁴² Generally speaking an injunction pendente lite will issue in order to preserve the status quo or protect the property or prevent that which would render the desired judg-

state judgment collusively suffered, the federal courts by reason of U. S. Rev. St. § 720 cannot vacate it and stay proceedings, but it may enjoin enforcement and may appoint a receiver to appear and litigate it in the state court. *Schultz v. Highland Gold Mines Co.*, 158 Fed. 337.

³⁸ *Grant v. Lookout Mountain Co.*, 93 Tenn. 691, 27 L. R. A. 98, 28 S. W. 90.

³⁹ *Kolb v. Mortimer*, 171 N. Y. App. Div. 901, 155 N. Y. Supp. 644.

Direct award was made to counsel without question in *Davis v. Gemmell*, 73 Md. 530, 21 Atl. 712.

Defendants having no interest cannot complain that plaintiff's attorney was allowed a lien on the property. *Hughes Manufacturing & Lumber Co. v. Culver*, — Ark. —, 189 S. W. 850

⁴⁰ See Chap. 51, *supra*, on Injunctions, and the chapters on Forfeiture,

Dissolution and Winding Up and Receivers, *infra*.

⁴¹ See cases following in this section.

⁴² *Hallenborg v. Cobre Grande Copper Co.*, 8 Ariz. 329, 74 Pac. 1052.

In North Carolina it is held too late for a stockholder to secure interference by way of injunction where the directors, authorized generally so to do, have made a completed sale of shares of the corporate stock. The plaintiff may attack the sale, where litigation is pending in regard thereto, at the time of the hearing. *Huet v. Piedmont Springs Lumber Co.*, 138 N. C. 443, 50 S. E. 846.

Where injunction was not proper because of a wrong accomplished by a holding company, the court suggested one against voting the stock of the subsidiary or choosing favorable directors. The case was remanded-ac-

ment ineffectual,⁴³ but it must be seasonably applied for.⁴⁴ It should not be so broad as to suspend the corporate functions entirely,⁴⁵ or go accordingly. *Hyams v. Calumet & H. Min. Co.*, 221 Fed. 529.

⁴³ Such preliminary order as will make the decree effective, if a decree should be granted, may be made. *Mitchell v. United Box Board & Paper Co.*, 72 N. J. Eq. 580, 66 Atl. 938.

To prevent fraudulent alienation of assets. *Robinson v. New York, W. & B. R. Co.*, 123 N. Y. App. Div. 339, 108 N. Y. Supp. 91, aff'g 55 N. Y. Misc. 516, 105 N. Y. Supp. 897.

Injunction is proper to prevent negotiation or payment of a note for illegal salary where corporation was largely indebted, some mortgages being on its property, and might be crippled. *Monmouth Inv. Co. v. Means*, 151 Fed. 159.

Where a stockholder alleges that certain other stockholders have organized a new corporation, and by manipulation, set forth, have compelled the original corporation to agree to buy the property of the new corporation at an exorbitant figure, preliminary injunction will be granted restraining the consummation of the transaction until the merits of the cause may be determined by the court. *Miller v. Consolidated Lake Superior Co.*, 110 Fed. 480.

Where directors have systematically acted to depreciate the value of the stock, refusing to take action necessary to promote the interests of the corporation for personal ends, stockholders may maintain action for the protection of the corporation. In such action an accounting and an injunction restraining the directors from further unlawful acts may be obtained. *Glover v. Manila Gold Mining & Milling Co.*, 19 S. D. 559, 104 N. W. 261.

Injunction was granted against bond issue unjust to minority. *Smith v. Westchester Bronxville Realty Co.*,

78 N. Y. Misc. 75, 137 N. Y. Supp. 690. See also § 3322, *supra*.

Preliminary injunction was allowed against compliance with a rate schedule not yet in effect and alleged to be confiscatory, and denied as to another one that had been accepted by defendant corporations and put into operation. *Perkins v. Northern Pac. Ry. Co.*, 155 Fed. 445.

Injunction against voting his stock pendente lite was denied where pending action for his removal, the president caused a special meeting which might legislate plaintiffs out of office. *Lersner v. Adair Mach. Co.*, 137 N. Y. Supp. 565.

Pendente lite order granted to restrain voting of trust shares until trial of issues. *Byington v. Piazza*, 131 N. Y. App. Div. 895, 115 N. Y. Supp. 918. And see § 1702, *supra*.

⁴⁴ Injunction pendente lite may be denied for laches which might not completely defeat relief. *Beidenkopf v. Des Moines Life Ins. Co.*, 160 Iowa 629, 46 L. R. A. (N. S.) 290, 142 N. W. 434.

Injunction pendente lite against misuse of trade-mark in violation of agreement denied on ground of laches. *Metzger v. Knox*, 77 N. Y. Misc. 271, 136 N. Y. Supp. 681, aff'd 153 N. Y. App. Div. 911, 137 N. Y. Supp. 1129.

Where injunction is preliminarily sought against a stock issue, and complainant has bought his stock after announcement of the plan and in order to sue, "he must move with the utmost speed." Query, whether nine days' delay was a bar to such relief. *General Inv. Co. v. Bethlehem Steel Corporation*, 87 N. J. Eq. 234, 100 Atl. 347.

⁴⁵ A pendente lite order which practically suspends the official and corporate functions is too broad. It should restrain only those specific

beyond the necessities of the case,⁴⁶ or in effect grant the full relief prayed for as final judgment.⁴⁷ Possible inconvenience to the public must be considered against allowing it.⁴⁸ The court will not hear a motion by a stockholder for a preliminary injunction where the corporation has not been made a party.⁴⁹ There must be a substantial showing for a *pendente lite* writ,⁵⁰ including evidence that the action will be taken if not prevented.⁵¹ In the federal courts injunction acts which menace the plaintiff. *Moore v. Moore Mica Paint Co.*, 150 N. Y. App. Div. 792, 135 N. Y. Supp. 210.

Relief such as injunction against making improvident contracts or the appointment of receivers where the corporation is not insolvent, will not be granted in terms which would invade the corporate management, except, possibly, on an extreme case. *Smith v. Chase & Baker Piano Mfg. Co.*, 197 Fed. 466.

⁴⁶ The order should not wholly forbid payment of any salaries merely because the ones paid were complained of as too large. *Lawrence v. Weber*, 137 N. Y. App. Div. 907, 122 N. Y. Supp. 1134, modifying 65 N. Y. Misc. 603, 120 N. Y. Supp. 289.

An injunction in a suit by a stockholder in a co-operative association is too broad if it forbids elections and the exercise of corporate functions merely because some illegal certificates are outstanding and an attempt to vote them and distribute dividends is alleged. *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530.

Injunction against completion of a bankruptcy sale to officers should not be so broadly allowed as to jeopardize a fund from which creditors agreed to be paid, but was denied on condition that the wrongdoer give bond to pay any judgment recovered against him. *Drucklieb v. Harris*, 158 N. Y. App. Div. 873, 142 N. Y. Supp. 912.

⁴⁷ *Pendente lite* injunction and receiver were denied where not urgently necessary to prevent irreparable in-

jury and where granting them would in effect have allowed full relief as prayed before final hearing. *Aldrich v. Union Bag & Paper Co.*, 81 N. J. Eq. 244, 87 Atl. 65.

⁴⁸ Injunction to the prejudice and inconvenience of the public service ought not to be allowed to serve a relatively small benefit to plaintiff. *Johnson v. United Rys. Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63.

⁴⁹ Cancellation suit. *Morshead v. Southern Pac. Co.*, 123 Fed. 350.

⁵⁰ A temporary injunction will not be granted to restrain a corporation from selling its franchise upon the allegation of a stockholder that he "has good reason to fear and does fear" that the franchise will be sold by the directors. *Quin v. Havenor*, 118 Wis. 53, 94 N. W. 642.

A stockholder instituted action for the reduction of capital stock on the ground that the property transferred in payment for the stock was overvalued, and asked an injunction barring the payment of dividends on the preferred stock. The request for the preliminary injunction was supported by an affidavit by himself which tended to show that he could not speak from personal knowledge, and by an affidavit by his counsel relating mainly to certain admissions of the president. The affidavits were deemed insufficient and the preliminary injunction was refused. *Schoenfeld v. American Can Co.* (N. J. Eq.), 55 Atl. 1044.

⁵¹ Injunction against purchase of stock of other corporation is improper without evidence that it will be made.

should not be granted without notice unless the bill shows danger of irreparable injury.⁵² It should be continued in force until trial whenever there is danger of loss of corporate assets.⁵³

Accounting by directors to the corporation may be adjudged as incidental relief to ascertain the liabilities.⁵⁴ Where they have property or profits belonging to the corporation,⁵⁵ the defendants may be required to account during a period extending as far back as the statute of limitations would sustain an action at law.⁵⁶

Ordinarily a court of equity has no jurisdiction to dissolve a corporation at the suit of a stockholder, unless by virtue of some express statutory provision.⁵⁷ There are express statutory provisions in

Smyth-Wales v. John M. Smyth Co., 190 Ill. App. 66.

⁵² U. S. Rev. St. § 718; *Worth Mfg. Co. v. Bingham*, 116 Fed. 785.

⁵³ The order should not be dissolved on motion but should be retained until trial, where a threatened contract might transfer away and deprive a corporation of valuable properties. *Robinson v. New York, W. & B. R. Co.*, 123 N. Y. App. Div. 339, 108 N. Y. Supp. 91, aff'g 55 N. Y. Misc. 516, 105 N. Y. Supp. 897.

⁵⁴ But it will not be necessary, and a judgment may be entered against them directly if the amount is fixed and known. *Pollitz v. Wabash R. Co.*, 167 N. Y. App. Div. 669, 152 N. Y. Supp. 803.

Where an attempted merger of fraternal benefit corporations is invalid and their transactions have been kept separate and distinguishable, accounting may be had as incident to injunction. *Knapp v. Supreme Commandery, United Order of Golden Cross of World*, 121 Tenn. 212, 118. S. W. 390.

Accounting dependent on rescission falls with it and cannot be allowed if it cannot. *Johnson v. United Rys. Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63.

That there can be no accounting direct to the plaintiff stockholder, see *supra*, this section.

⁵⁵ Accounting not proper where

there is no allegation that any defendant made a profit out of a sale to be set aside. *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

⁵⁶ *Barry v. Moeller*, 68 N. J. Eq. 483, 59 Atl. 97.

⁵⁷ *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa 313, 38 L. R. A. 122, 63 Am. St. Rep. 389, 70 N. W. 216. And see generally the chapter on Forfeiture, Dissolution and Winding Up, *infra*.

There is no common-law power to wind up the corporation in a stockholders' suit. *Pride v. Pride Lumber Co.*, 109 Me. 452, 84 Atl. 989.

Dissolution should not be adjudged, but must be passed on in a separate and proper proceeding. *Brock v. Poor*, 216 N. Y. 387, 111 N. E. 229, rev'g 167 N. Y. App. Div. 784, 798, 800, 153 N. Y. Supp. 332, 342, 343.

Where statutory grounds for receivership, dissolution or insolvency do not appear, allegations of waste and conspiracy to wreck and impoverish the corporation which is going and solvent, and with no prayer for relief but receivership, do not make out a case. *Toomey v. First Mortgage Trust Co.*, — Tex. Civ. App.—, 177 S. W. 539.

See chapter on Forfeiture, Dissolution and Winding Up, *infra*.

some states under which a stockholder may sue for the appointment of a receiver and a winding up or dissolution of the corporation under circumstances specified in the statute.⁵⁸ And there may be very ex-

⁵⁸ *Kieley v. Barron & Cooke Heating & Power Co.*, 87 N. Y. App. Div. 317, 84 N. Y. Supp. 306; *Kelly v. Fargo Mercantile Co.*, 16 S. D. 73, 91 N. W. 350. And see generally chapter on Forfeiture, Dissolution and Winding Up, *infra*.

A statute giving the courts jurisdiction, on petition of an officer or stockholder of a corporation, to require an accounting by its directors as to their official conduct, to remove them for gross misconduct, and require the election of others, and, incidentally, to appoint a receiver to take charge of the business of the corporation, does not authorize the winding up of a solvent corporation, and the distribution of its property. *Sidway v. Missouri Land & Live-Stock Co.*, 101 Fed. 481.

A stockholder, under the Illinois statute, cannot enforce dissolution of a corporation or forfeiture of its charter, on the ground that it is an illegal combination or trust prejudicial to the public. The state alone can complain on this ground. Nor can he do so for illegal acts, even when his individual interests are affected, if he participated or acquiesced therein. *Coquard v. National Linseed Oil Co.*, 67 Ill. App. 20, *aff'd* 171 Ill. 480, 49 N. E. 563.

It was held, under a Massachusetts statute, that it was no ground for dissolving a manufacturing corporation, on the petition of a majority in number of the stockholders owning a minority of the stock, that one owner of the majority of the stock had for many years controlled the election of officers, and elected himself agent and clerk; that he had for a long time managed the business "according to his own will and choice,

regardless of the wishes and interests of the other stockholders"; that, according to his statement, the corporation had been doing a losing business for many years; that he had refused to make any change in the business, or to purchase the shares of the petitioners; and that, if the business were skilfully and properly managed, it might be made a source of profit to all concerned. *Pratt v. Jewett*, 9 Gray (Mass.) 34.

In New York, provision is made by statute for an action to procure a judgment dissolving a corporation:

(1) Where it has remained insolvent for at least one year.

(2) Where it has neglected or refused, for at least one year, to pay and discharge its notes or other evidences of debt.

(3) Where it has suspended its ordinary and lawful business for at least one year.

(4) If it has banking powers, or power to make loans on pledges or deposits, or to make insurances, where it becomes insolvent or unable to pay its debts, or has violated any provision of the act by or under which it was incorporated, or of any other act binding upon it. Code Civ. Proc. N. Y. § 1785 (now re-enacted as General Corporation Law, § 101). In such action, an injunction may be issued to preserve the assets of the corporation pendente lite, and a receiver may be appointed. *Id.* §§ 1787, 1788, now §§ 103, 104. As to the procedure in such action, see *Id.* §§ 1787-1796, now §§ 103-115. The action may be maintained by the attorney general in the name and in behalf of the people, or by a creditor or stockholder, on obtaining leave of the court, if the attorney general omits for sixty days to

ceptional circumstances under which a court of equity may appoint a receiver and wind up a corporation at the suit of a stockholder, even in the absence of a statute.⁵⁹

Whether a court of equity may appoint a receiver in a stockholder's suit, not for the purpose of dissolving the corporation, but merely for the purpose of preserving the assets of the corporation, and preventing irreparable loss or injury pending the suit, is a very different question; and it is well settled that such power exists, as it does in the case of a partnership, if the circumstances render its exercise necessary. If it were otherwise, a stockholder would often be practically without any adequate remedy at all. Under statutes in some states, and independently of any statutes in others, the court may appoint a receiver in a stockholder's suit if the directors and majority of the stockholders are so managing or disposing of its business or assets in their own interest that they will probably be lost or destroyed before a decree can be rendered, or where there are such dissensions within the corporation that its business cannot be honestly or properly managed, or if for any other reason it clearly appears to the court that the appointment of a receiver pending the suit is necessary⁶⁰ to preserve the assets of the corporation, and protect

commence the action, after submission by the creditor or stockholder of a verified statement of facts showing grounds for the action. *Id.* § 1786, now § 102. These sections are not exclusive of other statutes specially applicable. See General Corporation Law, § 115.

Also in New York by N. Y. Code Civ. Proc. §§ 2419-2431, re-enacted as General Corporation Law, §§ 170-195, provision is made for proceedings for the voluntary dissolution of a corporation, on petition of a majority of the directors, trustees, or other officers having the management of its concerns, if they "discover that the stock, effects, and other property thereof are not sufficient to pay all just demands, for which it is liable, or to afford a reasonable security to those who may deal with it; or if, for any reason, they deem it beneficial to the interests of the stockholders, that the corporation should be dissolved." Section 2420, now § 171, prescribes the

procedure when the directors or trustees are equally divided, etc. See, as to these sections, *Hitch v. Hawley*, 132 N. Y. 212, 30 N. E. 401, and cases cited *infra* in the chapter on Forfeiture, Dissolution and Winding Up. This does not apply to library, religious, some school, municipal or political corporations. General Corporation Law, § 195.

⁵⁹ *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218.

The minority will be completely and adequately relieved from unlawful acts of the majority, but a dissolution will be allowed only if there is no other way. *Thwing v. McDonald*, 134 Minn. 148, 159 N. W. 564, 158 N. W. 820, 156 N. W. 780.

⁶⁰ *Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co.*, 136 Fed. 710; *Bowling Green Trust Co. v. Virginia Passenger & Power Co.*, 133 Fed. 186; *Polk v. Mutual Reserve Fund Life Ass'n*, 119 Fed. 491;

the rights of the complaining stockholders, even though it may lead

Aiken v. Colorado River Irrigation Co., 72 Fed. 591; **Featherstone v. Cooke**, 16 Eq. 298.

See also as to the appointment of a receiver at the suit of a stockholder or stockholders:

United States. **Clark v. National Linseed Oil Co.**, 105 Fed. 787; **Arents v. Blackwell's Durham Tobacco Co.**, 101 Fed. 338; **Griffing v. A. A. Griffing Iron Co.**, 96 Fed. 577; **Texas Consol. Compress & Manufacturing Ass'n v. Storrow**, 92 Fed. 5; **Powers v. Blue Grass Building & Loan Ass'n**, 86 Fed. 705; **D. A. Tompkins Co. v. Catawba Mills**, 82 Fed. 780; **Becker v. Hoke**, 80 Fed. 973; **Hunt v. American Grocery Co.**, 80 Fed. 70; **Darragh v. H. Wetter Mfg. Co.**, 78 Fed. 7.

Alabama. **Bridgeport Development Co. v. Tritsch**, 110 Ala. 274, 20 So. 16, and see **Jasper Land Co. v. Wallis**, 123 Ala. 652, 26 So. 659.

Arizona. **Hallenborg v. Cobre Grande Copper Co.**, 8 Ariz. 329, 74 Pac. 1052.

Connecticut. A receiver will be appointed without determining on ultimate dissolution, where usurping officers are wasting assets and the corporation cannot otherwise be protected. **Sheehy v. Barry**, 87 Conn. 656, 89 Atl. 259.

Delaware. Receiver held proper where there was grave dissension and losses were being sustained, complainant having made the only money contribution to the corporation and defendants being alleged to hold stock illegally issued to themselves without payment. **Ellis v. Penn Beef Co.**, 9 Del. Ch. 213, 80 Atl. 666.

Georgia. See **Empire Hotel Co. v. Main**, 98 Ga. 176, 25 S. E. 413.

Idaho. **Gibbs v. Morgan**, 9 Idaho 100, 72 Pac. 733.

Illinois. **Young v. Rutan**, 69 Ill. App. 513.

Indiana. **Sheridan Brick Works v. Marion Trust Co.**, 157 Ind. 292, 87 Am. St. Rep. 207, 61 N. E. 666; **Supreme Sitting Order of Iron Hall v. Baker**, 134 Ind. 293, 20 L. R. A. 210, 33 N. E. 1128; **Wayne Pike Co. v. Hammons**, 129 Ind. 368, 27 N. E. 487.

Iowa. **Wallace v. Pierce-Wallace Pub. Co.**, 101 Iowa 313, 38 L. R. A. 122, 63 Am. St. Rep. 389, 70 N. W. 216; **Dickerson v. Cass County Bank**, 95 Iowa 392, 64 N. W. 395. And see **Peatman v. Centerville Light, Heat & Power Co.**, 100 Iowa 245, 69 N. W. 541.

Kansas. **In re Lewis**, 52 Kan. 660, 35 Pac. 287.

Louisiana. **Brock v. Automobile Livery & Sales Co.**, 130 La. 404, 58 So. 21, 130 La. 414, 58 So. 25; **Marcuse v. Gullett Gin Mfg. Co.**, 52 La. Ann. 1383, 27 So. 846; **Sincer v. Alverson**, 51 La. Ann. 955, 25 So. 650; **In re Moss Cigar Co.**, 50 La. Ann. 789, 23 So. 544; **In re Belton**, 47 La. Ann. 1614, 30 L. R. A. 648, 18 So. 642.

Maine. See **Ulmer v. Maine Real-Estate Co.**, 93 Me. 324, 45 Atl. 40. Receiver may be appointed to prevent loss, where it is out of business, has few and insufficient assets, and funds have been misappropriated which must be recovered from defendants. **Pride v. Pride Lumber Co.**, 109 Me. 452, 84 Atl. 989.

Maryland. **DuPuy v. Transportation & Terminal Co.**, 82 Md. 408, 34 Atl. 910, 33 Atl. 889; **Davis v. United States Elec. Power & Light Co.**, 77 Md. 35, 25 Atl. 982.

Massachusetts. See **Davis v. Peabody**, 170 Mass. 397, 49 N. E. 750.

Michigan. **Miner v. Belle Isle Ice Co.**, 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218. And see **Rumney v. Detroit & M. Cattle Co.**, 116 Mich. 640, 74 N. W. 1043.

Mississippi. **Mulverhill v. Vicksburg Railroad, Power & Manufactur-**

to a dissolution.⁶¹ Without such a showing as this, however, a court will not appoint a receiver at the suit of a minority stockholder, and thus take the management of the corporation out of the hands of its directors and stockholders, even for a limited time, although the latter

ing Co., 88 Miss. 689, 40 So. 647; *Stewart v. Belt*, 19 So. 957.

Missouri. *Cantwell v. Columbia Lead Co.*, 199 Mo. 1, 97 S. W. 167. And see *Glover v. St. Louis Mut. Bond Inv. Co.*, 138 Mo. 408, 40 S. W. 110.

Montana. *State v. Second Judicial District Court of Silver Bow County*, 15 Mont. 324, 27 L. R. A. 392, 48 Am. St. Rep. 682, 39 Pac. 316.

Nebraska. See *Ponca Mill Co. v. Mikesell*, 55 Neb. 98, 75 N. W. 46. Receiver held proper where officers had appropriated funds to their own use and had been reckless, if not dishonest, in management. *Forrest v. Nebraska Hardware Co.*, 91 Neb. 735, 137 N. W. 839.

New Jersey. *Wood & Nathan Co. v. American Mach. & Mfg. Co.* (N. J. Eq.), 62 Atl. 768; *Hoopes v. Basic Co.*, 69 N. J. Eq. 679, 61 Atl. 979; *Sternberg v. Wolf*, 56 N. J. Eq. 389, 39 L. R. A. 762, 67 Am. St. Rep. 494, 39 Atl. 397. And see *Cape May v. Cape May*, D. B. & S. P. R. Co., 59 N. J. Eq. 59, 44 Atl. 973; *American Surety Co. v. Great White Spirit Co.*, 58 N. J. Eq. 526, 43 Atl. 579; *Ft. Wayne Elec. Corporation v. Franklin Elec. Light Co.*, 57 N. J. Eq. 7, 41 Atl. 217, rev'd *Franklin Elec. Light Co. v. Ft. Wayne Elec. Corporation*, 58 N. J. Eq. 579, 43 Atl. 1098. Receiver will be appointed in suit by stockholder and creditor to annul sale of all corporate assets, where they have passed into title of a foreign corporation leaving defendant insolvent, and where neither assets nor necessary parties are before the court. *Dalsheimer v. Graphié Arts Co.*, 85 N. J. Eq. 49, 97 Atl. 497.

New York. *Osgood v. Maguire*, 61 N. Y. 524; *Reusens v. Manufacturing*

& Selling Co. of America, 99 App. Div. 214, 90 N. Y. Supp. 1010; *Halpin v. Mutual Brewing Co.*, 91 Hun 220, 36 N. Y. Supp. 151; *Piza v. Butler*, 90 Hun 254, 35 N. Y. Supp. 721; *Case v. Hudson Co.*, 41 Misc. 51, 88 N. Y. Supp. 577.

North Carolina. It is not essential that absolute and irremediable insolvency exist. It is enough that it is threatened so that only receivership can save it. *Mitchell v. Aulander Realty Co.*, 169 N. C. 516, 86 S. E. 358.

Pennsylvania. *Pottsville Bank v. Minersville Water Co.*, 211 Pa. 566, 61 Atl. 119.

South Carolina. *Klugh v. Coronaca Milling Co.*, 66 S. C. 100, 44 S. E. 566; *Matthews v. Bank of Allendale*, 60 S. C. 183, 38 S. E. 437.

South Dakota. *Glover v. Manila Gold Mining & Milling Co.*, 19 S. D. 559, 104 N. W. 261.

Texas. *Becker v. Gulf City St. Railway & Real Estate Co.*, 80 Tex. 475, 15 S. W. 1094; *Brenton & McKay v. Peck*, 39 Tex. Civ. App. 224, 87 S. W. 898; *Farwell v. Babcock*, 27 Tex. Civ. App. 162, 65 S. W. 509. And see *People's Inv. Co. v. Crawford* (Tex. Civ. App.), 45 S. W. 738.

Virginia. *Stevens v. Davison*, 18 Gratt. 819, 98 Am. Dec. 692.

Washington. *Davis v. Edwards*, 41 Wash. 480, 84 Pac. 22; *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364; *Jones v. Western Mfg. Co.*, 27 Wash. 136, 67 Pac. 586. And see *Cameron v. Grove-land Improvement Co.*, 20 Wash. 169, 72 Am. St. Rep. 26, 54 Pac. 1128.

As to the particular grounds for receivership, and the practice therein, see chapter on Receivers, *infra*.

⁶¹ The mere fact that receivership may lead to dissolution is not enough

may be charged with fraud and mismanagement.⁶² Even the fact that the governing body will not meet for a long time is not enough.⁶³ It will not be done unless to preserve property or rights of creditors or stockholders, and not except in a strong case, where the corporation is solvent and going,⁶⁴ and not to supply a different management

to deny appointment if necessary. *Falfurrias Immigration Co. v. Spielhagen*, 61 Tex. Civ. App. 111, 129 S. W. 164.

⁶² **Alabama.** *Little Warrior Coal Co. v. Hooper*, 105 Ala. 665, 17 So. 118; *Ft. Payne Furnace Co. v. Ft. Payne Coal & Iron Co.*, 96 Ala. 472, 38 Am. St. Rep. 109, 11 So. 439.

California. *Fischer v. Superior Court City & County of San Francisco*, 110 Cal. 129, 42 Pac. 561.

Florida. *Stockton v. Harmon*, 32 Fla. 312, 13 So. 833.

Georgia. *Steele Lumber Co. v. Laurens Lumber Co.*, 98 Ga. 329, 24 S. E. 755; *Empire Hotel Co. v. Main*, 98 Ga. 176, 25 S. E. 413.

Illinois. *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 132.

Iowa. *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa 313, 38 L. R. A. 122, 63 Am. St. Rep. 389, 70 N. W. 216; *Peatman v. Centerville Light, Heat & Power Co.*, 100 Iowa 245, 69 N. W. 541.

Kansas. *Fluker v. Emporia City Ry. Co.*, 48 Kan. 577, 30 Pac. 18.

Maryland. *Mason v. Supreme Court Equitable League of Baltimore City*, 77 Md. 483, 39 Am. St. Rep. 433, 27 Atl. 171.

Michigan. *Rumney v. Detroit & M. Cattle Co.*, 116 Mich. 640, 74 N. W. 1043; *Cicotte v. Anciaux*, 53 Mich. 227, 18 N. W. 793.

New Jersey. *Edison v. Edison United Phonograph Co.*, 52 N. J. Eq. 620, 29 Atl. 195; *Laurel Springs Land Co. v. Fougeray*, 50 N. J. Eq. 756, 26 Atl. 886; *Einstein v. Rosefeld*, 38 N. J. Eq. 309.

New York. *People v. Albany & S. R. Co.*, 55 Barb. 344; *Waterbury v.*

Merchants' Union Exp. Co., 50 Barb. 157.

Pennsylvania. *Crombie v. Order of Solon*, 157 Pa. St. 588, 27 Atl. 710.

South Carolina. *Wenzel v. Palmetto Brewing Co.*, 48 S. C. 80, 26 S. E. 1.

Tennessee. *Downing v. Dunlap Coal, Iron & Railway Co.*, 93 Tenn. 221, 24 S. W. 122.

Texas. *People's Inv. Co. v. Crawford*, 45 S. W. 738; *New Birmingham Iron & Land Co. v. Blevens*, 12 Tex. Civ. App. 410, 34 S. W. 828.

See also cases cited in note preceding.

Receiver is improper where no statutory grounds are shown and no extraordinary circumstances requiring one. *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 83 N. E. 434, rev'g 135 Ill. App. 234.

The court has common-law power to appoint a receiver on a bill for accounting and removal of officers, but where there is no imminent danger of loss, the corporate management will not be disturbed by such an appointment on affidavits pending trial. *Katz v. DeWolf*, 151 Wis. 346, 138 N. W. 1016, 151 Wis. 337, Ann. Cas. 1914 B 237, 138 N. W. 1013.

⁶³ That the governing body will not meet for two years is not enough where the corporation is solvent and no impending irreparable injury is shown (fraternal benefit corporation). *Howze v. Harrison*, 165 Ala. 150, 51 So. 614.

⁶⁴ *Welcke v. Trageser*, 131 N. Y. App. Div. 731, 116 N. Y. Supp. 166; *Hastings v. Tousey*, 121 N. Y. App. Div. 815, 106 N. Y. Supp. 639.

Misapplication of funds not enough.

of affairs,⁶⁵ or where it appears that no real interest remains for the stockholders to realize,⁶⁶ or where a committee for the protection of stockholders in conjunction with directors is taking steps to prevent the commission of further waste,⁶⁷ or if the expense would be incommensurate with benefits.⁶⁸

Appointment should not be made on the bill or complaint alone if it is denied by a sworn answer, further showing being requisite in that case.⁶⁹ Appearance or service of all defendants is not prerequisite to making the order of appointment.⁷⁰ An officer of the corporation during the mismanagement should not be appointed as receiver,⁷¹ and it is better not to appoint attorneys in the case.⁷²

§ 4092. — Bar and conclusiveness of decree. Generally speaking stockholders are bound by a decree to which the corporation is a party, for "a stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."⁷³ It necessarily follows that

Metzger v. Knox, 77 N. Y. Misc. 271, 136 N. Y. Supp. 681, aff'd 153 N. Y. App. Div. 911, 137 N. Y. Supp. 1129.

Bad administration is not enough. *Fenn v. W. M. Ostrander*, 132 N. Y. App. Div. 311, 116 N. Y. Supp. 1083.

Receivership allowed where some officers were convicted or in prison, the manager unfit, with no competent officer to take charge, and several other receivership proceedings pending and being pressed. *Williams v. United Wireless Tel. Co.*, 131 N. Y. Supp. 41.

⁶⁵ *Schmidt v. Johnson*, 166 Ill. App. 622, 623.

Not allowed where object is to take possession and by better management make corporation more profitable. *Leary v. Columbia River & P. S. Nav. Co.*, 82 Fed. 775.

⁶⁶ Receiver will not be appointed where no creditor is pressing or is party, at suit of stockholders who allege total insolvency, whence it appears they have no real interest remaining. *Worth Mfg. Co. v. Bingham*, 116 Fed. 785.

⁶⁷ No further waste threatened. *Sedgwick v. Seward Development Co.*,

144 N. Y. App. Div. 455, 129 N. Y. Supp. 209.

⁶⁸ Denied where "receivership would entail heavy expenses on all concerned without bringing any corresponding benefit." *Commonwealth Title Insurance & Trust Co. v. Seltzer*, 227 Pa. 410, 136 Am. St. Rep. 896, 76 Atl. 77.

⁶⁹ *Falfurrias Immigration Co. v. Spielhagen*, 61 Tex. Civ. App. 111, 129 S. W. 164; *Smiley v. New River Co.*, 72 W. Va. 221, 77 S. E. 976.

⁷⁰ A pendente lite receivership may be ordered as against defendants who actually knew of the proceeding and filed affidavits against it, though they were not served and did not appear. *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666.

⁷¹ Competent stranger should be appointed. *Williams v. United Wireless Tel. Co.*, 131 N. Y. Supp. 41.

⁷² *Mitchell v. Aulander Realty Co.*, 169 N. C. 516, 86 S. E. 358, sustaining appointment of plaintiff's counsel but condemning the practice.

⁷³ *Hawkins v. Glenn*, 131 U. S. 319, 329, 33 L. Ed. 184; *Sanger v. Upton*,

the decree in one stockholders' suit is a bar to other such suits on the same cause of action.⁷⁴

91 U. S. 56, 58, 23 L. Ed. 220. And see Freeman on Judgments (4th Ed.), § 177.

Where a corporation is a party to an action involving the validity of a conveyance or other contract by it, the judgment or decree therein is a bar to a subsequent suit by a stockholder of the corporation to attack the same transaction. *Alexander v. Donohoe*, 68 Hun (N. Y.) 131, 22 N. Y. Supp. 652.

Judgment in action by corporation is bar unless fraud or the like opens it to stockholders' suit. *National Power & Paper Co. v. Rossman*, 122 Minn. 355, Ann. Cas. 1914 D 830, 142 N. W. 818.

Where a decree has been entered against a corporation it becomes binding on a stockholder unless reversed. *Buck v. Massie*, 109 La. 776, 33 So. 767.

⁷⁴ When a stockholder brings a suit in equity in behalf of himself and other stockholders who may come in, to redress an injury to the corporation, making the corporation a party, as he must do, any judgment or decree rendered in the suit is clearly binding upon all who are parties to the suit, the stockholder suing and other stockholders who actually come in and become parties, the corporation itself, guilty officers who are made parties defendant, and third persons who may have participated in the wrongs complained of, and who are made parties defendant. Further than this, the judgment or decree, unless collusive, being binding upon the corporation, **which** is the real party in interest, and **which** represents not only the stockholder suing, but all other stockholders as well, is conclusive against all the other stockholders, whether they avail themselves of their right to come in and be made parties or not; and

they cannot afterwards bring another suit for the purpose of litigating the same questions. "From the very form and nature of these suits, each stockholder must be considered as represented, for, if he is in sympathy with the complainant, he may become a party complainant by application to the court. If he is in sympathy with the threatened action of the company, he is represented by and in the corporation, which is a necessary party to the suit. * * * Not only this, but the court may, if satisfied that the interests of the corporation are not being properly presented or protected, admit a stockholder to be made a party defendant." *Willoughby v. Chicago Junct. Railways & Union Stockyards Co.*, 50 N. J. Eq. 656, 25 Atl. 277. And see *Dana v. Morgan*, 219 Fed. 313; *Dannmeyer v. Coleman*, 11 Fed. 97; *Montezuma Cattle Co. v. Dake*, 16 Colo. App. 139, 63 Pac. 1058; *Hearst v. Putnam Min. Co.*, 28 Utah 184, 66 L. R. A. 784, 107 Am. St. Rep. 698, 77 Pac. 753.

A former suit by another stockholder to impress a constructive trust on property for the corporation is bar to one to establish an express trust therein on the same facts. *Grant v. Greene Consol. Copper Co.*, 169 N. Y. App. Div. 206, 154 N. Y. Supp. 596.

A former bill grounded on ultra vires and failing on the merits bars one by another stockholder grounded on fraud in the same transaction. *Dana v. Morgan*, 219 Fed. 313.

A decision of a foreign court that shares were not the property of the corporation but of individuals, and that the plaintiffs therein were not defrauded, and dismissing the bill, bars a suit in equity to restrain the holder from voting such shares on the ground that he held them as "trus-

If, however, the action in which the bar or estoppel is asserted is not one in which there is mutuality of parties, or identity of cause or subject-matter, as where the second action is an individual action for injuries to the stockholders; then the rule is that no bar or estoppel exists.⁷⁵ The abatement of a suit in equity by stockholders of a corporation for the benefit of the corporation on the ground that capacity to sue was not proven will not bar a suit later for the same relief by the same stockholders after they have become qualified to bring suit. In the case at bar there had been failure to make due demand on the corporate officers to bring action, and at the time of the second suit this requirement had been complied with. The court held that the suit could then be maintained.⁷⁶

A decree for cancellation and surrender of stock does not prevent a lawful reissue of it.⁷⁷

An injunction, when granted, operates on the conditions found at the time, and is not to be taken as conclusive perpetually regardless of change in those conditions.⁷⁸

§ 4093. — Costs and fees and allowances. The ordinary rules of costs in equity apply. Where the suit is successful, they are ordinarily awarded to the plaintiff and against all the defendants,⁷⁹ and

tee" for the corporation, and also bars a proceeding in quo warranto to oust officers elected by such shares, parties being the same in both suits. *Corey v. Independent Ice Co.*, 106 Me. 485, 76 Atl. 930.

A decree dismissing a suit to overturn a reorganization and to turn back into the treasury certain shares held by one of defendants was a bar to a foreign suit to set aside such reorganization; hence it was proper to expend corporate funds in resisting such barred foreign suit. *Corey v. Independent Ice Co.*, — Mass. —, 115 N. E. 488.

Decree awarding relief for and against numerous stockholders and others, who were not brought under it as parties does not bind them, and they may, after the term, apply for proper relief. *In re Dennett*, 221 Fed. 350.

⁷⁵ A decree in foreclosure against the corporation establishing a defense

of fraud is not conclusive in favor of a stockholder suing one of the same parties for fraud in selling stock to him. The one is an individual and the other a corporate cause of action. *Colgan v. Finck*, 167 N. Y. App. Div. 718, 153 N. Y. Supp. 239.

⁷⁶ *The Telegraph v. Lee*, 125 Iowa 17, 98 N. W. 364.

⁷⁷ It is not a contempt to reissue stock for a lawful purpose after cancellation and surrender obedient to decree, no provision against reissue having been made in the decree. *Archer v. Hesse*, 164 N. Y. App. Div. 493, 150 N. Y. Supp. 296.

⁷⁸ Injunction was sustained against payment of certain salaries, against objection that it operated perpetually. The court explained that a material change in conditions would make a new case. *Wight v. Heublein*, 238 Fed. 321.

⁷⁹ *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl.

against plaintiff if he fails,⁸⁰ but may be denied to plaintiffs who have not conducted their litigation in accordance with good conscience,⁸¹ or to all parties where there was no bad faith.⁸² Cost of unnecessary testimony should be charged against the party adducing it.⁸³

In assessing costs the suit is the plaintiffs', as distinguished from the cause of action which is the corporation's, and hence the costs go to the plaintiffs or against them as individuals per capita and not pro rata their shares.⁸⁴ An intervenor should not be taxed with costs accrued before he came in.⁸⁵

On the principle of benefit in preserving a trust fund, allowances for fees and expenses may be made in proper cases out of the corporate property so benefited.⁸⁶ Conversely, expenses entailed on the

254; *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, Ann. Cas. 1912 C 859, 112 Pac. 647.

Charged to wrongdoing stockholder. *Merle v. Beifeld*, 275 Ill. 594, 114 N. E. 369.

Denied where he failed in major portion of demands. *Roth v. Robertson*, 64 N. Y. Misc. 343, 118 N. Y. Supp. 351.

⁸⁰ *Graham v. Dubuque Specialty Mach. Works*, 138 Iowa 456, 15 L. R. A. (N. S.) 729, 114 N. W. 619.

It was error to charge the prevailing defendants with costs of depositions taken by them where the bill was dismissed on the merits. *Peters v. Waverly Water-Front Improvement & Development Co.*, 113 Va. 318, 74 S. E. 168.

⁸¹ Denied where plaintiffs were agreeable to the wrong if done on their terms, but sued when these were not met. *Loewenstein v. Diamond Soda Water Mfg. Co.*, 94 N. Y. App. Div. 383, 88 N. Y. Supp. 313.

⁸² Denied to both parties on canceling a deed to all members, where no fraud existed and the corporation was a benevolent one which held the property by devise for corporate purposes. *German Corporation of Negaunee v. Negaunee German Aid Society*, 172 Mich. 650, 138 N. W. 343.

⁸³ Cost of unnecessary testimony

should not be awarded against the corporation, but against parties adducing it; but where no objection was made below, the error will not be corrected on appeal. *Ely Jellico Coal Co. v. Matthews*, 144 Ky. 531, 139 S. W. 796.

⁸⁴ *Edwards v. Bay State Gas Co.*, 130 Fed. 242.

⁸⁵ *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

⁸⁶ *United States. McCourt v. Singers-Bigger*, 150 Fed. 102, 145 Fed. 103, 7 Ann. Cas. 287; *Meeker v. Winthrop Iron Co.*, 17 Fed. 48.

Alabama. *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 59 Am. St. Rep. 140, 21 So. 315.

Iowa. *Graham v. Dubuque Specialty Mach. Works*, 138 Iowa 456, 15 L. R. A. (N. S.) 729, 114 N. W. 619.

Missouri. *Robinson v. Dundee Land & Investment Co.*, 80 Mo. App. 621.

Nebraska. *Forrest v. Nebraska Hardware Co.*, 91 Neb. 735, 137 N. W. 839.

Tennessee. *Grant v. Lookout Mountain Co.*, 93 Tenn. 691, 27 L. R. A. 98, 28 S. W. 90.

Allowed to plaintiff members who were "certificate holders." *Davis v. Bay State League*, 158 Mass. 434, 33 N. E. 591. But see *Forrester & MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 397, 76

corporation were in one case charged to the wrongdoers who made the litigation necessary,⁸⁷ and each was left to pay his own counsel, where the recovery for the corporation was only nominal and the real controversy was between individuals both accountable to the corporation.⁸⁸ Expenses incurred by directors where suit is brought against them for fraudulent misappropriation of corporate funds cannot be recovered by them from the corporation. This rule obtains although the corporation is named nominally as defendant.⁸⁹

Fees allowable will be only such as the court deems reasonable in view of the services rendered and the degree of success attained,⁹⁰

Pac. 211, 74 Pac. 1088, wherein it is said that it does not depend on possession of the trust fund alone.

The right is said to be based on the power to charge the corporation with the cost of a successful suit. *Louisville Bridge Co. v. Dodd*, 27 Ky. L. Rep. 454, 85 S. W. 683.

Attorney's fees were denied where lien creditors had already brought the property into court, when the stockholders' bill was filed, and where the lien consumed it, so that no benefit was gained. The fact that the suits were consolidated was not material. *Lamar v. Hall & Wimberly*, 129 Fed. 79.

Corporation which paid attorney's fees in defending a suit against it by another corporation cannot be reimbursed where judgment resulted in favor of a third corporation. *Dodd v. Pittsburg, C., C. & St. L. R. Co.*, 127 Ky. 762, 16 L. R. A. (N. S.) 898, 106 S. W. 787.

Where the substantial controversy was over the right to corporate office, and the decree against individual defendants resulted in the recovery of no property, fees and costs against the corporation were improperly allowed. *Burley Tobacco Co. v. Vest*, 165 Ky. 762, 178 S. W. 1102.

Allowed and adjudged to be a lien on funds recovered, and a defendant, other than the corporation, held not entitled to assign error therein. *Merle v. Beifeld*, 275 Ill. 594, 114 N. E. 369.

Claim was allowed direct to counsel, who took the case on a contingent fee supposing that it belonged individually to plaintiffs, but \$20,000 claimed was reduced to \$14,000 on a recovery of \$75,000. *Davis v. Gemmell*, 73 Md. 530, 21 Atl. 712.

⁸⁷ Expenses incurred by the corporation in defending suit may be chargeable to the delinquent directors, *Godley v. Crandall & Godley Co.*, 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236; but it should be proved that they were paid by it, and the delinquents should be apprised of the claim. Same case on appeal, 212 N. Y. 121, 105 N. E. 818.

⁸⁸ *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340.

Real controversy was between equal owners of the whole stock and defendant is adjudged to reimburse the corporation. *Boothe v. Summit Coal Min. Co.*, 72 Wash. 679, 131 Pac. 252.

⁸⁹ *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248.

⁹⁰ A plaintiff who failed on part of his charges was allowed part of his counsel fees and expenses, adjusted reasonably to the value of what he recovered. *Lillard v. Oil Paint & Drug Co.*, 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254.

Two thousand five hundred dollars counsel fee held proper to able counsel who recovered nine thousand dollars and upward after protracted lit-

and must be fixed on evidence, for the value of the services cannot be judicially known,⁹¹ and should be allowed as part of final judgment therein;⁹² and when such judgment is made the attorneys cannot be deprived of the allowance by a subsequent settlement and compromise among the parties.⁹³

Plaintiffs do not represent the corporation in the sense of agents who may bind it by contract for a contingent fee in event of success;⁹⁴ for while incidental to the power of a minority stockholder to institute suit to redress wrongs to the corporation, where there

igation. *Graham v. Dubuque Specialty Mach. Works*, 138 Iowa 456, 15 L. R. A. (N. S.) 729, 114 N. W. 319.

Fifty thousand dollars sustained where the property involved was about forty million dollars though plaintiff's stock was but fifty-three thousand dollars. *Forrester & MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 397, 74 Pac. 1088.

One thousand dollars allowance sustained. *Ely Jellico Coal Co. v. Matthews*, 144 Ky. 531, 139 S. W. 796.

In a suit regarded by the court as an individual suit against ultra vires acts impairing the stockholder's contract with the corporation, counsel fees were denied to the successful plaintiff because no trust fund was saved. *Alexander v. Atlanta & W. P. R. Co.*, 113 Ga. 193, 54 L. R. A. 305, 38 S. E. 772.

See also cases in the note preceding.

⁹¹ *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 59 Am. St. Rep. 140, 21 So. 315.

They should be fixed as an incident in the litigation, usually after its conclusion, on evidence taken by motion and notice or by a reference for that purpose. *Meeker v. Winthrop Iron Co.*, 17 Fed. 48; *Louisville Bridge Co. v. Dodd*, 27 Ky. L. Rep. 454, 85 S. W. 683.

⁹² The fee allowed on a judgment for accounting is payable without waiting for the result of such accounting. It is not an interlocutory decree. *For-*

rester v. Boston & M. Consol. Copper & Silver Min. Co., 29 Mont. 397, 74 Pac. 211, rev'g on rehearing 74 Pac. 1088.

After judgment is a finality there can be no addition to it by way of a fee allowance, though it might have been proper. *Wickersham v. Crittenden*, 103 Cal. 582, 37 Pac. 513.

As to making the allowance a lien, see § 4090, *supra*.

⁹³ Where the decree contains a provision for payment of the misappropriated sum to the clerk, and for payment by him of a sum certain as fees to the successful attorneys for the minority, a subsequent compromise and settlement will not defeat such attorneys. They may recover their fees as if that much of the judgment was unsatisfied. *Princeton Coal & Mining Co. v. Gilchrist*, 51 Ind. App. 216, 99 N. E. 426.

⁹⁴ *Graham v. Dubuque Specialty Mach. Works*, 138 Iowa 456, 15 L. R. A. (N. S.) 729, 114 N. W. 619; *Louisville Bridge Co. v. Dodd*, 27 Ky. L. Rep. 454, 85 S. W. 683.

The attorney in a Wisconsin case recovered his compensation in a direct action against the corporation after he had unsuccessfully defended an action brought by minority members in its right to prevent alienation of property. See *Kanneberg v. Evangelical Creed Congregation*, 146 Wis. 610, 39 L. R. A. (N. S.) 138, Ann. Cas. 1912 C 376, 131 N. W. 353, two judges dissenting.

has been due demand and refusal on the part of the corporate authorities to institute such action, is the right to employ counsel and to have such counsel reimbursed from the corporate funds in proper cases, there is a clear distinction between expenses which directors may impose and those which a minority stockholder may impose upon the corporation in the institution of actions to protect corporate rights. Where the directors institute suits in good faith, the expenses thereof may be properly charged to the corporation, although it subsequently appears that the directors were in error and the corporation fails to receive benefit from the institution of the suit. Where, however, a minority stockholder institutes a suit and it subsequently appears that his action was without ground and the corporation is in no wise benefited thereby, the expenses of the suit must be borne by the stockholder and cannot be charged to the corporation. To permit a rule otherwise would be to throw open the door to minority stockholders to indulge in litigation, oftentimes clearly foolish, and which might result in wrecking the corporation.⁹⁵

XXXIII. LIABILITY OF STOCKHOLDERS TO CREDITORS ON ACCOUNT OF UNPAID SUBSCRIPTIONS

§ 4094. Scope of subdivision. We are to deal in this subdivision with the liability of stockholders for a balance that may be due on their stock, of the rights and remedies of creditors in respect thereto, and of the remedies of stockholders inter se, upon payment. The validity and effect of subscriptions to capital stock, and matters relating to their enforcement by the corporation, have been fully considered in the chapter on subscriptions to capital stock.⁹⁶ And many matters bearing more or less directly on the liability of stockholders to creditors have also been treated in that chapter, as, for example, the making of the contract of subscription,⁹⁷ the validity and effect of conditions precedent⁹⁸ and conditions subsequent, or special terms, in such a contract,⁹⁹ the effect on the liability of the stockholders to creditors of fraud¹ or mistake² in the making of the contract, and of the forfeiture or sale of the shares by the corporation for a failure to pay calls,³ the effect of illegality or irregularities in the organiza-

⁹⁵ Louisville Bridge Co. v. Dodd, 27 Ky. L. Rep. 454, 85 S. W. 683.

⁹⁶ See Chap. 17, supra.

⁹⁷ See § 521 et seq., supra.

⁹⁸ See §§ 573-600, supra.

⁹⁹ See §§ 601-609, and particularly §§ 606, 607, supra.

¹ See § 636, supra.

² See § 544, supra.

³ See § 665, supra.

tion of the corporation,⁴ and the estoppel of stockholders to deny the existence of the corporation,⁵ or the fact or validity of their subscriptions.⁶

The liability to creditors of the holders of watered or fictitiously paid up stock,⁷ or of stock which is part of an overissue or an unauthorized increase,⁸ has been considered in previous sections of this chapter. And the statutory liability of stockholders to creditors will be considered in subsequent sections.⁹

§ 4095. Existence of liability—General principles. The capital stock of a corporation is the basis of its credit, since the stockholders are not personally liable for its debts unless such liability is imposed by statute. Persons deal with a corporation on the faith of this fund, and, if it is not paid in, they have a right to insist that it shall be paid in, when its payment is necessary for the satisfaction of their claims against the corporation.¹⁰ It is perfectly well settled, therefore, that when stockholders are indebted to a corporation on account of their stock, and the corporation becomes insolvent, they may be com-

⁴ See §§ 586, 587, *supra*.

⁵ See § 715, *supra*.

⁶ See §§ 716-720, *supra*.

⁷ See §§ 3517-3598, *supra*.

⁸ See §§ 3467, 3468, 3469, *supra*.

⁹ See § 4141 *et seq.*, *infra*.

¹⁰ **United States.** *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 349; *In re Phoenix Hardware Co.*, 249 Fed. 410; *Enright v. Heckscher*, 240 Fed. 863; *In re Grand Rapids Furniture Agency*, 209 Fed. 483; *In re Newfoundland Syndicate*, 196 Fed. 443; *In re Putman*, 193 Fed. 464; *Republic Iron & Steel Co. v. Carlton*, 189 Fed. 126; *Bagnell v. Ives*, 184 Fed. 466; *Land Title & Trust Co. v. Asphalt Co. of America*, 127 Fed. 1; *Marsh v. Burroughs*, 1 Woods 463, Fed. Cas. No. 9,112.

Alabama. *Vaughn v. Alabama Nat. Bank*, 143 Ala. 572, 5 Ann. Cas. 665, 42 So. 64; *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92; *Smith v. Huckabee*, 53 Ala. 191; *Allen v. Montgomery R. Co.*, 11 Ala. 437. See also § 4153, *infra*.

Arizona. See § 4153, *infra*.

Arkansas. *Ford Hardwood Lumber Co. v. Clement*, 97 Ark. 522, 135 S. W. 343; *Tiger Bros. v. Rogers Cotton Cleaner & Gin Co.*, 96 Ark. 1, 30 L. R. A. (N. S.) 694, Ann. Cas. 1912 B 488, 130 S. W. 585; *Jones v. Arkansas Mechanical & Agricultural Co.*, 38 Ark. 17; *Jones v. Jarman*, 34 Ark. 323.

California. *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986; *Harrison v. Armour*, 169 Cal. 787, 147 Pac. 1166; *R. H. Herron Co. v. Shaw*, 165 Cal. 668, Ann. Cas. 1915 A 1265, 133 Pac. 488; *Perkins v. Cowles*, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711; *Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204; *Union Sav. Bank*

pelled to pay the amount due by or for the benefit of its creditors in

of *San Jose v. Leiter*, 145 Cal. 696, 79 Pac. 441; *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858; *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 56 L. R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776, 27 Pac. 674; *Harmony v. Page*, 62 Cal. 448; *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438.

Colorado. See § 4153, *infra*.

Connecticut. *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711; *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593. See also § 4153, *infra*.

Delaware. See § 4153, *infra*.

Florida. See § 4153, *infra*.

Georgia. *Chappell v. Lowe*, 145 Ga. 717, 89 S. E. 777; *Spratling v. Westbrook*, 140 Ga. 625, 79 S. E. 536; *Commercial Bank of Augusta v. Warthen*, 119 Ga. 990, 47 S. E. 536; *Tichenor v. Williams Block Pavement Co.*, 116 Ga. 303, 42 S. E. 505; *Dalton & M. R. Co. v. McDaniel*, 56 Ga. 191; *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98, 2 Am. Rep. 563; *Stinson v. Williams*, 35 Ga. 170; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412. See also § 4153, *infra*.

Idaho. See § 4153, *infra*.

Illinois. *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388; *Sprague v. National Bank of America*, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, aff'g 66 Ill. App. 320; *World's Fair Excursion & Transportation Boat Co. v. Gasch*, 162 Ill. 402, 44 N. E. 724; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725; *Patterson v. Lynde*, 112 Ill. 196; *Clapp v. Peterson*, 104 Ill. 26. See also § 4153, *infra*.

Indiana. *Marion Trust Co. v. Blish*, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814; *Carnahan*

v. Campbell, 158 Ind. 226, 63 N. E. 384; *Bent v. Underdown*, 156 Ind. 516, 60 N. E. 307; *Coffin v. Ransdell*, 110 Ind. 417, 11 N. E. 20; *Indiana Novelty Mfg. Co. v. McGill*, 15 Ind. App. 1, 43 N. E. 464.

Iowa. *Miller v. Hawkeye Gold Dredging Co.*, 156 Iowa 557, 137 N. W. 507; *Tierney v. Ledden*, 143 Iowa 286, 21 Ann. Cas. 105, 121 N. W. 1050; *Es-gen v. Smith*, 113 Iowa 25, 84 N. W. 954; *Wishard v. Hansen*, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691; *Jackson v. Traer*, 64 Iowa 469, 52 Am. Rep. 449, 20 N. W. 764; *Osgood v. King*, 42 Iowa 478.

Kansas. See § 4153, *infra*.

Kentucky. *Haldeman v. Ainslie*, 82 Ky. 395, 6 Ky. L. Rep. 397; *Williams v. Chamberlain*, 29 Ky. L. Rep. 606, 94 S. W. 29. See also § 4153, *infra*.

Louisiana. *Jackson Fire & Marine Ins. Co. v. Walle*, 105 La. 89, 29 So. 503; *Belknap v. Adams*, 49 La. Ann. 1350, 22 So. 382; *Robertson v. Con-rey*, 5 La. Ann. 297.

Maine. *Barron v. Burrill*, 86 Me. 66, 29 Atl. 939; *Barron v. Paine*, 83 Me. 312, 22 Atl. 218; *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904. See also § 4153, *infra*.

Maryland. *Crawford v. Rohrer*, 59 Md. 599; *Brant v. Ehlen*, 59 Md. 1; *Rider v. Morrison*, 54 Md. 429; *Musgrave v. Morrison*, 54 Md. 161; *Morrison v. Dorsey*, 48 Md. 461; *Hager v. Cleveland*, 36 Md. 476. See also § 4153, *infra*.

Michigan. *Grand Rapids Trust Co. v. Nichols*, 165 N. W. 667; *Union City Lumber Co. v. Traverse City, L. & M. R. Co.*, 170 Mich. 205, 136 N. W. 463; *Dieterle v. Ann Arbor Paint & Enamel Co.*, 143 Mich. 416, 107 N. W. 79; *C. H. Little Co. v. Woodward Ave. Cemetery Ass'n*, 135 Mich. 248, 97 N. W. 682; *Schaub v. Welded-Barrel Co.*, 130 Mich. 606, 90 N. W. 335; *Peninsular Sav. Bank of Detroit v. Black Flag*

so far as such payment may be necessary to satisfy their claims.

Stove Polish Co., 105 Mich. 535, 63 N. W. 514.

Minnesota. Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606; Downer v. Union Land Co. of St. Paul, 113 Minn. 410, 129 N. W. 777; McConey v. Belton Oil & Gas Co., 97 Minn. 190, 106 N. W. 900; Wallace v. Carpenter Elec. Heating Mfg. Co., 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189; Rule v. Omega Stove & Grate Co., 64 Minn. 326, 67 N. W. 60; Farnsworth v. Robbins, 36 Minn. 369, 31 N. W. 349. See also § 4153, *infra*.

Mississippi. Allen v. Edwards, 93 Miss. 719, 47 So. 382; Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74. See also § 4153, *infra*.

Missouri. Berry v. Rood, 225 Mo. 85, 123 S. W. 888; First Nat. Bank of Deadwood, South Dakota v. Rockefeller, 195 Mo. 15, 93 S. W. 761; Meyer v. Ruby-Trust Mining & Milling Co., 192 Mo. 162, 90 S. W. 821; Shields v. Hobart, 172 Mo. 491, 95 Am. St. Rep. 529, 72 S. W. 669; Berry v. Rood, 168 Mo. 316, 67 S. W. 644; Van Cleve v. Berkey, 143 Mo. 109, 42 L. R. A. 593, 44 S. W. 743; Guernsey v. Moore, 131 Mo. 650, 32 S. W. 1132; Washington Sav. Bank v. Butchers' & Drovers' Bank, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644; State v. Goodrich, 138 Mo. App. 283, 120 S. W. 646; Haskell v. Sells, 14 Mo. App. 91. See also Coleman v. Hagey, 252 Mo. 102, 158 S. W. 829, and § 4153, *infra*.

Montana. See § 4153, *infra*.

Nebraska. See § 4153, *infra*.

Nevada. Thompson v. Reno Sav. Bank, 19 Nev. 242, 3 Am. St. Rep. 883, 9 Pac. 121, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

New Hampshire. Flather v. Economy Slugging Mach. Co., 71 N. H. 398, 52 Atl. 454.

New Jersey. Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82

Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069; Honeyman v. Haughey (N. J. Eq.), 66 Atl. 582; Easton Nat. Bank v. American Brick & Tile Co., 70 N. J. Eq. 732, 8 L. R. A. (N. S.) 271, 10 Ann. Cas. 84, 64 Atl. 917, rev'g judgment 69 N. J. Eq. 326, 60 Atl. 54; See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843; See v. Heppenheimer, 55 N. J. Eq. 240, 36 Atl. 966; Wetherbee v. Baker, 35 N. J. Eq. 501; National Trust Co. v. Miller, 33 N. J. Eq. 155. See also Sivin v. Mutual Match Co. (N. J. Eq.), 66 Atl. 921, and § 4153, *infra*.

New York. Stoddard v. Lum, 159 N. Y. 265, 45 L. R. A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108, rev'g judgment 32 App. Div. 565, 53 N. Y. Supp. 607; Hastings v. Drew, 76 N. Y. 9; Bartlett v. Drew, 57 N. Y. 587; Dayton v. Borst, 31 N. Y. 435; Gillet v. Moody, 3 N. Y. 479, 5 Barb. 185; Mann v. Pentz, 3 N. Y. 415; Leighton v. Leighton-Lea Ass'n, 62 Misc. 73, 114 N. Y. Supp. 918; Briggs v. Penniman, 8 Cow. 387. See also § 4153, *infra*.

North Carolina. Goodman v. White, 174 N. C. 399, 93 S. E. 906; Bernard v. Carr, 167 N. C. 481, 83 S. E. 816; Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538; Cooper v. Adel Security Co., 127 N. C. 219, 37 S. E. 216; Cooper v. Adel Security Co., 122 N. C. 463, 30 S. E. 348.

North Dakota. See § 4153, *infra*.

Ohio. Security Trust Co. v. Ford, 75 Ohio St. 322, 8 L. R. A. (N. S.) 263, 79 N. E. 474; Henry v. Vermillion & A. R. Co., 17 Ohio 187; Gilmore's Ex'rs v. Bank of Cincinnati, 8 Ohio 62. See also § 4153, *infra*.

Oklahoma. Chilson v. McFarland, 161 Pac. 199; Chilson v. Cavanagh, 160 Pac. 601. See also § 4153, *infra*.

Oregon. Morgan v. Ruble, 81 Ore. 641, 160 Pac. 543; Sargent v. American Bank & Trust Co., 80 Ore. 16, 154 Pac. 759, rehearing denied 156 Pac.

And in some states this is the rule by express provision of the consti-

431; *McAllister v. American Hospital Ass'n*, 62 Ore. 530, 125 Pac. 286; *Macbeth v. Banfield*, 45 Ore. 553, 106 Am. St. Rep. 670, 78 Pac. 693; *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320. See also § 4153, *infra*.

Pennsylvania. *Burt v. Real Estate Exchange*, 175 Pa. St. 619, 52 Am. St. Rep. 858, 34 Atl. 923; *Johnston v. Mar-ble Paper Co.*, 153 Pa. St. 189, 25 Atl. 560, 885; *Bunn's Appeal*, 105 Pa. St. 45, 51 Am. Rep. 166; *Germantown Passenger Ry. Co. v. Fitler*, 60 Pa. St. 124, 100 Am. Dec. 546; *Bank of Virginia v. Adams*, 1 Pars. Sel. Cas. 534.

South Carolina. *Effird v. Piedmont Land Improvement & Investment Co.*, 55 S. C. 78, 32 S. E. 758, 897; *Haslett's Ex'rs v. Wotherspoon*, 1 Strobb. Eq. 209. See also § 4153, *infra*.

South Dakota. See § 4153, *infra*.

Tennessee. *Sullivan v. Farnsworth*, 132 Tenn. 691, 179 S. W. 317; *Kelley v. Fletcher*, 94 Tenn. 1, 28 S. W. 1099; *Ohio Life Insurance & Trust Co. v. Merchants' Insurance & Trust Co.*, 11 Humph. 1, 53 Am. Dec. 742.

Texas. *Mitchell v. Hancock*, — Tex. Civ. App. —, 196 S. W. 694; *Mitchell v. Porter*, — Tex. Civ. App. —, 194 S. W. 981; *Rich v. Park*, — Tex. Civ. App. —, 177 S. W. 184; *Davis v. Burns*, — Tex. Civ. App. —, 173 S. W. 476; *Horn Bros. v. Baker*, — Tex. Civ. App. —, 173 S. W. 474; *Witt v. Nelson*, — Tex. Civ. App. —, 169 S. W. 381; *Herf & Frerichs Chemical Co. v. Brewster*, 54 Tex. Civ. App. 217, 117 S. W. 880; *Galvin v. McConnell*, 53 Tex. Civ. App. 486, 117 S. W. 211; *United States & M. Trust Co. v. Delaware Western Const. Co.* (Tex. Civ. App.), 112 S. W. 447; *Bank of De Soto v. Reed*, 50 Tex. Civ. App. 102, 109 S. W. 256. See also *National Bank of Jefferson v. Texas Inv. Co.*, 74 Tex. 421, 12 S. W. 101, and § 4153, *infra*.

Utah. *Rolapp v. Ogden & N. W. R. Co.*, 37 Utah 540, 110 Pac. 364.

Vermont. *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313.

Virginia. *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

Washington. *Hosner v. Conservative Casualty Co.*, 99 Wash. 161, 168 Pac. 1122; *Murphy v. Pantan*, 96 Wash. 637, 165 Pac. 1074; *Chamberlain v. Piercy*, 82 Wash. 157, 143 Pac. 977; *Johns v. Clothier*, 78 Wash. 602, 139 Pac. 755; *German-American State Bank v. Soap Lake Salts Remedy Co.*, 77 Wash. 332, 137 Pac. 461; *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415; *Burch v. Taylor*, 1 Wash. St. 245, 24 Pac. 438. See also § 4153, *infra*.

West Virginia. *Benedum v. First Citizens' Bank*, 72 W. Va. 124, 78 S. E. 656. See also § 4153, *infra*.

Wisconsin. *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188; *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57.

Wyoming. See § 4153, *infra*.

Creditors "have a right to deal with the corporation in good faith and to assume that all shareholders who have subscribed for stock have either paid, or will pay, the amount of their subscription." *Williams v. Chamberlain*, 29 Ky. L. Rep. 606, 94 S. W. 29.

A subscriber must be held to contemplate that the corporation will incur debts and pledge its capital, including the liability of its members for unpaid capital as security. Creditors who in good faith trust the corporation upon the faith of this security are in the position of bona fide purchasers for value, and it would be unjust to permit a shareholder to refuse to pay his share of the capital after it has been pledged with his knowledge and consent to innocent third parties. *Marion Trust Co. v. Blish*. (Ind. App.), 79 N. E. 415.

tution or statutes.¹¹ This liability of stockholders is very generally based by the courts upon the ground that the capital stock of a corporation is a trust fund for the benefit of creditors.¹² It is now practically settled, however, that this is not the true basis of the doctrine, for, as we shall see at length in a subsequent chapter, neither unpaid

Where the corporation is in process of being wound up, if there are unsatisfied debts after the corporate assets have been disposed of, the creditors have the right to collect or have collected for them the balances due on stock subscriptions without tendering back partial payments or property given in as payment at an exaggerated valuation. Hence the fact that property turned in at an exaggerated valuation for stock has been sold by the receiver and its proceeds distributed to the creditors does not estop them or the receiver from recovering the difference between the actual value of such property and the valuation at which it was turned in. *Berry v. Rood*, 168 Mo. 316, 67 S. W. 344.

Proof that stock has been issued to the defendant and has not been paid for makes out a prima facie case of liability. *Tierney v. Ledden*, 143 Iowa 286, 21 Ann. Cas. 105, 121 N. W. 1050.

¹¹ See § 4153 et seq., *infra*.

¹² *United States*. In *re Phoenix Hardware Co.*, 249 Fed. 410.

California. *Perkins v. Cowles*, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711; *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440.

Illinois. *Patterson v. Lynde*, 112 Ill. 196.

Indiana. *Marion Trust Co. v. Blish*, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814; *Indiana Novelty Mfg. Co. v. McGill*, 15 Ind. App. 1, 43 N. E. 464.

Iowa. *Miller v. Hawkeye Gold Dredging Co.*, 156 Iowa 557, 137 N. W. 507.

Louisiana. *Jackson Fire & Marine Ins. Co. v. Walle*, 105 La. 89, 29 So. 503.

Michigan. *Grand Rapids Trust Co. v. Nichols*, 165 N. W. 667.

Missouri. *State v. Goodrich*, 138 Mo. App. 283, 120 S. W. 646.

New Jersey. *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069; *Honeyman v. Haughey* (N. J. Eq.), 66 Atl. 582; *Wetherbee v. Baker*, 35 N. J. Eq. 501.

North Carolina. *Goodman v. White*, 174 N. C. 399, 93 S. E. 906; *Bernard v. Carr*, 167 N. C. 431, 83 S. E. 816; *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538; *Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348.

Oregon. *Macbeth v. Banfield*, 45 Ore. 553, 106 Am. St. Rep. 670, 78 Pac. 693.

Tennessee. *Sullivan v. Farnsworth*, 132 Tenn. 691, 179 S. W. 317.

Texas. *Mitchell v. Hancock*, — Tex. Civ. App. —, 196 S. W. 694; *Mitchell v. Porter*, — Tex. Civ. App. —, 194 S. W. 981; *Davis v. Burns*, — Tex. Civ. App. —, 173 S. W. 476; *Horn Bros. v. Baker*, — Tex. Civ. App. —, 173 S. W. 474; *Witt v. Nelson*, — Tex. Civ. App. —, 169 S. W. 381; *Herf & Frerichs Chemical Co. v. Brewster*, 54 Tex. Civ. App. 217, 117 S. W. 880; *Bank of De Soto v. Reed*, 50 Tex. Civ. App. 102, 109 S. W. 256. See also *National Bank of Jefferson v. Texas Inv. Co.*, 74 Tex. 421, 12 S. W. 101.

Virginia. *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

Washington. *Hosner v. Conservative Casualty Co.*, 99 Wash. 161, 168 Pac. 1122; *Murphy v. Panton*, 96

stock subscriptions nor the other assets of the corporation are in any proper sense a trust fund for creditors.¹³ Nor is it at all necessary to base the liability on this ground, at least in the case of watered or fictitiously paid up stock, or where the subscribers have been released from liability by the corporation without consideration. Unpaid subscriptions, when there is a liability as between the stockholders and the corporation, are like any other assets of the corporation when it becomes insolvent, and may be collected, like any other assets, through the interposition of a court of equity, for the purpose of paying its debts; and if the corporation has secretly agreed not to require payment, or if it has released the subscribers without consideration, the agreement or release may be held void as against creditors on the ground of fraud.¹⁴

It is presumed that the creditors trusted the corporation in reli-

Wash. 637, 165 Pac. 1074; Chamberlain v. Piercy, 82 Wash. 157, 143 Pac. 977; Johns v. Clothier, 78 Wash. 602, 139 Pac. 755; Adamant Mfg. Co. v. Wallace, 16 Wash. 614, 48 Pac. 415.

See also the other cases cited in note 96, *supra*.

And see the chapter on Insolvency, *infra*.

¹³ See the chapter on Insolvency, *infra*.

¹⁴ Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606; Hospes v. Northwestern Manufacturing & Car Co., 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117; McAllister v. American Hospital Ass'n, 62 Ore. 530, 125 Pac. 286. See also Vaughn v. Alabama Nat. Bank, 143 Ala., 572, 5 Ann. Cas. 665, 42 So. 64; Spratling v. Westbrook, 140 Ga. 625, 79 S. E. 536; Downer v. Union Land Co., of St. Paul, 113 Minn. 410, 129 N. W. 777; Coleman v. Hagey, 252 Mo. 102, 158 S. W. 829. And see § 3590, *supra*.

"Debts due to a corporation constitute a portion of its assets, and may be reached by creditors. Among these are unpaid subscriptions to stock." Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 56 L.

R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057.

Unpaid subscriptions are treated in equity as assets, the same as other debts due the corporation. Adamant Mfg. Co. v. Wallace, 16 Wash. 614, 48 Pac. 415.

Persons extending credit to the corporation have the right to assume that it has paid up capital to the amount it represents itself as having, and if they give it credit on the faith of that representation, and it is false, it is a fraud upon them, and in case the corporation becomes insolvent the law will require the stockholders to make the representation good: Lea v. Iron Belt Mercantile Co., 147 Ala. 421, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93, 42 So. 415; Hospes v. Northwestern Manufacturing & Car Co., 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117; Macbeth v. Banfield, 45 Ore. 553, 106 Am. St. Rep. 670, 78 Pac. 693.

"Where the corporators organize and proceed to transact business on the capital stock fixed in the charter, without having paid in the same, they commit a legal fraud by so doing, and are liable to creditors to make good at least what they had agreed to pay for such stock, if not

ance upon the fact that its capital was actually paid in or was due from its stockholders,¹⁵ and it need not be shown that they actually did so.¹⁶ The stockholder's liability is not in any wise affected by the fact that the creditor knew or did not know, when he extended credit to the corporation that the defendant was a subscriber,¹⁷ or the amount of the professed capital stock,¹⁸ or that the stock was unpaid in whole or in part,¹⁹ or by his knowledge or lack of knowledge as

for the entire amount of the minimum capital stock provided for." *Indiana Novelty Mfg. Co. v. McGill*, 15 Ind. App. 1, 43 N. E. 464.

"This obligation does not necessarily result from any subscription or promise to pay. The theory of the law is that, when a corporation holds itself out to the world as having a certain amount of capital stock paid in, every person who deals with it does so on the presumption that said amount of money has been or will be paid into the treasury, and it would be inequitable to allow a part of said fund to be taken back by the stockholder." *Vaughn v. Alabama Nat. Bank*, 143 Ala. 572, 5 Ann. Cas. 665, 42 So. 64.

Unpaid subscriptions "may sometimes be collected by creditors when the corporation itself has released them, or in some way deprived itself of that right. And as to creditors the obligation is unconditional, although the corporation has accepted a qualified liability." *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 56 L. R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057.

¹⁵ *R. H. Herron Co. v. Shaw*, 165 Cal. 668, Ann. Cas. 1915 A 1265, 133 Pac. 488; *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 56 L. R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057; *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606; *Dwinnell v. Minneapolis Fire & Marine Mut. Ins. Co.*, 97 Minn. 340, 106 N. W. 312; *Hospes v. Northwest-*

ern Manufacturing & Car Co., 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117.

¹⁶ *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606; *Dwinnell v. Minneapolis Fire & Marine Mut. Ins. Co.*, 97 Minn. 340, 106 N. W. 312; *Hospes v. Northwestern Manufacturing & Car Co.*, 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117. See also *See v. Heppeneimer*, 69 N. J. Eq. 36, 61 Atl. 843.

¹⁷ *Union City Lumber Co. v. Traverse City, L. & M. R. Co.*, 170 Mich. 205, 136 N. W. 463; *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606; *Dwinnell v. Minneapolis Fire & Marine Mut. Ins. Co.*, 97 Minn. 340, 106 N. W. 312; *Hospes v. Northwestern Manufacturing & Car Co.*, 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117; *Davis v. Burns*, — Tex. Civ. App. —, 173 S. W. 476.

¹⁸ *Dwinnell v. Minneapolis Fire & Marine Mut. Ins. Co.*, 97 Minn. 340, 106 N. W. 312; *Hospes v. Northwestern Manufacturing & Car Co.*, 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117.

¹⁹ *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972; *Moore v. United States One Stave Barrel Co.*, 238 Ill. 544, 128 Am. St. Rep. 153, 87 N. E. 536, aff'g 141 Ill. App. 104; *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 373, 82 N. E. 891; *Sprague v. National Bank of America*, 172 Ill. 149, 168, 42 L. R. A.

to the amount that particular stockholders have paid or agreed to pay,²⁰ in the absence of any agreement or understanding between the creditor and the corporation or the stockholders as to the amount of the liability of the latter,²¹ although generally he cannot recover from the holder of bonus or watered stock if he dealt with the corporation with knowledge of the arrangement under which it was issued.²² If the amount paid in is required to be made a matter of public record for the benefit of creditors, creditors are presumed to have acted upon the information contained in such records in the absence of any proof on the subject.²³

To warrant the enforcement of the liability by or for the benefit of creditors in any case it must be made to appear that the corporation is insolvent;²⁴ that the persons sought to be held subscribed for the stock in question, or otherwise became liable to pay for the same;²⁵ and that they have not paid for the same in full;²⁶ and the existence of a debt or debts due by the corporation, which the collection of the subscription is intended to liquidate, must also be shown.²⁷

The fact that stockholders are subject to a statutory liability in addition to the amount unpaid on their stock in no way affects their liability for the latter amount,²⁸ and creditors are not bound to en-

606, 64 Am. St. Rep. 17, 50 N. E. 19, aff'g 66 Ill. App. 320; *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606. See also *Meyer v. Ruby-Trust Mining & Milling Co.*, 192 Mo. 162, 90 S. W. 821.

It is immaterial that the creditor did not know that the defendant had not paid the amount of his subscription. *Davis v. Burns*, — Tex. Civ. App. —, 173 S. W. 476.

The liability may be enforced for the benefit of creditors even though they did not know of such unpaid subscriptions at the time their debts were incurred. *Mitchell v. Porter*, — Tex. Civ. App. —, 194 S. W. 981.

²⁰ "In the absence of any agreement or understanding between the creditors and the corporation or shareholders as to the amount of the liability of the latter, the question as to the creditors' knowledge or lack of knowledge as to the amount the

stockholder has paid or subscribed to pay is not material." *Williams v. Chamberlain*, 29 Ky. L. Rep. 606, 94 S. W. 29.

²¹ See § 4140, *infra*.

²² See § 3595, *supra*.

The creditor need not allege that he believed that bonus stock had been paid for. If he dealt with the corporation with knowledge of an arrangement whereby bonus stock was issued, this is a matter of defense. *Hospes v. Northwestern Manufacturing & Car Co.*, 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117.

²³ See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843.

²⁴ *Tichenor v. Williams Block Pavement Co.*, 116 Ga. 303, 42 S. E. 505.

²⁵ See § 4107, *infra*.

²⁶ See § 4104, *infra*.

²⁷ See § 4100, *infra*.

²⁸ *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776, 27

force the statutory liability before instituting proceedings to collect the amount unpaid.²⁹

§ 4096. — Effect of dissolution of corporation. Dissolution of a corporation by expiration of its charter, judgment of forfeiture, or otherwise, does not extinguish the liability of stockholders for a balance due on their stock when its payment is necessary in order to satisfy the debts of the corporation, and the liability may nevertheless be enforced in equity by or for the benefit of the corporate creditors,³⁰ although it has been held that garnishment proceedings will not lie at the instance of creditors under such circumstances.³¹

Where a statute provides that corporations which are dissolved by expiration or forfeiture of their charters, or otherwise shall continue to exist for a specified length of time for the purpose of bringing and defending suits and closing up their affairs,³² the liability of the stockholders may be enforced during the period specified in the same manner as though no such dissolution or forfeiture had taken place.³³

Under some statutes the liability may be enforced at the instance of creditors in a proceeding by a majority of the stockholders for the voluntary dissolution of the corporation.³⁴ And as we shall see in a subsequent section it may generally be enforced by a receiver,

Pac. 674; *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777; *Harmon v. Page*, 62 Cal. 448.

²⁹ *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777.

³⁰ *Smith v. Huckabee*, 53 Ala. 191; *Flightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *Germantown Passenger Ry. Co. v. Fitler*, 60 Pa. St. 124, 100 Am. Dec. 546. See *Paschall v. Whitsett*, 11 Ala. 472; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *Stillman v. Dougherty*, 44 Md. 380; *Rowland v. Meader Furniture Co.*, 38 Ohio St. 269. See also *Gaff v. Flesher*, 33 Ohio St. 107.

The fact that a corporation has been ousted from the franchise of being a corporation in quo warranto proceedings is no defense to a suit by a judgment creditor to hold the stockholders liable for the amount unpaid

on their subscriptions. *Rowland v. Meader Furniture Co.*, 38 Ohio St. 269.

³¹ *Paschall v. Whitsett*, 11 Ala. 472.

³² See chapter on Dissolution, *infra*.

³³ *Pankey v. Lippman*, 187 Ala. 199, 65 So. 771.

During the period specified the corporation is an "existing" one within the meaning of a statute authorizing the garnishment of stockholders for the payment of creditors of an "existing corporation." *Curry v. Woodward*, 53 Ala. 371.

³⁴ In proceedings for the dissolution of the corporation, instituted by a majority of the stockholders pursuant to the Minnesota statute, the court may bring in the stockholders and enforce their liability for unpaid subscriptions, on the petition or complaint of a corporate creditor who has

trustee in bankruptcy or assignee, for the benefit of creditors in proceedings to wind up the affairs of insolvent corporations.³⁵

The effect of the dissolution of a corporation on the right to enforce a statutory liability of its stockholders will be considered in a subsequent section.³⁶

§ 4097. — Effect of consolidation. Whether a consolidation of corporations will discharge subscribers to the stock of the consolidating corporations from liability on their subscriptions has been considered in the chapter on subscriptions to capital stock,³⁷ and what is there said is equally applicable where unpaid subscriptions are sought to be enforced by or for the benefit of corporate creditors. The effect of a consolidation on the statutory liability of the stockholders will be considered in a subsequent section of this chapter.³⁸

§ 4098. — Conflict of laws. The liability of stockholders to creditors for unpaid subscriptions, and the nature and extent of such liability, is to be determined by the law of the state of the domicile of the corporation.³⁹ A court will not take judicial notice of the laws of another state in this regard, and unless they are pleaded and

proved his debt. *In re People's Live Stock Ins. Co.*, 56 Minn. 180, 57 N. W. 468.

As to the enforcement of the statutory liability of stockholders of a national bank in proceedings for its voluntary dissolution, see § 4225, *infra*.

³⁵ See § 4115, *infra*.

³⁶ See § 4150, *infra*.

³⁷ See § 649, *supra*.

³⁸ See § 4149, *infra*.

³⁹ **United States.** *In re Schuylkill-Heim Brewing Co.*, 208 Fed. 70; *Brown v. Allebach*, 166 Fed. 488; *Covell v. Fowler*, 144 Fed. 535.

Illinois. *Young v. Farwell*, 139 Ill. 326, 28 N. E. 845; *Patterson v. Lynde*, 112 Ill. 196.

Iowa. *Johnson v. Morgan*, 178 Iowa 577, 160 N. W. 2.

Kentucky. *Horton v. Sherrill-Russell Lumber Co.*, 147 Ky. 226, 143 S. W. 1053; *Williams v. Chamberlain*, 29 Ky. L. Rep. 606, 94 S. W. 29.

Missouri. *Meyer v. Ruby-Trust Mining & Milling Co.*, 192 Mo. 162, 90

S. W. 821; *Rogers v. Stag Min. Co.*, 185 Mo. App. 659, 171 S. W. 676.

New Jersey. *Johnson v. Tennessee Oil, etc., Co.*, 74 N. J. Eq. 32, 69 Atl. 788.

New York. *Southworth v. Morgan*, 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490, *rev'g* judgment 143 App. Div. 648, 128 N. Y. Supp. 196, which *aff'd* 71 Misc. 214, 128 N. Y. Supp. 598.

North Carolina. *Hobgood v. Ehlen*, 141 N. C. 344, 53 S. E. 857.

Rhode Island. See *Crowley v. Walton*, 23 R. I. 331, 50 Atl. 385.

Tennessee. *Sullivan v. Farnsworth*, 132 Tenn. 691, 179 S. W. 317.

Virginia. *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

West Virginia. See *Swing v. Taylor & Crate*, 68 W. Va. 621, 70 S. E. 373.

The liability of stockholders to creditors is to be determined by its charter or the statute of the state where it was organized. He is liable only

proved will presume that they are the same as the common law of the forum.⁴⁰

The right to enforce the liability in states other than that of the corporation's domicile is considered in a subsequent section.⁴¹

§ 4099. Nature and extent of liability—Nature of liability. The liability rests in contract.⁴² It is an asset of the corporation,⁴³ and

in accordance with the law of the corporation's domicile. *Nesom v. City Nat. Bank*, — Tex. Civ. App. —, 174 S. W. 715.

See also § 4151, *infra*.

⁴⁰ *Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204; *Horton v. Sherrill-Russell Lumber Co.*, 147 Ky. 226, 14 S. W. 1053; *Milliken v. Caruso*, 205 N. Y. 559, 98 N. E. 493, *aff'g* 146 N. Y. App. Div. 940, 131 N. Y. Supp. 1129; *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

⁴¹ See § 4131, *infra*.

⁴² *United States*. In *re Putman*, 193 Fed. 464.

California. *Perkins v. Cowles*, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711; *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440.

Connecticut. *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

Georgia. *Commercial Bank of Augusta v. Warthen*, 119 Ga. 990, 47 S. E. 536.

Kentucky. *Williams v. Chamberlain*, 29 Ky. L. Rep. 606, 94 S. W. 29.

Maryland. *Pittsburg Steel Co. v. Baltimore Equitable Society*, 113 Md. 77, 77 Atl. 255.

Missouri. *Rogers v. Yoder*, 198 Mo. App. 27, 195 S. W. 50; *Rogers v. Stag Min. Co.*, 185 Mo. App. 659, 171 S. W. 676.

New Jersey. *McDermott v. Woodhouse*, 87 N. J. Eq. 124, 99 Atl. 103.

New York. *Milliken v. Caruso*, 205

N. Y. 559, 98 N. E. 493, *aff'g* 146 App. Div. 940, 131 N. Y. Supp. 1129; *Southworth v. Morgan*, 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490, *rev'g* judgment 143 App. Div. 648, 128 N. Y. Supp. 196, which *aff'd* 71 Misc. 214, 128 N. Y. Supp. 598; *Stoddard v. Lum*, 159 N. Y. 265, 45 L. R. A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108, *rev'g* judgment 32 App. Div. 565, 53 N. Y. Supp. 607; *McNelus v. Stillman*, 172 App. Div. 307, 158 N. Y. Supp. 428; *Leighton v. Leighton Lea Ass'n*, 62 Misc. 73, 114 N. Y. Supp. 918.

Ohio. *Thomas v. Kalbfus*, 119 N. E. 412.

Tennessee. *Sullivan v. Farnsworth*, 132 Tenn. 691, 179 S. W. 317.

Utah. *Crofoot v. Thatcher*, 19 Utah 212, 75 Am. St. Rep. 725, 57 Pac. 171.

Virginia. *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

See also § 4176, *infra*.

⁴³ *United States*. *Patterson v. Lynde*, 106 U. S. 519, 27 L. Ed. 265; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Republic Iron & Steel Co. v. Carlton*, 189 Fed. 126.

Arkansas. *Tiger Bros. v. Rogers Cotton Cleaner & Gin. Co.*, 96 Ark. 1, 30 L. R. A. (N. S.) 694, Ann. Cas. 1912 B 488, 130 S. W. 585.

California. *Perkins v. Cowles*, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711; *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 56 L. R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057; *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440.

the indebtedness is an indebtedness to the corporation itself and not to its creditors.⁴⁴

The liability of the stockholders is several and not joint. Each is liable for the full amount due on his stock, irrespective of the liability of others, so far as creditors are concerned,⁴⁵ although he

Delaware. John W. Cooney Co. v. Arlington Hotel Co., — Del. Ch. —, 101 Atl. 879.

Georgia. Spratling v. Westbrook, 140 Ga. 625, 79 S. E. 536; Commercial Bank of Augusta v. Warthen, 119 Ga. 990, 47 S. E. 536.

Illinois. Great Western Tel. Co. v. Gray, 122 Ill. 630, 14 N. E. 214; Patterson v. Lynde, 112 Ill. 196; Lane v. Nickerson, 99 Ill. 284.

Indiana. Marion Trust Co. v. Blish, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814.

Minnesota. Basting v. Ankeny, 64 Minn. 133, 66 N. W. 266; In re People's Live Stock Ins. Co., 56 Minn. 180, 57 N. W. 468; Hospes v. Northwestern Manufacturing & Car Co., 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117; Spooner v. Bay St. Louis Syndicate, 47 Minn. 464, 50 N. W. 601.

Missouri. Berry v. Rood, 225 Mo. 85, 123 S. W. 888.

Nebraska. Bohrer v. Adair, 61 Neb. 824, 86 N. W. 495.

New Jersey. See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843.

New York. Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 N. Y. Supp. 918.

Oregon. Macbeth v. Banfield, 45 Ore. 553, 106 Am. St. Rep. 670, 78 Pac. 693; Hawkins v. Citizens' Inv. Co., 38 Ore. 544, 64 Pac. 320.

Texas. Showalter v. Laredo Improvement Co., 83 Tex. 162, 18 S. W. 491; Mitchell v. Hancock, — Tex. Civ. App. —, 196 S. W. 694; Herf & Freichs Chemical Co. v. Brewster, 54 Tex. Civ. App. 217, 117 S. W. 880; United States & Mexican Trust Co. v.

Delaware Western Const. Co. (Tex. Civ. App.), 112 S. W. 447. See also National Bank of Jefferson v Texas Inv. Co., 74 Tex. 421, 12 S. W. 101.

Washington. Adamant Mfg. Co. v. Wallace, 16 Wash. 614, 48 Pac. 415.

West Virginia. Benedum v. First Citizens' Bank, 72 W. Va. 124, 78 S. E. 656.

⁴⁴In re People's Live Stock Ins. Co., 56 Minn. 180, 57 N. W. 648.

The liability is not to the creditor, but for an indebtedness to the corporation. Macbeth v. Banfield, 45 Ore. 553, 106 Am. St. Rep. 670, 78 Pac. 693.

"The liability of the stockholder to the creditor is through the corporation,—not direct." Patterson v. Lynde, 112 Ill. 196, quoted with approval in Patterson v. Lynde, 112 Ill. 196.

Where stock is issued as fully paid up, the amount remaining unpaid is, so far as corporate creditors are concerned, deemed to be money due to the corporation from the stockholders. R. H. Herron Co. v. Shaw, 165 Cal. 668, Ann. Cas. 1915 A 1265, 133 Pac. 488.

Without statutory authority, a creditor cannot reach it except through the corporation. In re People's Live Stock Ins. Co., 56 Minn. 180, 57 N. W. 468.

⁴⁵United States. Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Ogilvie v. Knox Ins. Co., 22 How. 380, 16 L. Ed. 349; In re Phoenix Hardware Co., 249 Fed. 410; In re Putman, 193 Fed. 464; Marsh v. Burroughs, 1 Woods 468, Fed. Cas. No. 9,112.

California. Blood v. Serena Land &

may be entitled to contribution from the other stockholders if he is compelled to pay more than his proportion as between the stockhold-

Water Co., 150 Cal. 764, 89 Pac. 1090; Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776, 27 Pac. 674.

Georgia. Harrell v. Blount, 112 Ga. 711, 38 S. E. 56.

Illinois. Edwards v. Schillinger, 245 Ill. 231, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048, aff'g 148 Ill. App. 227; Singer v. Hutchinson, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388, aff'g 83 Ill. App. 675; Siegel v. A. H. Andrews & Co., 181 Ill. 350, 54 N. E. 1008, aff'g 78 Ill. App. 611; Coleman v. Howe, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725.

Kentucky. Williams v. Chamberlain, 29 Ky. L. Rep. 606, 94 S. W. 29.

Minnesota. Dwinnell v. Minneapolis Fire & Marine Mut. Ins. Co., 97 Minn. 340, 106 N. W. 312.

Missouri. Meyer v. Ruby-Trust Mining & Milling Co., 192 Mo. 162, 90 S. W. 821; Rogers v. Yoder, 198 Mo. App. 27, 195 S. W. 50.

Nevada. Thompson v. Reno Sav. Bank, 19 Nev. 242, 3 Am. St. Rep. 883, 9 Pac. 121.

New Jersey. Wolcott v. Waldstein, 86 N. J. Eq. 63, 97 Atl. 951.

North Carolina. Cooper v. Adel Security Co., 127 N. C. 219, 37 S. E. 216.

Ohio. Smith v. Johnson, 57 Ohio St. 486, 49 N. E. 693.

Oregon. Sargent v. American Bank & Trust Co., 80 Ore. 16, 154 Pac. 759, rehearing denied 156 Pac. 431; Shipman v. Portland Const. Co., 64 Ore. 1, 128 Pac. 989; Brundage v. Monumental Gold & Silver Min. Co., 12 Ore. 222, 7 Pac. 314.

South Carolina. Haslett's Ex'rs v. Wotherspoon, 1 Strobb. Eq. 209.

Virginia. Mountain Lake Land Co. v. Blair, 109 Va. 147, 63 S. E. 751.

Wisconsin. Pierce v. Milwaukee Const. Co., 38 Wis. 253.

"The liability of a stockholder for unpaid subscriptions is several and not joint, and the creditor is not bound to settle up the affairs of the corporation in order to obtain his dues. A creditor of a corporation seeking satisfaction of his debt need look no further than to find a solvent stockholder who is liable for it, and he sustains no relation to the corporation which requires him to adjust equities between stockholders or between the corporation and others." Edwards v. Schillinger, 245 Ill. 231, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048, aff'g 148 Ill. App. 227.

"Each subscriber is liable for the unpaid balance of his own subscription, but not for that of the other subscribers." Hequembourg v. Edwards, 155 Mo. 514, 56 S. W. 490.

"A creditor is not limited in his recovery to the amount represented by the proportion which the defendant's unpaid subscription bears to all unpaid subscriptions. He may sue any one stockholder and recover from him his total debt, provided it does not exceed the amount of the defendant's liability for subscription." Blood v. Serena Land & Water Co., 150 Cal. 764, 89 Pac. 1090.

"The liability being joint and several, and each stockholder being liable only to the extent of his unpaid subscription, it is wholly immaterial whether all of the stockholders, who have not paid their stock in full, or only a limited number of them, or only one of them, is sought to be held liable by a creditor. The fact that one who has thus been called on to respond has a remedy against the other stockholders for contribution, is

ers.⁴⁶ It has been held, therefore, that each stockholder is liable for the full amount due on his stock, if its collection is necessary for the payment of debts of the corporation, notwithstanding the fact that some of the stockholders are insolvent, and nothing at all can be collected from them;⁴⁷ or though some of them are nonresidents and hence beyond the jurisdiction of the court,⁴⁸ or are non sui juris,⁴⁹ or though the liability of some of the stockholders has been

no defense to an action by the creditor against him." *Meyer v. Ruby-Trust Mining & Milling Co.*, 192 Mo. 162, 90 S. W. 821.

Judgment should be rendered against a subscriber on this basis, with provision for the issuance of executions for each stockholder's pro rata share in the first instance, and then for the issue, on order of court, of subsequent successive executions for such additional pro rata amounts or assessments as may be necessary by reason of failure to collect from insolvent stockholders. *Dwinnell v. Minneapolis Fire & Marine Mut. Ins. Co.*, 97 Minn. 340, 106 N. W. 312.

The failure of the corporation to enforce the liability of one of its officers on an alleged subscription to the preferred stock is no defense to an action to enforce the liability of another subscriber, where the full amount of preferred stock authorized has been subscribed and is outstanding in the names of original subscribers without such subscription. *Brown v. Allebach*, 166 Fed. 488.

See also § 571, *supra*.

As to the statutory liability, see § 4141 et seq., *infra*.

⁴⁶ See § 4102, *infra*.

⁴⁷ *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, *aff'd* 82 N. J. Eq. 364, 91 Atl. 1069; See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843; *Haslett's Ex'rs v. Wotherspoon*, 1 Strobb. Eq. (S. C.) 209.

Impossibility of collection as to some subscribers is not a defense at

law to the liability of the others. *Brown v. Allebach*, 166 Fed. 488.

Insolvent stockholders are not necessary parties to a suit by a trustee in bankruptcy to collect unpaid subscriptions. *Edwards v. Schillinger*, 245 Ill. 231, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048, *aff'g* 148 Ill. App. 227.

Insolvent stockholders may be excluded in levying assessments on delinquent stockholders. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

The insolvency of certain stockholders may be established *prima facie* by a return of *nulla bona* against them, for the purpose of determining the propriety of an additional assessment against solvent stockholders. *Leman v. Teter*, 169 Ill. App. 503.

⁴⁸ *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, *aff'd* 82 N. J. Eq. 364, 91 Atl. 1069; See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843.

The whole of an assessment may be made against delinquent stockholders within the jurisdiction, with a right to those who pay to enforce contribution against the others. If there is but one stockholder within the jurisdiction, and the amount unpaid on his subscription is sufficient to pay all the creditors and expenses, the whole burden may be imposed on him. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

⁴⁹ The burden must be borne by those who are *sui juris*. *Holcombe v.*

collected only in part under compromises made in good faith;⁵⁰ that creditors may sue to reach the amount due from particular stockholders, without proceeding against other stockholders who are also liable, or making them parties,⁵¹ and that it is error to enter a joint or a joint and several decree against all of the stockholders.⁵²

§ 4100. — Extent of liability in general. Stockholders are liable for a balance remaining unpaid on their stock in a suit by or for the benefit of creditors of the corporation to such extent, and only to such extent, as payment may be necessary for satisfying the debts⁵³

Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069.

⁵⁰ Brown v. Allebach, 166 Fed. 488.

⁵¹ See § 4127, *infra*.

⁵² In re Phoenix Hardware Co., 249 Fed. 410.

A joint judgment cannot be rendered against several subscribers although they are joined as defendants in a single suit and answer jointly. Shipman v. Portland Const. Co., 64 Ore. 1, 128 Pac. 989.

⁵³ **United States.** Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; In re Canister Co., 248 Fed. 587; Kirkpatrick v. American Alkali Co., 140 Fed. 186, 135 Fed. 230; In re Crystal Spring Bottling Co., 96 Fed. 945.

Arkansas. Davis v. Scott, 129 Ark. 226, 195 S. W. 383; Fletcher v. Bank of Lonoke, 71 Ark. 1, 69 S. W. 580.

California. Hunt v. Sharkey, 20 Cal. App. 690, 130 Pac. 21.

Kansas. West v. Topeka Sav. Bank, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

Louisiana. In re New Iberia Cotton Mills Co., 113 La. 404, 37 So. 8; Jackson Fire & Marine Ins. Co. v. Walle, 105 La. 89, 29 So. 503; Belknap v. Adams, 49 La. Ann. 1350, 22 So. 382. See also Dilzell Engineering & Construction Co. v. Lehmann, 120 La. 273, 45 So. 138.

Minnesota. In re Minnehaha Driving Park Ass'n, 53 Minn. 423, 55 N. W. 598.

Missouri. Meyer v. Ruby-Trust Mining & Milling Co., 192 Mo. 162, 90 S. W. 821.

New Jersey. Gilson v. Appleby, 80 N. J. L. 542, 77 Atl. 1084, aff'd 82 N. J. L. 400, 81 Atl. 724; McDermott v. Woodhouse, 87 N. J. Eq. 615, 101 Atl. 375, rev'g judgment 87 N. J. Eq. 124, 99 Atl. 103; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069; Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co., 57 N. J. Eq. 627, 42 Atl. 585; Wetherbee v. Baker, 35 N. J. Eq. 501.

New York. McNelus v. Stillman, 172 App. Div. 307, 158 N. Y. Supp. 428.

Oregon. Sargent v. Waterbury, 83 Ore. 159, 161 Pac. 443, rehearing denied 163 Pac. 416.

Pennsylvania. Swearingen v. Sewickley Dairy Co., 198 Pa. 68, 53 L. R. A. 471, 47 Atl. 941.

Texas. Cole v. Adams, 19 Tex. Civ. App. 507, 49 S. W. 1052.

Washington. Rea v. Eslick, 87 Wash. 125, 151 Pac. 256; Beddow v. Huston, 65 Wash. 585, 118 Pac. 752; Grady v. Graham, 64 Wash. 436, 36 L. R. A. (N. S.) 177, 116 Pac. 1098.

Where the corporation is dissolved a receiver cannot collect the entire amount due unless the amount owing by all solvent stockholders is necessary to discharge the corporate debts. McNelus v. Stillman, 172 N. Y. App. Div. 307, 158 N. Y. Supp. 428.

of the corporation, together with the interest and the costs.⁵⁴ Before stockholders can be held liable, therefore, the existence of a valid⁵⁵ debt or debts due by the corporation, which the collection of the subscription is intended to liquidate, must be shown.⁵⁶ The debt must be an existing one, and not merely a future contingent liability;⁵⁷ and if it is secured, the creditor may be required to exhaust his security before proceeding against the stockholders.⁵⁸

As a rule, it must also appear that the other assets of the corporation have been or are being collected, and are insufficient to pay its debts.⁵⁹ But it has been held that where the subscription is payable

⁵⁴ See § 4101, *infra*.

⁵⁵ The liability cannot be enforced for the purpose of paying a judgment based on an indebtedness which the corporation had no right to contract. *Leighton v. Leighton Lea Ass'n*, 74 N. Y. Misc. 229, 131 N. Y. Supp. 561.

A final judgment founded on tort is sufficient to form the basis of a creditor's suit to reach unpaid subscriptions. *In re Putman*, 193 Fed. 464.

See also § 4163 *et seq.*, *infra*.

⁵⁶ *Tichenor v. Williams Block Pavement Co.*, 116 Ga. 303, 42 S. E. 505; *Kelly v. Killian*, 133 Ill. App. 102; *Hess v. Trumbo*, 27 Ky. L. Rep. 320, 84 S. W. 1153; *American Spirits Mfg. Co. v. Eldridge*, 209 Mass. 590, 95 N. E. 942.

"Unpaid balances on subscriptions cannot be collected unless there is a necessity therefor to pay debts or in equalizing stockholders in the distribution of the assets on winding up the corporation." *Simmons v. Taylor*, 106 Tenn. 729, 63 S. W. 1123.

⁵⁷ A receiver will not be permitted to call in unpaid subscriptions to provide a fund to meet corporate obligations which will probably arise in the future, as where it appears that the corporation will probably break a certain contract at some future time, and that it will, after its surety has settled for the resulting damage, owe said surety the amount so paid.

Tichenor v. Williams Block Pavement Co., 116 Ga. 303, 42 S. E. 505.

⁵⁸ *Vaughn v. Alabama Nat. Bank*, 143 Ala. 572, 5 Ann. Cas. 665, 42 So. 64.

⁵⁹ *In re Crystal Spring Bottling Co.*, 96 Fed. 945; *Simmons v. Taylor*, 106 Tenn. 729, 63 S. W. 1123.

"The fund thus to be acquired is in the nature of a reserve, to be called in and applied when the other assets of the bank are exhausted and a balance of indebtedness remains unpaid." *Sargent v. Waterbury*, 83 Ore. 159, 161 Pac. 443, rehearing denied 163 Pac. 416.

The stockholders who may be liable upon their subscriptions are entitled to have the assets of the company disposed of and applied to the payment of its debts before they are called upon to contribute anything towards such payment. *Kirkpatrick v. American Alkali Co.*, 140 Fed. 186, 135 Fed. 230.

"The assets of the corporation and its total indebtedness must be brought into the account, for until they are ascertained neither the amount of money required to satisfy the creditors of the corporation nor the proportion of the sum required to be paid by each stockholder can be ascertained. *Weatherbee v. Baker*, 35 N. J. Eq. 501. Quoted with approval in *Kirkpatrick v. American Alkali Co.*, 135 Fed. 230.

immediately and absolutely, and not upon call or as needed, a receiver directed by the decree appointing him to collect it is not obliged to show, in order to make out a prima facie case for the recovery of the full amount due, that all of it is needed to pay the corporate debts.⁶⁰ And, of course, one who buys stock from an existing corporation is absolutely liable for the full amount of the agreed price.⁶¹ The fact that a receiver has made an unlawful settlement of a claim in favor of the corporation against one of its officers is no defense to an action by him to enforce the liability of a stockholder on his subscription.⁶²

In some jurisdictions it is held that the stockholder may properly be decreed to be liable for the full amount due upon his subscription; ⁶³ but payment of the judgment recognizing such liability should be enforced only to the extent necessary to discharge the debts and expenses, and the judgment decreed to be satisfied upon payment of that amount.⁶⁴ And it has also been held that it is proper to ren-

An application by the receiver for the levy of an assessment is premature where it appears that he has made no effort to dispose of certain assets of the company which are nominally worth a large sum. *Kirkpatrick v. American Alkali Co.*, 135 Fed. 230.

Where the receiver has no assets for the prosecution of a disputed claim, and the stockholders have not asserted its validity or indemnified him against the expenses of a suit, he will not be required to prosecute it before the court will order an assessment. *Cumberland Lumber Co. v. Clinton Hill Lumber & Manufacturing Co.*, 64 N. J. Eq. 517, 54 Atl. 450.

Where stockholders have paid the full amount called for by their contracts, any further liability on their part to creditors is secondary, and cannot be resorted to until the property of the corporation has been exhausted. *Dickinson v. Kline*, 96 Neb. 435, 148 N. W. 141.

A bill filed by a receiver in behalf of a judgment creditor against stockholders is not premature because all the corporate debts have not been ascertained. *McBryan v. Universal*

Elevator Co., 130 Mich. 111, 97 Am. St. Rep. 453, 89 N. W. 683.

That a creditor must exhaust his remedies against the corporation before he can sue stockholders, see § 4129, *infra*.

⁶⁰ *Philadelphia & Gulf S. S. Co. v. Pechin*, 61 Pa. Super. Ct. 401; *Philadelphia & Gulf S. S. Co. v. Clark*, 59 Pa. Super. Ct. 415.

⁶¹ *Sargent v. Waterbury*, 83 Ore. 159, 161 Pac. 443, rehearing denied 163 Pac. 416.

⁶² *Brown v. Allebach*, 166 Fed. 488.

⁶³ *Jackson Fire & Marine Ins. Co. v. Walle*, 105 La. 89, 29 So. 503. See also *Cole v. Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052.

⁶⁴ *Jackson Fire & Marine Ins. Co. v. Walle*, 105 La. 89, 29 So. 503.

The fact that the judgment against each of the stockholders determines the amount for which each is liable to creditors, does not authorize the receiver to collect more from each than the demands of creditors and the cost of the receivership proceedings may require. *Cole v. Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052.

der judgment against each stockholder for the immediate payment of the remainder of his subscription in full, where there are no assets except unpaid subscriptions which are less in amount than the debts of the corporation.⁶⁵ If more than his just share is collected from any stockholder, he is entitled to have the excess refunded.⁶⁶

A decree appointing a receiver for an insolvent corporation cannot authorize him to compromise, in his discretion, with stockholders with regard to the payment of their subscriptions, especially when all the stockholders are not parties to the proceeding.⁶⁷

It has been held that a direction to receivers to collect subscriptions from such stockholders as in the receivers' opinion, are "legally liable" is not a delegation of the court's equitable powers, but a mandatory direction to them not to proceed against any apparent debtor where investigation has developed that he has a legal defense which would defeat recovery.⁶⁸

§ 4101. — Liability for interest and costs. As we have seen, the liability of a subscriber to stock for interest on the amount of his subscription is the same as in the case of any other contract to pay money, where there is no express stipulation or agreement on the subject,⁶⁹ and this is equally true when such liability is sought to be enforced by or for the benefit of corporate creditors.⁷⁰ Interest is recoverable from the day the subscriber was placed in default,⁷¹ which is generally held to be the date when the particular call is

⁶⁵ Carnahan v. Campbell (Ind.), 59 N. E. 1054.

⁶⁶ Foote v. Glenn, 52 Fed. 529.

If a receiver collects from a stockholder more than is necessary to pay the debts and costs of administration and to equalize the rights and liabilities of stockholders, he is bound to restore such excess. In re New Iberia Cotton Mills Co., 113 La. 404, 37 So. 8; Jackson Fire & Marine Ins. Co. v. Walle, 105 La. 89, 29 So. 503.

⁶⁷ Chandler v. Brown, 77 Ill. 333. Compare Hambleton v. Glenn, 72 Md. 331, 20 Atl. 115.

⁶⁸ Graves v. Denny, 15 Ga. App. 718, 84 S. E. 187.

⁶⁹ See § 689, supra.

⁷⁰ A stockholder is liable for interest on the amount found to be due from him by the decree in a cred-

itors' suit. Florsheim v. Illinois Trust & Savings Bank, 192 Ill. 382, 61 N. E. 491, aff'g 93 Ill. App. 297.

"Where there is no express promise to pay interest it is recoverable upon the theory that it is damages for the retention of money due and unpaid." Enright v. Heckscher, 240 Fed. 863.

See also Leighton v. Leighton Lea Ass'n, 122 N. Y. Supp. 139, construing the provisions of the constitution of a building and loan association as to interest.

⁷¹ Priest v. Glenn, 51 Fed. 400; Liggett v. Glenn, 51 Fed. 381, rev'g judgment 47 Fed. 472; Jackson Fire & Marine Ins. Co. v. Walle, 105 La. 89, 29 So. 503; See v. Heppenheimer, 69 N. J. Eq. 36, 87, 61 Atl. 843.

payable.⁷² If the subscription is payable in instalments at fixed times so that no call is necessary, the instalments bear interest from the time they become due, and such interest may be collected by the creditor.⁷³

Persons to whom stock has been issued as a gratuity or for property at an overvaluation, are liable for interest on the amount regarded as unpaid⁷⁴ from the date when it should have been paid, which has been held by different courts to be the date when the stock was issued,⁷⁵ the date when the action against the stockholder was begun,⁷⁶ or the date of a judgment against him.⁷⁷ Where the liability is enforced by means of an assessment in receivership proceedings, creditors who have proved their claims are entitled to interest thereon if the assets, including the stockholders' liability, are sufficient to pay it.⁷⁸ But the contrary is true in equity where the corporate assets, including the stock liability, are less than its indebtedness.⁷⁹ The stockholders are also liable for the costs and expenses of administering the estate under such circumstances, includ-

⁷² *Priest v. Glenn*, 51 Fed. 400; *Liggett v. Glenn*, 51 Fed. 381, rev'g judgment 47 Fed. 472.

⁷³ *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320. See also § 689, supra.

⁷⁴ Where a stockholder delivers his stock to the corporation in consideration of a credit on a note for which it is held as collateral, and the transaction is held void as to creditors, he is liable for interest on the amount of the credit at the rate fixed by the note. *Fitzpatrick v. McGregor*, 133 Ga. 332, 25 L. R. A. (N. S.) 50, 65 S. E. 859.

⁷⁵ *Enright v. Heckscher*, 240 Fed. 863; *Sullivan v. Farnsworth*, 132 Tenn. 691, 179 S. W. 317; *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188.

⁷⁶ See dictum to this effect in *Union Pac. R. Co. v. Blair*, 48 Utah 38, 156 Pac. 948.

⁷⁷ A stockholder who in good faith controverts his liability to pay for stock issued to him for worthless property is liable for interest only from the date of the judgment. This is particularly true under the Oregon

statute relating to the recovery of interest on judgments for the payment of money. *Sargent v. American Bank & Trust Co.*, 80 Ore. 16, 154 Pac. 759, rehearing denied 156 Pac. 431.

⁷⁸ *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879; See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843.

Interest on the claims of creditors is to be included in determining the amount to be assessed. *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069; See *v. Heppenheimer*, 69 N. J. Eq. 36, 88, 61 Atl. 843; *Cumberland Lumber Co. v. Clinton Hill Lumber Co.*, 64 N. J. Eq. 521, 54 Atl. 452.

⁷⁹ "Where the assets of a corporation, including stock liability, are less than its indebtedness, and it passes into the control of a court of chancery for administration of its assets and for dissolution, the general rule is that interest is not allowable on the claims against the fund. The delay in distribution is the act of the law." Hence interest will be al-

ing counsel fees and legal expenses in suits against stockholders, and the compensation of the receiver, which may be taken into account in fixing the amount of the assessment.⁸⁰

§ 4102. — Contribution among stockholders. When several stockholders are indebted to a corporation on account of unpaid subscriptions, and one of them is compelled to pay more than his proportion to or for the benefit of creditors, he is entitled to contribution from the others;⁸¹ and this is equally true although the latter are non-

lowed only to the time of the filing of the bill. *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 373, 82 N. E. 891.

⁸⁰ **United States.** *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Louisiana. In re *New Iberia Cotton Mills Co.*, 113 La. 404, 37 So. 8; *Jackson Fire & Marine Ins. Co. v. Walle*, 105 La. 89, 29 So. 503.

Missouri. *Berry v. Rood*, 225 Mo. 85, 123 S. W. 888.

New Jersey. *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375, rev'g judgment 87 N. J. Eq. 124, 99 Atl. 103; *Wolcott v. Waldstein*, 86 N. J. Eq. 63, 97 Atl. 951; *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069; *Honeyman v. Haughey* (N. J. Eq.), 66 Atl. 582; See v. *Heppenheimer*, 69 N. J. Eq. 36, 88 Atl. 843; *Cumberland Lumber Co. v. Clinton Hill Lumber Co.*, 64 N. J. Eq. 521, 54 Atl. 452; *Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co.*, 57 N. J. Eq. 627, 42 Atl. 585.

Texas. *Cole v. Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052.

Washington. *Rea v. Eslick*, 87 Wash. 125, 151 Pac. 256; *Beddow v. Huston*, 65 Wash. 585, 118 Pac. 752.

An allowance may be made for future expenses of the receivership. *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972.

In *Berry v. Rood*, 225 Mo. 85, 123 S. W. 888, half the costs and expenses of the receivership were taxed against the creditor who instituted the proceedings solely for his own benefit, and whose claim was disallowed.

⁸¹ **United States.** *Allen v. Fairbanks*, 45 Fed. 445, 40 Fed. 188.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Georgia. *Harrell v. Blount*, 112 Ga. 711, 38 S. E. 56; *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187.

Illinois. *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 588; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725; *Young v. Farwell*, 139 Ill. 326; *Wincock v. Turpin*, 96 Ill. 135; *Siegel v. Fish*, 129 Ill. App. 319.

Iowa. *Esgen v. Smith*, 113 Iowa 25, 84 N. W. 954.

Kentucky. *Williams v. Chamberlain*, 29 Ky. L. Rep. 606, 94 S. W. 29.

Massachusetts. *Putnam v. Misochi*, 189 Mass. 421, 109 Am. St. Rep. 648, 4 Ann. Cas. 733, 75 N. E. 956.

Missouri. *Meyer v. Ruby-Trust Mining & Milling Co.*, 192 Mo. 162, 90 S. W. 821.

New Jersey. *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069; See v. *Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843.

New York. *Graeber v. Ehr Gott*, —

residents of the state.⁸² The right to contribution may be enforced against the estate of a deceased stockholder,⁸³ since his liability survives.⁸⁴ The parties may control this right by contract, however,⁸⁵ and contribution will never be enforced when it would be inequitable.⁸⁶

The remedy to enforce contribution as between stockholders is in equity, in the absence of any statute prescribing a special remedy. A stockholder who is made a defendant to a creditors' bill to reach his unpaid subscription may file a cross bill, and bring in any stockholders who are not parties thereto, and enforce contributions from them in that suit.⁸⁷ Or, after having been compelled to pay more

App. Div. —, 169 N. Y. Supp. 32.

North Carolina. *Cooper v. Adel Security Co.*, 127 N. C. 219, 37 S. E. 216.

Virginia. *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 So. 751.

"The neglect of a subscriber for stock to pay for it in full is not a tort, which deprives him of his right to contribution, but it leaves him in the position of a surety, who is liable for a debt equally with other sureties." *Putnam v. Misochi*, 189 Mass. 421, 109 Am. St. Rep. 648, 4 Ann. Cas. 733, 75 N. E. 956.

A stockholder is not barred from seeking contribution from fellow stockholders merely because he has made no demand for reimbursement upon the corporation and has taken no action against it as authorized by statute. *Putnam v. Misochi*, 189 Mass. 421, 109 Am. St. Rep. 648, 4 Ann. Cas. 733, 75 N. E. 956.

Where a loan to a corporation is secured by an assignment of subscriptions, and the subscribers agree to pay the amount of their subscriptions to the lender, subscribers who pay a judgment for the amount of the loan may enforce contribution against the remaining stockholders who were parties to the agreement though the corporation be solvent. It is not necessary in such action that the corporation be made a party. *Hart v.*

Sickles, 45 N. Y. Misc. 174, 91 N. Y. Supp. 897. See also *Hinshaw v. Austin*, 64 Kan. 460, 67 Pac. 882.

As to the statutory liability of stockholders, see § 4141 et seq., *infra*.

⁸² *Allen v. Fairbanks*, 45 Fed. 445, 40 Fed. 188; *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879; *Putnam v. Misochi*, 189 Mass. 421, 109 Am. St. Rep. 648, 4 Ann. Cas. 733, 75 N. E. 956; See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843.

⁸³ *Allen v. Fairbanks*, 40 Fed. 188.

⁸⁴ See § 4195, *infra*.

⁸⁵ It is competent for stockholders to enter into agreement as between themselves that the property and money which they have turned over to the corporation shall end their liability on subscriptions, and where they have so done one stockholder who has voluntarily paid more than par for his stock in discharge of such liability cannot compel the remaining stockholders to pay in such additional amounts as shall render their payment equal with his. *Esgen v. Smith*, 113 Iowa 25, 84 N. W. 954.

⁸⁶ *Esgen v. Smith*, 113 Iowa 25, 84 N. W. 954.

⁸⁷ *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 484; *Young v. Farwell*, 139 Ill. 326, 28 N.

than his proportion, he may maintain an independent suit against the other stockholders for contribution.⁸⁸ And a court of equity administering the estate of an insolvent corporation may direct its receivers to enforce the liability of those stockholders who have not paid their subscriptions in full for the purpose of equalizing by contribution stockholders who have so paid.⁸⁹ If the liability is enforced by means of an assessment levied in receivership proceedings, and the whole assessment is made against delinquent stockholders within the jurisdiction, those who pay may be subrogated to the rights of the receiver by order of court, and may use the proceedings in which the assessment is made for the purpose of enforcing contribution.⁹⁰ A decree dismissing a creditor's bill as to certain stockholders sued with others is not *res adjudicata* as to the liability of those so dismissed in a subsequent suit for contribution brought against them by those held liable.⁹¹

The statute of limitations does not begin to run against the right to bring an independent suit until the stockholder seeking contribution has actually been compelled to pay the debt.⁹²

The right of stockholders to contribution where they have been held liable under statutes imposing individual liability to creditors is considered in a subsequent section.⁹³

§ 4103. Defenses available to stockholders—In general. In the absence of fraud or elements of estoppel, creditors can compel an alleged stockholder to pay on the ground of a subscription to stock only when there is a complete and binding contract of subscription, so that payment might be enforced in an action by the corporation itself. When a person, therefore, is sued by or for the benefit of creditors upon an alleged subscription for stock, he may set up any defense which he could have successfully set up in an action by the

E. 845; *Siegel v. Fish*, 129 Ill. App. 319. See also *Harrell v. Blount*, 112 Ga. 711, 38 S. E. 56.

⁸⁸ *Singer v. Hutchinson*, 183 Ill. 606, 620, 75 Am. St. Rep. 133, 140, 56 N. E. 388. See *Siegel v. Fish*, 129 Ill. App. 319; *Fiery v. Emmert*, 36 Md. 464; *Putnam v. Misoichi*, 189 Mass. 421, 109 Am. St. Rep. 648, 4 Ann. Cas. 733, 75 N. E. 956.

⁸⁹ *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 871.

⁹⁰ *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

⁹¹ This is especially true when the dismissal was obtained practically by default. *Siegel v. Fish*, 129 Ill. App. 319.

⁹² It does not begin to run at the time when the stockholder had the right to bring the other stockholders into the creditor's suit by cross-bill. *Siegel v. Fish*, 129 Ill. App. 319.

⁹³ See § 4265; *infra*.

corporation,⁹⁴ unless he is for some reason estopped as against creditors.⁹⁵ Thus, in the absence of fraud or elements of estoppel, a subscriber is not liable to or for the benefit of creditors if his subscription was not accepted by the corporation,⁹⁶ or if he withdrew it before its acceptance,⁹⁷ so that no contract was made, or if a different corporation from that contemplated by the subscription was formed,⁹⁸ or if the subscriber was an infant, and has repudiated his subscription before any affirmance on attaining his majority,⁹⁹ or if the subscription was by another as agent without authority, and has not been ratified,¹ or if the stock was issued and delivered to him on credit, in violation of law,² or if, for any other reason, no binding

94 Alabama. *White v. Kahn*, 103 Ala. 308, 15 So. 595.

California. *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70.

District of Columbia. *Metropolitan Coach Co. v. Freund*, 42 App. Cas. 283.

Maine. *Carr v. Bartlett*, 72 Me. 120.

Maryland. *Fear v. Bartlett*, 81 Md. 435, 33 L. R. A. 721, 32 Atl. 322; *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414.

New Jersey. *Cumberland Lumber Co. v. Clinton Hill Lumber Co.*, 64 N. J. Eq. 521, 54 Atl. 452; *Cumberland Lumber Co. v. Clinton Hill Lumber & Manufacturing Co.*, 64 N. J. Eq. 517, 54 Atl. 450.

New York. *Glenn v. Garth*, 133 N. Y. 18, 31 N. E. 344, 30 N. E. 649; *Dorris v. Sweeney*, 60 N. Y. 463.

Texas. *Mitchell v. Porter*, — Tex. Civ. App. —, 194 S. W. 981; *Nesom v. City Nat. Bank*, — Tex. Civ. App. —, 174 S. W. 715.

Wisconsin. *Gilman v. Gross*, 97 Wis. 224, 72 N. W. 885.

England. *Ebbetts' Case*, 5 Ch. App. 302.

In the absence of an estoppel, stockholders are not liable to creditors on the insolvency of the corporation unless they would have been liable to the corporation itself. *Grier v.*

Union Nat. Life Ins. Co., 217 Fed. 287.

There is no privity between the creditor and the stockholder, but it is merely a case of a creditor seeking to collect his debt from a debtor of his debtor. Whatever rights he may have come to him through the corporation, and generally they cannot be other or greater than the rights of the latter. *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70.

He may show that he never subscribed for any stock and never owned any. *McFarland v. Martin & Moodie* (Tex. Civ. App.), 86 S. W. 639.

Where action is brought against a stockholder by a creditor of an insolvent corporation to enforce payment of an unpaid balance of the subscription price of stock, allegation that the defendant is the holder of unpaid stock is sufficient. It is for the defendant to set up facts which relieve him from liability implied from such allegation. *Atlantic Trust Co. v. Osgood*, 116 Fed. 1019.

⁹⁵ See § 716 et seq., supra.

⁹⁶ See § 521 et seq., supra.

⁹⁷ See § 563 et seq., supra.

⁹⁸ See § 524, supra.

⁹⁹ See § 546, supra.

¹ See § 553, supra.

² In Texas, as we have seen (§ 3514, supra), a note given for stock issued on credit is void, and its invalidity

contract has been made,³ or, if made, he has legally been released from liability thereunder.⁴ Issue of a certificate of stock is not necessary to render one liable as a subscriber, either to the corporation, or to or for the benefit of creditors.⁵

The effect of fraud⁶ or mistake⁷ in procuring subscriptions, or of a noncompliance with conditions precedent⁸ or special terms⁹ in the contract of subscription, and the liability of the holders of stock which is part of an overissue or unauthorized increase,¹⁰ and the effect of a forfeiture or sale of shares by the corporation for nonpayment of calls,¹¹ have been fully considered in other sections.

may be set up as a defense to an action thereon by a receiver for the benefit of creditors. *Mitchell v. Porter*, — Tex. Civ. App., 194 S. W. 981.

³ See § 521, *supra*.

It is a good defense that there was no due authorization by the corporation for subscriptions to its stock, but that such stock was in fact sold by it to an individual, with whom the defendant had all of his transactions in relation to it. *Stevens v. Lippman*, 85 N. Y. Misc. 347, 148 N. Y. Supp. 419.

⁴ See § 4104, *infra*.

⁵ See § 593, *supra*.

⁶ See § 636, *supra*. And in addition to the cases there cited, see *Salter v. Williams*, 244 Fed. 126, rev'g 219 Fed. 1017; *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711; *Cosmopolitan Life Ins. Co. v. Sheats*, 20 Ga. App. 622, 93 S. E. 507; *Morgan v. Ruble*, 81 Ore. 641, 160 Pac. 543; *Mitchell v. Hancock*, — Tex. Civ. App., 196 S. W. 694; *Mitchell v. Porter*, — Tex. Civ. App., 194 S. W. 981.

⁷ See § 544, *supra*.

⁸ As to the effect of the nonperformance of conditions generally, see § 579, *supra*. And in addition to the cases there cited, see *Temple v. Lemon*, 112 Ill. 51; *Foot v. Greilick*, 166 Mich. 636, 132 N. W. 473; *Seubert v. Scott*, 39 S. D. 278, 164 N. W. 75; *Silvain v. Benson*, 83 Wash. 271,

145 Pac. 175; *Natwick v. Terwilliger*, 24 Wyo. 253, 160 Pac. 338, 157 Pac. 696.

As to the effect of the nonperformance of an express or implied condition that the full amount of the capital stock, or a specified percentage thereof shall be subscribed, see § 693 *et seq.*, *supra*.

⁹ See § 601 *et seq.*, *supra*.

¹⁰ See § 3467 *et seq.*, *supra*.

¹¹ See § 665, *supra*.

Where the remedy by forfeiture is cumulative, the fact that it exists will not prevent the collection of the balance due on the subscription, if there has been no forfeiture. *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187.

A plea setting up a remedy by forfeiture as a defense to an action to recover the balance due on a subscription is demurrable where it does not allege that the statutory notice of forfeiture has been given to delinquent subscribers, or that the stock has in fact ever been cancelled. *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187.

The subscriber is not relieved from liability where the stock is sold to satisfy the unpaid subscription and is purchased by the corporation at a time when it is insolvent. *Tiger Bros. v. Rogers Cotton Cleaner & Gin Co.*, 96 Ark. 1, 30 L. R. A. (N. S.) 694, Ann. Cas. 1912 B 488, 130 S. W. 585.

§ 4104. — Release or discharge of stockholders. A stockholder may defeat an action or call by or for the benefit of creditors for payment of his subscription by setting up a valid release by the corporation,¹² or by the creditors,¹³ or a discharge by operation of law,—as by transfer of his shares,¹⁴ by a discharge in bankruptcy,¹⁵ by a material alteration of the contract of subscription without his consent,¹⁶ by nonperformance of conditions precedent,¹⁷ by a material alteration or amendment of the charter of the corporation without his consent,¹⁸ or by a consolidation without his consent.¹⁹

As we have seen, however, a corporation cannot, except in pursuance of a bona fide compromise, release a stockholder from liability on his subscription, as against existing creditors, by accepting a surrender of his shares, or purchasing them, or otherwise. As against them, the release is fraudulent and void, and the stockholder remains liable.²⁰ This does not apply where a subscriber is released in pursuance of a bona fide compromise. Such a release is binding,

¹² *New Haven Trust Co. v. Gaffney*, 73 Conn. 480, 47 Atl. 760; *New Haven Trust Co. v. Nelson*, 73 Conn. 477, 47 Atl. 753; *Nesom v. City Nat. Bank*, — Tex. Civ. App. —, 174 S. W. 715; *Elliot v. Ashby*, 104 Va. 716, 52 S. E. 383; *Shoemaker v. Washburn Lumber Co.*, 97 Wis. 585, 73 N. W. 333; *Trevor v. Whitworth*, 12 App. Cas. 409.

A release before the corporation began operations or incurred debts is valid as to subsequent creditors. *Commercial Germania Trust & Savings Bank v. Jurgens*, 134 La. 755, 64 So. 703.

The corporation is not bound by an unauthorized agreement by its president that if certain subscribers will pay their subscriptions he will cancel their notes and transfer bonds or other assets of the corporation to an equal amount. *Henderson v. Hall*, 134 Ala. 455, 63 L. R. A. 673, 32 So. 840.

As to the right of the corporation or its officers to release stockholders generally, see § 638, *supra*.

¹³ See § 4105, *infra*.

¹⁴ See § 4111, *infra*.

¹⁵ *Carey v. Mayer*, 79 Fed. 926; *Glenn v. Abell*, 39 Fed. 10; *Grand Rap-*

ids Trust Co. v. Nichols, — Mich. —, 165 N. W. 667. And see § 644, *supra*.

The liability is a probable debt. *In re Putman*, 193 Fed. 464.

The liability is a probable debt where the corporation is insolvent at the time of the filing of the petition. *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440.

But it has been held that there is no discharge if the subscription was not due at the time of the discharge in bankruptcy, because no call had been made. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46; *Sayre v. Glenn*, 87 Ala. 631, 6 So. 45; *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 So. 44; *Glenn v. Howard*, 65 Md. 40, 3 Atl. 895. Compare, however, *Carey v. Mayer*, 79 Fed. 926. And see § 644, *supra*.

As to the effect of a discharge in bankruptcy on a statutory liability to creditors, see § 4264, *infra*.

¹⁶ See § 645, *supra*.

¹⁷ See § 579, *supra*.

¹⁸ See § 524, *supra*.

¹⁹ See § 649, *supra*.

²⁰ See § 639, *supra*. And see *Enright v. Heckscher*, 240 Fed. 863; *In*

both upon the corporation and as against creditors.²¹ And even when there is no compromise, but simply a release, it has been held that subsequent creditors cannot complain, for there is no fraud as against them.²² But there is authority that a release of a subscriber is not valid even as to subsequent creditors, where the capital stock is thereby impaired.²³

Payment of his subscription or some part of it by the subscriber is, of course, a good defense pro tanto.²⁴ But payments made by stockholders to creditors in discharge of a statutory personal liability for

re Putman, 193 Fed. 464; Sargent v. American Bank & Trust Co., 80 Ore. 16, 154 Pac. 759, rehearing denied 80 Ore. 16, 156 Pac. 431; Kramer v. Hamsher, 63 Pa. Super. Ct. 211; Murphy v. Panton, 96 Wash. 637, 165 Pac. 1074.

Wholesalers who furnish goods to the corporation as ordered both before and after an attempted cancellation of a subscription are to be regarded as existing creditors even in respect to goods furnished after that time. Murphy v. Panton, 96 Wash. 637, 165 Pac. 1074.

²¹ See § 640, supra.

If the subscriber is insolvent, the corporation may compromise its claim, but there must be a valuable consideration for the compromise. Murphy v. Panton, 96 Wash. 637, 165 Pac. 1074.

²² Johnson v. Lullman, 88 Mo. 567, 15 Mo. App. 55; Erskine v. Peck, 83 Mo. 465, 13 Mo. App. 280; Shoemaker v. Washburn Lumber Co., 97 Wis. 585, 73 N. W. 333. And see Gade v. Forest Glen Brick & Tile Co., 165 Ill. 367, 46 N. E. 286.

²³ Chrisman-Sawyer Banking Co. v. Independence Wool Mfg. Co., 168 Mo. 634, 68 S. W. 1026; Murphy v. Panton, 96 Wash. 637, 165 Pac. 1074.

²⁴ United States. Maryland Rail Co. v. Taylor, 231 Fed. 119; French v. Busch, 189 Fed. 480.

Alabama. Hall & Farley v. Alabama Terminal & Improvement Co., 173 Ala. 398, 56 So. 235; Henderson v.

Hall, 134 Ala. 455, 63 L. R. A. 673, 32 So. 840.

California. Home Sav. Bank of Los Angeles v. Los Angeles City Realty Co., — Cal. —, 171 Pac. 290.

Iowa. Merrill v. Timbrell, 123 Iowa 375, 98 N. W. 879.

Maine. Grindle v. Stone, 78 Me. 176, 8 Atl. 183.

Michigan. Brown v. Weeks, 195 Mich. 27, 161 N. W. 945.

New York. Graeber v. Ehr Gott, — App. Div. —, 169 N. Y. Supp. 32.

Oregon. Norris Safe & Lock Co. v. Weaver, 81 Ore. 670, 160 Pac. 807; Shipman v. Portland Const. Co., 64 Ore. 1, 128 Pac. 989.

Texas. O'Bear-Nester Glass Co. v. Antiexplo Co. (Tex. Civ. App.); 106 S. W. 180.

Utah. Union Pac. R. Co. v. Blair, 48 Utah 38, 156 Pac. 948. See also Dotson v. Hoggan, 44 Utah 295, 140 Pac. 128.

Washington. Murphy v. Panton, 96 Wash. 637, 165 Pac. 1074; McKay v. Garman, 89 Wash. 23, 153 Pac. 1082.

Stockholders who have made payments on their stock in excess of their proportion of the amount due the creditors should be excluded, in levying assessments, and those who have made payments on account of their shares should be given credit therefor. John W. Cooney Co. v. Arlington Hotel Co., — Del. Ch. —, 101 Atl. 879.

The complaint in a suit to enforce the liability must show for how many

corporate debts over and above the amount unpaid on their stock cannot be regarded as payments made upon the capital stock so as to discharge them pro tanto from liability for the unpaid portion of their subscriptions.²⁵

§ 4105. — Waiver or release of liability by creditors. A creditor may, by express contract at the time the debt is incurred, waive his right to collect the same from delinquent stockholders in case the corporation fails to pay it.²⁶ And creditors have no remedy against

shares the defendant subscribed and how much remains unpaid on his subscription. *Morris Safe & Lock Co. v. Weaver*, 81 Ore. 670, 160 Pac. 807.

Where the statute imposes liability on the holders of stock not fully paid, this refers to stock not fully paid when the action to enforce the liability is brought, and the complaint must allege that it was not fully paid at that time. An allegation that it was issued without consideration is insufficient. *Graeber v. Ehr Gott*, — N. Y. App. Div. —, 169 N. Y. Supp. 32; *Dyer v. Drucker*, 108 N. Y. App. Div. 238, 95 N. Y. Supp. 749.

It is sufficient to plead that the defendant holds stock which has never been paid up. Circumstances excusing him from paying the balance are matters of defense to be pleaded by him. *Atlantic Trust Co. v. Osgood*, 116 Fed. 1019.

It has been held by a number of courts that the burden of showing that the stock has never been paid for in full is on the plaintiff. *Henry v. Semonian*, 27 Colo. App. 487, 150 Pac. 818; *Speer v. Bordelean*, 20 Colo. App. 413, 79 Pac. 332; *Kelly v. Kilian*, 133 Ill. App. 102; *American Spirits Mfg. Co. v. Eldridge*, 209 Mass. 590, 95 N. E. 942 (liability under the Illinois statute); *Merrill v. Timbrell*, 123 Iowa 375, 98 N. W. 879; *Rich v. Park*, — Tex. Civ. App. —, 177 S. W. 184. But in *Goodman v. White*, 174 N. C. 399, 93 S. E. 906, it is held that where a stockholder pleads payment

the burden of proving it rests on him.

The payment of a note given for the amount of an unpaid subscription must be pleaded and proved by the party relying on such payment as a defense. *Wyman v. Williams*, 53 Neb. 670, 74 N. W. 48, 52 Neb. 833, 73 N. W. 235.

An entry in the corporate minutes that stock has been paid for in full is not conclusive against creditors, but they may show the true nature of the transaction. *Home Sav. Bank of Los Angeles v. Los Angeles City Realty Co.*, — Cal. —, 171 Pac. 290.

In *Davis v. Scott*, 129 Ark. 226, 195 S. W. 383, it was held that amounts paid in by certain stockholders on a reorganization of the corporation could not be taken as payment of amounts unpaid on subscriptions of other stockholders in so far as creditors were concerned.

See also § 642, *supra*.

As to what constitutes payment, see § 3501 et seq., *supra*.

²⁵ *Marsh v. Burroughs*, 1 Woods 463, Fed. Cas. No. 9,112; *Union Sav. Bank of San Jose v. Leiter*, 145 Cal. 696, 79 Pac. 441.

See also § 4260, *infra*.

²⁶ *Babbitt v. Read*, 236 Fed. 42, aff'g 215 Fed. 395; *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972; *Fidelity Trust Co. v. Washington-Oregon Corporation*, 217 Fed. 568; *Babbitt v. Read*, 173 Fed. 712; *Carnahan v. Campbell*, 158 Ind. 226, 63 N. E. 384; *Grady v. Graham*, 64 Wash. 436, 36

stockholders, if, at the time they extended the credit, they knew of, or were parties to, an arrangement whereby the stockholders' liability upon their subscriptions was waived or limited.²⁷ So a stockholder who is a party to a transaction whereby property is turned over to the company at a fictitious valuation as payment in full for stock issued, cannot hold his fellow stockholders as for unpaid subscriptions on their stock to satisfy a judgment in his favor for money actually loaned to the company, since he has not given the credit on the faith of the unpaid subscription being an asset of the corporation.²⁸ And for the same reason, a creditor who extends the credit with notice or knowledge of the fact that property has been taken at an overvaluation in full payment for stock cannot recover the difference between the value at which such property was taken and its actual value from the holders of such stock.²⁹

§ 4106. — Estoppel or waiver of right to set up defenses. The estoppel of persons who have held shares of stock to deny the exist-

L. R. A. (N. S.) 177, 116 Pac. 1098.

Where corporate bonds refer to a mortgage securing them for the terms and conditions upon which they are issued, and the mortgage provides that no individual liability shall exist on the bonds, and no recourse shall be had in favor of any holder or owner thereof, against any stockholder, by the enforcement of any assessment or call, or otherwise, stockholders cannot be held liable on their unpaid subscriptions for the benefit of the holders of such bonds. *Babbitt v. Read*, 236 Fed. 42, aff'g 215 Fed. 395; *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972.

Such a provision is not contrary to public policy. *Babbitt v. Read*, 236 Fed. 42, aff'g 215 Fed. 395.

An agreement in bonds that no stockholder should be in any wise liable for the payment thereof, and that no bondholder should be entitled to any remedy to enforce payment thereof against any stockholder, was held not to be a defense to an action by a bondholder to compel stockholders to make good the difference between the par value of their stock issued as fully paid and what they actually paid

for it. *Downer v. Union Land Co. of St. Paul*, 113 Minn. 410, 129 N. W. 777.

As to waiver or release of statutory liability, see § 4253 et seq., *infra*.

²⁷ See *Carnahan v. Campbell (Ind.)*, 59 N. E. 1054, where it was held that, conceding the correctness of this rule, the agreement in question did not purport to release the parties thereto from liability.

Compare *Carnahan v. Campbell*, 158 Ind. 226, 63 N. E. 384.

²⁸ *LaVeine v. Tiffany Springs & Land Co. (Mo.)*, 187 S. W. 1186; *Schroeder v. Edwards*, 267 Mo. 459, 184 S. W. 108; *Euston v. Edgar*, 207 Mo. 287, 105 S. W. 773; *Meyer v. Ruby-Trust Mining & Milling Co.*, 192 Mo. 162, 90 S. W. 821. See also § 3595, *supra*.

This is equally true of a creditor of such a stockholder who has become an assignee of his claim against the corporation through operation of law by garnishment proceedings. *Meyer v. Ruby-Trust Mining & Milling Co.*, 192 Mo. 162, 90 S. W. 821.

²⁹ See § 3595, *supra*.

ence of the corporation,³⁰ or to deny the fact or validity of their subscriptions,³¹ or to set up that the corporation was formed for a different purpose or for a longer period than was contemplated by their subscription,³² or that their stock was illegally issued,³³ or was part of an overissue, or an unauthorized or irregular increase of stock,³⁴ and the waiver of conditions precedent in subscriptions,³⁵ have been considered in previous sections.

One who permits his name to appear and remain on the books of the corporation as a stockholder is estopped, as against corporate creditors, to deny that he is a stockholder.³⁶

In states where it is held that a party who has had the benefit of an ultra vires contract will not be permitted to question its validity,³⁷ one who has pledged his stock to the corporation as security for the payment of his subscription cannot set up as a defense to an action by a receiver to foreclose the pledge that the statute prohibits the corporation from accepting shares of its own stock as collateral.³⁸

"Estoppel implies hurt or injury, the doing of a thing which, but for the thing relied on, would not have been done."³⁹

§ 4107. Persons liable—In general. Before a person can be held liable to creditors as a stockholder, it must appear that he subscribed for the stock in question or otherwise became liable to pay for the

³⁰ See § 715, *supra*.

³¹ See § 716 et seq., *supra*. And in addition to the cases there cited, see *Jackson Fire & Marine Ins. Co. v. Walle*, 105 La. 89, 29 So. 503; *Dwinell v. Minneapolis Fire & Marine Mut. Ins. Co.*, 97 Minn. 340, 106 N. W. 312; *Clevenger v. Moore*, 71 N. J. L. 148, 58 Atl. 88.

One who permits the corporation to hold him out as a stockholder is estopped, as against creditors to claim that he was not a stockholder, but that his subscription was a mere option, and that he was not bound to take the stock and never did so. *Johns v. Clothier*, 78 Wash. 602, 139 Pac. 755.

³² See § 625, *supra*.

³³ See § 3488, *supra*.

³⁴ See § 3469, *supra*.

³⁵ See § 598, *supra*. And in addition to the cases there cited, see *Natwick v. Terwilliger*, 24 Wyo. 253, 160 Pac. 338, 157 Pac. 696.

³⁶ See § 4209, *infra*.

³⁷ See Chap. 37, *supra*.

³⁸ *Meholin v. Carlson*, 17 Idaho 742, 134 Am. St. Rep. 286, 107 Pac. 755.

³⁹ The holders of full paid stock, who surrender it to the corporation and then immediately subscribe for the amount so surrendered, are not estopped to deny liability on such subscriptions, although the corporation gave statements to commercial agencies showing such subscriptions upon which credit was extended, since the persons extending the credit are not injured by the fact that the stock is paid for in full. *Murphy v. Pantan*, 96 Wash. 637, 165 Pac. 1074.

same.⁴⁰ Any person who is liable to the corporation for a balance due on a subscription is liable, of course, to or for the benefit of its creditors, and, as a general rule, persons who are not liable to the corporation are not liable to creditors. To the latter proposition, however, there are many exceptions. For example, as we have already seen, a release of a subscriber by the corporation may be valid as between the corporation and the subscriber, but fraudulent and void as against creditors,⁴¹ and a stockholder may be liable to creditors on account of watered or fictitiously paid up stock, although not liable to the corporation.⁴²

The liability extends to preferred stockholders as well as to the holders of common stock.⁴³ Nor does a provision that in no event shall a holder of preferred stock be liable for the debts of the company relieve such a stockholder from liability to pay the balance due on his stock.⁴⁴

The liability survives the death of the stockholder, and may be enforced against his estate,⁴⁵ or against his heirs, devisees or legatees to the extent of the property received by them from the estate.⁴⁶

⁴⁰ *Kelly v. Killian*, 133 Ill. App. 102; *Shipman v. Portland Const. Co.*, 64 Ore. 1, 128 Pac. 989.

Stockholders cannot be held liable for the amount unpaid on stock purchased by the corporation unless they, upon a sufficient consideration, expressly or impliedly promised to pay the same. *Crawford v. Roney*, 130 Ga. 515, 61 S. E. 117.

The fact that a person at various times received money from the assets of a corporation does not make him liable for its return upon the theory that this amount represented a balance due upon an unpaid stock subscription. *McKay v. Garman*, 89 Wash. 23, 153 Pac. 1082.

If a person subscribes for a certain number of shares, his liability to creditors is not affected by the fact that he was charged on the books and accounts of the corporation with a less number, and the corporation never demanded payment for the rest. *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320.

⁴¹ See §§ 638, 639, *supra*.

⁴² See § 3589 et seq., *supra*.

⁴³ *Kirkpatrick v. American Alkali Co.*, 140 Fed. 186.

Both should be treated alike in levying assessments. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

See also post, § 4186.

⁴⁴ *Kirkpatrick v. American Alkali Co.*, 140 Fed. 186.

⁴⁵ *Allen v. Fairbanks*, 40 Fed. 188; *Succession of Shropshire*, 12 La. Ann. 527; *Thomas v. Kalbfus*, — Ohio St. —, 119 N. E. 412; *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736; *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398.

As to whether or not a statutory liability survives, see § 4195, *infra*.

⁴⁶ *Glenn v. Sothoron*, 4 App. Cas. (D. C.) 125; *Thomas v. Kalbfus*, — Ohio St. —, 119 N. E. 412.

The defendant in such case may interpose any defense which the decedent could have asserted. *Thomas v. Kalbfus*, — Ohio St. —, 119 N. E. 412.

See also § 4195, *infra*.

The defenses which a stockholder may set up for the purpose of escaping liability to creditors have been considered in a former section.⁴⁷

§ 4108. — Infants and married women. A subscription for stock by an infant may be repudiated by him when he attains his majority or before, and in such a case he cannot be held liable to or for the benefit of creditors of the corporation; but he is liable if he has expressly ratified the subscription after attaining his majority, or if he has impliedly ratified it by accepting the benefit of it, or acting upon it, or if he has failed to disaffirm it within a reasonable time.⁴⁸

At common law, a married woman cannot be held liable to creditors on a subscription to stock, for her contract is void, but it is otherwise under the statutes in most jurisdictions removing the disability of married women to contract.⁴⁹

In states where the community property system exists as between husband and wife, it has been held that a subscription made by the husband will be presumed to have been made for the benefit of the community, and that, if this presumption is not rebutted, the community property may be subjected to its payment.⁵⁰ But it has also been held that although a subscription by the husband creates a community debt, it also creates a separate personal obligation on his part, which is in no way dependent upon establishing a claim against the community, and which is not affected by a loss of remedy against the community estate, as by failure to present a claim for the amount due against the community estate on the death of the wife.⁵¹

§ 4109. — Other corporations. When a corporation has the power under its charter to subscribe for or purchase stock in another corporation, and does so, its liability to creditors of the corporation is the same, of course, as that of any other stockholder.⁵² The authori-

⁴⁷ See § 4103, *supra*.

⁴⁸ See § 546, *supra*.

As to the statutory liability of infants, see § 4187, *infra*.

⁴⁹ See § 547, *supra*.

A general statute imposing liability on stockholders includes married women. *Dickinson v. Traphagan*, 147 Ala. 442, 41 So. 272.

As to her statutory liability to creditors, see § 4188, *infra*.

⁵⁰ *Johns v. Clothier*, 78 Wash. 602, 139 Pac. 755.

⁵¹ *Rea v. Eslick*, 87 Wash. 125, 151 Pac. 256.

⁵² *In re Asiatic Banking Corporation*, 4 Ch. App. 252.

See also § 1133, *supra*.

As to the statutory liability of a corporation under such circumstances, see § 4189, *infra*.

ties are in conflict as to whether it is liable when its subscription or purchase was *ultra vires*.⁵³

§ 4110. — Principal and agent; trustee and beneficiary. One to whom stock is issued, and who appears on the books of the corporation as the owner, cannot escape liability to creditors of the corporation for the balance remaining unpaid on the stock by showing that he holds the same merely as agent or trustee for another.⁵⁴ It is generally held that the principal or real owner of the stock is also liable under such circumstances, and that creditors or a receiver may proceed against him at their election.⁵⁵ And it has also been

⁵³ The cases in which this question has arisen have been cases involving the statutory liability of corporations as stockholders, and will be considered in that connection. See § 4189, *infra*.

⁵⁴ **United States.** *Brown v. Allenbach*, 166 Fed. 488; *Brown v. Artman*, 166 Fed. 485.

California. *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776, 27 Pac. 674.

Connecticut. *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905.

Delaware. *Fell v. Securities Co. of North America*, — Del. Ch. —, 100 Atl. 788.

Maryland. *McKim v. Glenn*, 66 Md. 479.

New York. *Mann v. Currie*, 2 Barb. 294.

England. *King's Case*, 6 Ch. App. 196; *Williams' Case*, 1 Ch. Div. 576; *Bugg's Case*, 2 Dr. & Sm. 452; *Hoare's Case*, 2 Johns. & H. 229.

Where a person takes a transfer of shares, and is registered as owner on the books of the corporation, he cannot avoid liability for the balance due on the shares, in an action by a receiver, by showing that another is the equitable owner of the shares, even though the corporation may have had notice thereof. *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905.

One to whom stock is transferred

on the books of the company in order to qualify him to hold the office of director thereby holds himself out as being the owner thereof in his own right, and cannot escape liability to creditors by showing that he never had a beneficial interest in it, but held it as agent of another, to whom he had delivered the stock certificate with a transfer indorsed thereon. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879; *Fell v. Securities Co. of North America*, — Del. Ch. —, 100 Atl. 788.

It is not inequitable to permit a receiver appointed in voluntary liquidation proceedings to proceed against the agent rather than against the principal, if that course be the best for the creditors, as where the principal is a nonresident and has not been brought into the proceedings, and his solvency is unknown. *Fell v. Securities Co. of North America*, — Del. Ch. —, 100 Atl. 788.

This is equally true as to a statutory liability. See § 4191, *infra*.

As to the personal liability of agents or trustees on stock subscriptions generally, see § 554, *supra*.

⁵⁵ *Brown v. Allebach*, 166 Fed. 488; *Brown v. Artman*, 166 Fed. 485; *Fell v. Securities Co. of North America*, — Del. Ch. —, 100 Atl. 788.

Under a complaint alleging that stock of a corporation was subscribed

held that, where an incorporator subscribes for stock in behalf of, and at the request of, all the incorporators, all of them, including the subscriber, are jointly and severally liable for the payment of the subscription.⁵⁶ If an agent is held liable, he has a remedy over against his principal.⁵⁷ A person who holds stock solely as agent for another, and has no interest in it himself, is not liable for the balance remaining unpaid thereon, where it has never been registered in his name.⁵⁸

Where the constitution prohibits the investment of trust funds in corporate stock, a trust estate cannot be held liable on stock purchased by the trustee or taken by him in payment of a debt due the estate, but in such case the trustee is individually liable.⁵⁹

Where there are two trustees, both must be joined as defendants in an action to hold the estate liable on stock.⁶⁰

§ 4111. — Effect of transfer of stock. The liability of a stockholder for calls after a transfer of stock depends upon the law of the state in which the corporation was created, and not upon the law of the state in which the stockholder may reside, and in which action may be brought.⁶¹

for by a person as trustee, and that, in subscribing, he acted as agent for certain other persons at their request, and for the benefit of each of them in a certain proportion, the creditors of the corporation or a receiver may maintain a suit against the real parties in interest to compel them to pay the amount of their subscriptions, and parol evidence is admissible, without any proof of fraud, to show that the subscriptions were made by the nominal subscriber as their agent and for their benefit. *Cole v. Satsop R. Co.*, 9 Wash. 487, 43 Am. St. Rep. 858, 37 Pac. 700.

A provision in the charter that the holders of the shares of record on the books of the company, and they only, shall be liable for assessments, does not relieve the real owner from liability under such circumstances. *Brown v. Artman*, 166 Fed. 485.

See also § 4191, *infra*.

As to the liability of the principal

or cestui que trust on a subscription made by an agent or trustee generally, see § 553, *supra*.

⁵⁶ *Brown v. Weeks*, 195 Mich. 27, 161 N. W. 945.

⁵⁷ *Fell v. Securities Co. of North America*, — Del. Ch. —, 100 Atl. 788; *Stover v. Flack*, 30 N. Y. 64. And see *Orr v. Bigelow*, 14 N. Y. 556.

⁵⁸ *American Alkali Co. v. Kurtz*, 138 Fed. 392, aff'g 134 Fed. 663.

⁵⁹ *Bagnell v. Ives*, 184 Fed. 466.

⁶⁰ *Bagnell v. Ives*, 184 Fed. 466.

⁶¹ *United States. Priest v. Glenn*, 51 Fed. 400.

Alabama. Morris v. Glenn, 87 Ala. 628, 7 So. 90.

Maryland. Hambleton v. Glenn, 72 Md. 331, 20 Atl. 115; *McKim v. Glenn*, 66 Md. 479, 8 Atl. 130.

Minnesota. McConey v. Belton Oil & Gas Co., 97 Minn. 190, 106 N. W. 900.

Missouri. Meyer v. Ruby-Trust Mining & Milling Co., 192 Mo. 162, 90 S. W. 821; *Glenn v. Hunt*, 120 Mo. 330.

In the absence of a statutory provision⁶² or an agreement⁶³ to the contrary, it is generally held that a bona fide transfer of stock, perfected on the books of the corporation, when this is required, discharges the transferrer from any further liability, either to the corporation or to creditors, for calls or assessments made after the transfer, but not for calls made prior thereto, and the transferee takes his place and becomes liable for calls or assessments made after the transfer, but not for those made before.⁶⁴ In other words, a stockholder may generally relieve himself from liability for any

⁶² See § 4196 et seq., *infra*.

⁶³ Generally the transferrer remains liable for calls previously made, but the contrary is true where the transferee agrees to assume all of the transferrer's liability as a part of the consideration for the transfer, and this is assented to by the corporation or ratified by it. *Hall & Farley v. Alabama Terminal & Improvement Co.*, 173 Ala. 398, 56 So. 235.

⁶⁴ *United States*. *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Glenn v. Porter*, 73 Fed. 275; *Upton v. Burnham*, 3 Biss. 520, Fed. Cas. No. 16,799, 3 Biss. 431, Fed. Cas. No. 16,798; *Upton v. Hansbrough*, 3 Biss. 417, Fed. Cas. No. 16,801.

Alabama. *Hall & Farley v. Alabama Terminal & Improvement Co.*, 173 Ala. 398, 56 So. 235; *Henderson v. Mayfield Woolen Mills*, 153 Ala. 625, 45 So. 211; *Allen v. Montgomery R. Co.*, 11 Ala. 437.

Arkansas. *Davis v. Scott*, 129 Ark. 226, 195 S. W. 383.

California. *Perkins v. Cowles*, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711; *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858.

Illinois. *Kellogg v. Stockwell*, 75 Ill. 68.

Iowa. *Wishard v. Hansen*, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691.

Louisiana. *Haynes v. Palmer*, 13 La. Ann. 240.

Maine. *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904.

Maryland. *Brant v. Ehlen*, 59 Md. 1.

Minnesota. *In re People's Live Stock Ins. Co.*, 56 Minn. 180, 57 N. W. 468.

Missouri. *Banta v. Hubbell*, 167 Mo. App. 38, 150 S. W. 1089; *Dain Mfg. Co. v. Trumbull Seed Co.*, 95 Mo. App. 144, 68 S. W. 951.

New York. *Signa Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194, aff'g 58 App. Div. 436, 69 N. Y. Supp. 295; *Tucker v. Gilman*, 121 N. Y. 189, 24 N. E. 302, 45 Hun 193; *Billings v. Robinson*, 94 N. Y. 415, 28 Hun 122; *Isham v. Buckingham*, 49 N. Y. 216; *Cole v. Ryan*, 52 Barb. 168; *Cowles v. Cromwell*, 25 Barb. 413; *Mann v. Currie*, 2 Barb. 294.

Pennsylvania. *Finletter v. Acetylene Light, Heat & Power Co.*, 215 Pa. 86, 64 Atl. 429; *Bell's Appeal*, 115 Pa. St. 88, 2 Am. St. Rep. 532, 8 Atl. 177.

South Carolina. *Efird v. Piedmont Land Improvement & Investment Co.*, 55 S. C. 78, 32 S. E. 758, 897.

Texas. *Rich v. Park*, — Tex. Civ. App. —, 177 S. W. 184.

Washington. *Murphy v. Pantan*, 96 Wash. 637, 165 Pac. 1074; *Walton Lumber Co. v. Commonwealth Lumber Co.*, 95 Wash. 295, 163 Pac. 762; *Iverson v. Bradrick*, 54 Wash. 633, 104 Pac. 130.

England. *Harrison's Case*, 6 Ch. App. 286; *Gilbert's Case*, 5 Ch. App. 559; *Weston's Case*, 4 Ch. App. 20.

balance remaining due on his stock, not already called for, by transferring the same,⁶⁵ and the transferee will become liable therefor in his place.⁶⁶ Hence, in order to hold a person liable as a stockholder for an unpaid subscription it must be alleged and proved that he was a stockholder when the liability is sought to be enforced.⁶⁷ And if he is a stockholder when the action to enforce his liability is commenced, it is no defense that the plaintiff became a creditor after he acquired it.⁶⁸

In some jurisdictions, however, it is held that a transfer will not relieve the transferrer from liability to creditors who became such before the transfer, but will relieve him from liability to future cred-

See also § 3769, *supra*.

As to the effect of a transfer of stock on the statutory liability of stockholders, see § 4196 et seq., *infra*.

⁶⁵ *McConey v. Belton Oil & Gas Co.*, 97 Minn. 190, 106 N. W. 900; *Cole v. Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052.

"At common law a stockholder could transfer his stock at any time, and was thereafter relieved of all liability on account thereof." *Fidelity & Columbia Trust Co. v. Edelen*, 176 Ky. 376, 195 S. W. 447.

A stockholder "can discharge himself by a bona fide transfer of the stock to a solvent party with the assent of the corporation, which is at the time solvent." *Henderson v. Mayfield Woolen Mills*, 153 Ala. 625, 45 So. 211.

An original subscriber sued as a stockholder who claims to have been released from liability by a sale of his stock should specially plead that fact as a defense. *Harrell v. Blount*, 112 Ga. 711, 38 S. E. 56.

In *Walton Lumber Co. v. Commonwealth Lumber Co.*, 95 Wash. 295, 163 Pac. 762, it was held that while a resolution of the board of directors requiring subscribers to pay two per cent per month on their subscriptions until the full amount was paid was, in substance, a call, it did not change the character of the subscriber's debt

so as to make a stockholder who sold and transferred his stock liable to subsequent creditors.

⁶⁶ *Davis v. Scott*, 129 Ark. 226, 195 S. W. 383; *Crawford v. Swicord*, — Ga. —, 94 S. E. 1025, rev'g judgment 20 Ga. App. 35, 92 S. E. 394; *McAllister v. American Hospital Ass'n*, 62 Ore. 530, 125 Pac. 286; *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 So. 751.

⁶⁷ This is true in an action by the superintendent of banks to collect unpaid subscriptions. *Sargent v. Waterbury*, 83 Ore. 159, 161 Pac. 443, rehearing denied 163 Pac. 416.

There is no presumption that because the defendants are alleged to have been stockholders when the stock was originally issued to them, they continued to be such when the suit was brought. The statutory presumption "that a thing once proved to exist continues as long as is usual with things of that nature" does not apply, since duration is not an invariable attribute of ownership in shares of stock. Moreover, the presumption is a rule of evidence and not of pleading, and cannot take the place of averment. *Sargent v. Waterbury*, 83 Ore. 159, 161 Pac. 443, rehearing denied 163 Pac. 416.

⁶⁸ *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa 147, 59 Am. St. Rep. 362, 64 N. W. 782.

itors.⁶⁹ And by express statutory provision in some states a transfer of stock, although in good faith, and to a responsible person, does not relieve the transferrer from liability, but he continues liable for future as well as past calls, although the transferee becomes liable also.⁷⁰ And original incorporators who make false statements as to the amount of capital stock actually paid in are liable to creditors who deal with the corporation in reliance thereon, though the credit is extended after they have parted with their stock.⁷¹

A transfer of shares, to discharge the transferrer from liability to creditors for a balance due thereon, must not be merely colorable;⁷² and further than this, it must be to a person capable of assuming the liability.⁷³ Nor can a stockholder escape liability by transferring his stock to another without his knowledge or consent.⁷⁴ In this country, the courts have held that a stockholder remains liable if he transfers his shares to a person whom he knows to be insolvent, for the purpose of escaping liability, although the transfer may be out and out. In England this rule is not recognized, but it is held that a transfer, unless it is merely colorable, discharges the transferrer from further liability, although it may be made to a person known to be insolvent, and for the purpose of avoiding liability.⁷⁵

After a corporation becomes insolvent, a stockholder cannot escape liability for a balance due on his subscription by voluntarily assigning his certificate in blank, and delivering it to the treasurer of the corporation at his request.⁷⁶ Nor can a stockholder escape liability for a balance due on his stock by transferring the same after commencement of an action to enforce his liability.⁷⁷

The liability of a transferee of stock which was issued as full paid, when it was not so in fact, has been considered in a previous section.⁷⁸

⁶⁹ *Walton Lumber Co. v. Commonwealth Lumber Co.*, 95 Wash. 295, 163 Pac. 762.

Stockholders are only liable to creditors for debts and contracts created while they were stockholders, and not for those created after they have in good faith disposed of their shares. *Hall v. Hughes*, 119 Md. 487, 87 Atl. 387.

⁷⁰ See § 4196 et seq., *infra*.

⁷¹ *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 97 Am. St. Rep. 453, 89 N. W. 683.

⁷² See § 4201, *infra*.

⁷³ See § 4203, *infra*.

⁷⁴ See § 4201, *infra*.

⁷⁵ See § 4202, *infra*.

⁷⁶ *Burt v. Real Estate Exchange*, 175 Pa. St. 619, 52 Am. St. Rep. 858, 34 Atl. 923.

⁷⁷ *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa 147, 59 Am. St. Rep. 362, 64 N. W. 782.

⁷⁸ See §§ 3597, 3771, *supra*.

§ 4112. — Effect of pledge of stock. In the absence of a statutory provision to the contrary, a person who has taken a transfer of stock, and appears on the books of the corporation as the owner, is none the less liable to creditors for a balance due on the stock because he holds the same merely as collateral security;⁷⁹ but of course, if the pledgee is compelled to pay assessments, he is entitled to recover the same from the pledgor.⁸⁰

A pledgee of stock is not liable where he does not appear on the books as a stockholder, but the entry in the stock books and all the other records of the corporation show that he holds the stock merely as collateral security.⁸¹

In some states it is expressly provided by statute that the pledgee shall not be liable.⁸²

§ 4113. By whom liability may be enforced—In general. As a general rule the liability may be enforced by any creditor of the corporation who has recovered judgment against the corporation and had execution thereon returned unsatisfied,⁸³ provided he has not waived his right or released the stockholder.⁸⁴ Ordinarily the liability inures to the benefit of future as well as existing creditors.⁸⁵ And in some

⁷⁹ Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818; Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 153, 30 Pac. 776, 27 Pac. 674; People's Home Sav. Bank v. Rauer, 2 Cal. App. 445, 84 Pac. 329; Tierney v. Ledden, 143 Iowa 286, 21 Ann. Cas. 105, 121 N. W. 1050; Calumet Paper Co. v. Stotts Inv. Co., 96 Iowa 147, 59 Am. St. Rep. 362, 64 N. W. 782; Hale v. Walker, 31 Iowa 344, 7 Am. Rep. 137. Compare Mandion v. Firemen's Ins. Co., 11 Rob. (La.) 178.

See also § 3921, *supra*.

As to the liability of pledgees under statutes imposing liability upon stockholders, see § 4193, *infra*.

⁸⁰ McCalla v. Clark, 55 Ga. 53.

See also § 3914, *supra*, and § 4193, *infra*.

⁸¹ Union Sav. Ass'n v. Seligman, 92 Mo. 635, 1 Am. St. Rep. 776, 15 S. W. 630.

Only the holder of the legal title to the stock is liable for the unpaid subscription. Hence one who holds

the equitable title to stock as indemnity for liability upon a note of the corporation is not liable. McAllister v. American Hospital Ass'n, 62 Ore. 530, 125 Pac. 286.

See also § 4193, *infra*, and cases there cited.

⁸² See § 4193, *infra*.

⁸³ As to the necessity for exhausting the legal remedies against the corporation, see § 4129, *infra*.

⁸⁴ See § 4105, *supra*.

⁸⁵ Durand v. Brown, 236 Fed. 609; Jackson Fire & Marine Ins. Co. v. Walle, 105 La. 89, 29 So. 503; Clark v. E. C. Clark Mach. Co., 151 Mich. 416, 115 N. W. 416.

In Durand v. Brown, 236 Fed. 609, it was held that, although this is the general rule, persons who extended credit to the corporation after the recording of a mortgage of corporate property, given to secure the return of money advanced to it by the alleged stockholder, under an agreement giving him an option to purchase stock

jurisdictions it is held to exist for the benefit of all of the creditors, regardless of whether their claims were contracted before or after the stock was issued.⁸⁶ But it is generally held that an issue of watered or fictitiously paid up stock cannot be attacked, nor the holders thereof compelled to pay its full par value, by or for the benefit of persons who dealt with the corporation and became creditors before the stock was issued.⁸⁷

The liability may be enforced by the assignee of a judgment creditor.⁸⁸ In the absence of fraud, the court may not inquire into the consideration paid for the assignment of claims by creditors.⁸⁹ And the fact that creditors became such by assignment of claims after the corporation became insolvent does not limit their recovery to the amount paid by them for such claims.⁹⁰

The right of purchasers from receivers, assignees for creditors, or trustees in bankruptcy to enforce the liability will be considered in a subsequent section.⁹¹

§ 4114. — Creditors who are also stockholders. According to the weight of authority, a creditor is not precluded from maintaining a creditors' suit because he happens also to be a stockholder in the corporation, even though he has not paid his own subscription in full.⁹² The other delinquent stockholders cannot set off against their indebted-

or to treat the advances as a loan, could not complain that such stock had not been fully paid.

⁸⁶ This is true in Connecticut, where the liability is not based upon either the "trust fund" or the "fraud" theory, but is imposed by a statute, which "clearly contemplates that all creditors are entitled to be paid, and that stockholders are bound to pay them if the stock held by them has not been paid for in full." *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972.

⁸⁷ See § 3595, *supra*.

⁸⁸ An assignee of the judgment may maintain garnishment proceedings in the name of the assignor. *Henderson v. Hall*, 134 Ala. 455, 63 L. R. A. 673, 32 So. 840.

An assignee of a judgment creditor may institute a suit under the Minnesota statute to sequester the property of an insolvent corporation and

recover unpaid subscriptions. *Argall v. Sullivan*, 83 Minn. 71, 85 N. W. 931.

The statute is remedial and is to be liberally construed. The word "representatives" in the provision authorizing such an action to be brought by "the person obtaining such judgment or his representatives" includes an assignee. *Argall v. Sullivan*, 83 Minn. 71, 85 N. W. 931.

⁸⁹ *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489.

⁹⁰ *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489.

⁹¹ See § 4117, *infra*.

⁹² *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972; *Bissit v. Kentucky River Nav. Co.*, 15 Fed. 353; *Blood v. Serena Land & Water Co.*, 150 Cal. 764, 89 Pac. 1090; *Bickley v. Schlag*, 46 N. J. Eq. 533, 20 Atl. 250; *Union Pac. R. Co. v. Blair*, 48 Utah 38, 156 Pac. 948; *Wilson v. Kiesel*, 9 Utah 397.

edness to the corporation the plaintiff's indebtedness to it, and hence the fact that his liability exceeds the amount of his claim will not prevent him from recovering against them.⁹³ But in such case the creditor stockholder must first pay in the unpaid portion of his subscription,⁹⁴ and must contribute ratably with the defendant stockholders towards the liquidation of his demand against the corporation.⁹⁵ And there is authority to the effect that he cannot maintain an action at law against other stockholders under such circumstances.⁹⁶

The liability is not affected by the fact that one of the delinquent stockholders is also a stockholder of the creditor corporation by which such liability is sought to be enforced.⁹⁷

A stockholder is not a creditor within the meaning of the rule that creditors may recover from stockholders of an insolvent corporation the amount of their unpaid subscriptions to the capital stock.⁹⁸ And in case of insolvency no stockholder can be made liable to call for the benefit of a fellow stockholder. But, as we have seen, where several stockholders are indebted to the corporation on account of unpaid subscriptions and one of them is compelled to pay more than his proportion to or for the benefit of creditors, he is entitled to contribution from the others.⁹⁹ Stockholders who have paid their subscriptions are entitled to have the liability of those who have not paid

As to the right of a creditor who is also a stockholder to enforce a statutory liability of stockholders, see § 4211, *infra*.

⁹³ *Blood v. Serena Land & Water Co.*, 150 Cal. 764, 89 Pac. 1090.

"As a stockholder owing a subscription" the plaintiff "is bound to apply this subscription toward the satisfaction of the debts of the corporation; but there is no reason why, merely because he unites in his own person the two characters of creditor and stockholder, he should, as stockholder, be compelled to bear the entire burden of satisfying his own claim, for which other stockholders are equally liable." *Blood v. Serena Land & Water Co.*, 150 Cal. 764, 89 Pac. 1090.

⁹⁴ *Union Pac. R. Co. v. Blair*, 48 Utah 38, 156 Pac. 948.

⁹⁵ *Bissit v. Kentucky River Nav. Co.*, 15 Fed. 353; *Blood v. Serena Land*

& Water Co., 150 Cal. 764, 89 Pac. 1090; *Bickley v. Schlag*, 46 N. J. Eq. 533, 20 Atl. 250.

"He must contribute *pari passu* with the other stockholders to the payment of the amount due him, if any." *Wilson v. Kiesel*, 9 Utah 397, 35 Pac. 488.

⁹⁶ See § 4211, *infra*.

⁹⁷ *Flather v. Economy Slugging Mach. Co.*, 71 N. H. 398, 52 Atl. 454.

⁹⁸ *Esgen v. Smith*, 113 Iowa 25, 84 N. W. 954.

One who purchases stock from another stockholder is not a creditor within the meaning of the rule that a creditor may recover from a stockholder the balance which should have been paid on stock not fully paid in money or money's worth. *LaVeine v. Tiffany Springs & Land Co. (Mo.)*, 187 S. W. 1186.

⁹⁹ See § 4102, *supra*.

enforced for the benefit of the corporation or for the purpose of adding to its assets where it has ceased to be a going concern.¹ And a stockholder may sue to compel the payment of unpaid subscriptions where the proper corporate officers neglect or refuse to do so.²

§ 4115. — Receivers, trustees in bankruptcy, assignees for creditors, and the like. A general assignment by a corporation for the benefit of creditors passes to the assignee, with the other assets of the corporation, the right to collect, for the benefit of creditors, balances due from the stockholders on subscriptions to stock.³ And generally the liability of the stockholders for the amount remaining unpaid may be enforced by an assignee in insolvency,⁴ or a receiver,⁵ when

¹ Stockholders of an insolvent corporation who have paid their subscriptions may sue to compel others who have not paid to do so, so that the amount can be treated as part of the assets of the corporation for distribution. *Bank of Des Arc v. Moody*, 110 Ark. 39, 161 S. W. 134.

² See § 673, *supra*.

³ **United States.** *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790.

Alabama. *Chamberlain v. Bromberg*, 83 Ala. 576, 3 So. 434.

California. *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741.

Iowa. *Johnson v. Morgan*, 178 Iowa 577, 160 N. W. 2.

Kansas. *Beal v. Dillon*, 5 Kan. App. 27, 47 Pac. 317.

Maine. *Dunn v. Howe*, 96 Fed. 160 (under the Maine statute).

Maryland. *Glenn v. Williams*, 60 Md. 93.

Missouri. *Hequembourg v. Edwards*, 155 Mo. 514, 56 S. W. 490; *Eppright v. Nickerson*, 78 Mo. 482; *Shockley v. Fisher*, 75 Mo. 498; *Banta v. Hubbell*, 167 Mo. App. 38, 150 S. W. 1089; *Haskell v. Sells*, 14 Mo. App. 91; *Franklin v. Menown*, 11 Mo. App. 592, 10 Mo. App. 570; *Lionberger v. Broadway Sav. Bank*, 10 Mo. App. 499.

New York. *Stoddard v. Lum*, 159 N. Y. 265, 45 L. R. A. 551, 70 Am. St. Rep. 541, 53 N. E. 1103, rev'g 32 App. Div. 565, 53 N. Y. Supp. 607.

Pennsylvania. *Cook v. Carpenter*, 212 Pa. 165, 1 L. R. A. (N. S.) 900, 108 Am. St. Rep. 854, 4 Ann. Cas. 723, 61 Atl. 799; *Citizens' & Miners' Sav. Bank & Trust Co. v. Gillespie*, 115 Pa. St. 564, 9 Atl. 73; *Germantown Passenger Ry. Co. v. Fitler*, 60 Pa. St. 124, 100 Am. Dec. 546; *West Chester & P. R. Co. v. Thomas*, 2 Phila. 344.

Tennessee. *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

Virginia. *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806; *Lewis' Adm'r v. Glenn*, 84 Va. 947, 6 S. E. 866.

Washington. *McKay v. Elwood*, 12 Wash. 579, 41 Pac. 919.

At common law, the assignee cannot sue in his own name at law, but must sue in the name of the corporation. *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790.

See also § 688, *supra*.

As to the remedies of the assignee, see § 4122, *infra*.

As to the right of an assignee to enforce a statutory liability of stockholders, see § 4214, *infra*.

⁴ *In re Minnehaha Driving-Park Ass'n*, 53 Minn. 423, 55 N. W. 598; *Marson v. Deither*, 49 Minn. 423, 52 N. W. 38.

⁵ **United States.** *Hollander v. Heaslip*, 222 Fed. 808; *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972; *Republic Iron & Steel Co. v. Carlton*, 189 Fed.

he is authorized to enforce it by the court appointing him. And it

126; *Land Title & Trust Co. v. Asphalt Co. of America*, 127 Fed. 1; *Kroegher v. Calivada Colonization Co.*, 119 Fed. 641; *Winans v. McKean R. & Nav. Co.*, 6 Blatchf. 215, Fed. Cas. No. 17,862.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Georgia. *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187. See also *Tichenor v. Williams Block Pavement Co.*, 116 Ga. 303, 42 S. E. 505.

Illinois. *Great Western Tel. Co. v. Gray*, 122 Ill. 630, 14 N. E. 214.

Indiana. *Marion Trust Co. v. Blish*, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814; *Carnahan v. Campbell*, 158 Ind. 226, 63 N. E. 384; *Id. (Ind.)*, 59 N. E. 1054; *Gainey v. Gilson*, 149 Ind. 58, 48 N. E. 633; *Reel v. Brammer*, 56 Ind. App. 180, 101 N. E. 1043.

Louisiana. *Winterhalter v. Hoffman*, 119 La. 125, 43 So. 980; *Jackson Fire & Marine Ins. Co. v. Walle*, 105 La. 89, 29 So. 503.

Maryland. *Frank v. Morrison*, 58 Md. 423; *Stillman v. Dougherty*, 44 Md. 380; *Hall v. United States Ins. Co. of Baltimore*, 5 Gill 484.

Michigan. *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 97 Am. St. Rep. 453, 89 N. W. 683.

Minnesota. *Basting v. Ankeny*, 64 Minn. 133, 66 N. W. 266; *Spooner v. Bay St. Louis Syndicate*, 47 Minn. 464, 50 N. W. 601.

Missouri. *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644.

Nebraska. *Wyman v. Williams*, 53 Neb. 670, 74 N. W. 48, 52 Neb. 833, 73 N. W. 285.

New Jersey. *McDermott v. Woodhouse*, 87 N. J. Eq. 124, 99 Atl. 103. See *v. Heppenheimer*, 55 N. J. Eq. 240, 36 Atl. 966, aff'd 56 N. J. Eq. 453, 41

Atl. 1116 (mem. dec.); *Barkalow v. Totten*, 53 N. J. Eq. 573, 32 Atl. 2.

New York. *Dayton v. Borst*, 31 N. Y. 435; *Rankine v. Elliot*, 16 N. Y. 377; *Van Schaick v. Mackin*, 129 App. Div. 335, 113 N. Y. Supp. 408; *Wagenen v. Clark*, 22 Hun 497; *Nathan v. Whitlock*, 9 Paige 152.

North Carolina. *Worth v. Wharton*, 122 N. C. 376, 29 S. E. 370.

Ohio. *Smith v. Johnson*, 57 Ohio St. 486, 49 N. E. 693.

Pennsylvania. See *Bailey v. Pittsburgh Coal R. Co.*, 139 Pa. St. 213, 21 Atl. 72.

Texas. *Showalter v. Laredo Improvement Co.*, 83 Tex. 162, 18 S. W. 491; *Mitchell v. Porter*, — Tex. Civ. App. —, 194 S. W. 981; *Herf & Frerichs Chemical Co. v. Brewster*, 54 Tex. Civ. App. 217, 117 S. W. 880; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

A receiver "succeeds to the title and rights of action of the corporation itself, and takes all such rights as the corporation itself originally had, and may enforce them by the same legal remedies." *Smith v. Johnson*, 57 Ohio St. 486, 49 N. E. 693.

Title is vested in receiver and it is his right and duty to enforce the liability when the interests of creditors require it. *Herf & Frerichs Chemical Co. v. Brewster*, 54 Tex. Civ. App. 217, 117 S. W. 880.

A receiver may sue in his own name. *Frank v. Morrison*, 58 Md. 423; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

A receiver may maintain an independent action to recover a call made by the board of directors prior to the institution of the proceedings in which he was appointed. *Basting v. Ankeny*, 64 Minn. 133, 66 N. W. 266.

The court appointing a receiver may direct him to collect calls made by directors before his appointment. *Wy-*

may also be enforced by a superintendent or commissioner of banks,⁶ or by the directors or trustees of the corporation,⁷ where the statute intrusts the winding up of the affairs of the corporation to them.

man v. Williams, 53 Neb. 670, 74 N. W. 48, 52 Neb. 833, 73 N. W. 285.

A receiver can maintain an action to recover an unpaid subscription only by virtue of the authority conferred upon him by the court, and in such an action his pleading must show his authority. Fletcher v. Bank of Lonoke, 71 Ark. 1, 69 S. W. 580; Gainey v. Gilson, 149 Ind. 58, 48 N. E. 633; Simmons v. Taylor, 106 Tenn. 729, 63 S. W. 1123.

The receiver must show a clear legal right to institute and carry on the suit, and to that end should show his appointment by a decree which is conclusive as against the defendant. Chandler v. Brown, 77 Ill. 333.

A clause in a decree appointing a receiver, providing that, "if there shall be any sums due upon the shares of the capital stock * * * the * * * receiver will proceed to collect and recover the same," was held not to be a call for the entire balance of subscriptions not previously called for, but merely an authority to collect any sums not paid on calls already made. Liggett v. Glenn, 51 Fed. 381.

A decree of the chancellor having jurisdiction to administer the estate of an insolvent corporation directing a receiver to sue the corporate debtors gives him full authority to sue subscribers for the unpaid balance of their subscriptions, and this is true although it is merely an interlocutory decree for the purpose of marshalling the corporate assets. Graves v. Denny, 15 Ga. App. 718, 84 S. E. 187.

A receiver appointed at the instance of a judgment creditor may sue without leave of court. McBryan v. Universal Elevator Co., 130 Mich. 111, 97 Am. St. Rep. 453, 89 N. W. 683.

As to the remedies of the receiver, see § 4122, *infra*.

As to the right of a receiver to enforce a statutory liability of stockholders, see § 4214, *infra*.

⁶ Sargent v. Waterbury, 83 Ore. 159, 161 Pac. 443, rehearing denied 163 Pac. 416; Sargent v. American Bank & Trust Co., 80 Ore. 16, 154 Pac. 759, rehearing denied 156 Pac. 431.

A special agent, appointed pursuant to the statute by the commissioner of banking to wind up the affairs of an insolvent bank, may sue in the name of the bank on a note given in payment of a subscription. McWhirter v. First State Bank of Amarillo, — Tex. Civ. App. —, 182 S. W. 682.

⁷ Hurd v. Tallman, 60 Barb. (N. Y.) 272.

Under a former California statute providing for the liquidation of the affairs of banks adjudged insolvent by their directors as trustees, it was held that directors in liquidation could levy an assessment upon unpaid stock in the manner provided by the general provisions of the statute (Civ. Code, § 331 et seq.) and could elect to collect the same by an action in the name of the corporation, pursuant to Civ. Code, § 349. Union Sav. Bank of San Jose v. Leiter, 145 Cal. 696, 79 Pac. 441; Union Sav. Bank of San Jose v. Dunlap, 135 Cal. 628, 67 Pac. 1084.

The repeal of the provisions for winding up the affairs of banks in this manner by an act containing no saving clause as to pending litigation was held not to affect a judgment previously rendered, decreeing a bank to be insolvent and requiring it to proceed to wind up its affairs under the management of its directors, or the

Generally unpaid subscriptions pass to a trustee in bankruptcy of the corporation, and he may sue to collect them.⁸ And the Bankruptcy Act now expressly provides that he shall be vested with all

right of said directors to levy and collect an assessment for that purpose. *Union Sav. Bank of San Jose v. Leiter*, 145 Cal. 696, 79 Pac. 441.

United States. *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Upton v. Tribilecock*, 91 U. S. 45, 23 L. Ed. 203; *Babbitt v. Read*, 236 Fed. 42, aff'g 215 Fed. 395; *In re Newfoundland Syndicate*, 196 Fed. 443, judgment modified 201 Fed. 917; *Babbitt v. Read*, 173 Fed. 712; *In re Remington Automobile & Motor Co.*, 153 Fed. 345, modifying judgment 139 Fed. 766; *Upton v. Burnham*, 3 Biss. 520, Fed. Cas. No. 16,799; *Upton v. Hansbrough*, 3 Biss. 417, Fed. Cas. No. 16,801; *Payson v. Stoevers*, 2 Dill. 427, Fed. Cas. No. 10,863. See also *Kelley v. Gill*, 245 U. S. 116, 62 L. Ed. 185, aff'g 238 Fed. 996.

Alabama. *Porter v. Hughes*, 73 So. 400.

California. *Perkins v. Cowles*, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711.

Georgia. *Chappell v. Lowe*, 145 Ga. 717, 89 S. E. 777; *Bailey v. Anderson*, 142 Ga. 11, 82 S. E. 290; *Spratling v. Westbrook*, 140 Ga. 625, 79 S. E. 536; *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494; *Commercial Bank of Augusta v. Warthen*, 119 Ga. 990, 47 S. E. 536. See also *Crawford v. Roney*, 130 Ga. 515, 61 S. E. 117.

Illinois. *Edwards v. Schillinger*, 245 Ill. 231, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048, aff'g 148 Ill. App. 227; *Lane v. Nickerson*, 99 Ill. 284.

Michigan. *Foote v. Greilick*, 166 Mich. 636, 132 N. W. 473.

Missouri. See *Biggs v. Westen*, 248 Mo. 333, 154 S. W. 708.

New Jersey. *Clevenger v. Moore*, 71 N. J. L. 148, 58 Atl. 88.

New York. *Manufacturers' Commercial Co. v. Heckscher*, 144 App. Div. 601, 129 N. Y. Supp. 556, aff'd 203 N. Y. 560, 96 N. E. 1121; *Rathbone v. Ayre*, 84 App. Div. 186, 82 N. Y. Supp. 235.

Texas. *Smoot v. Perkins*, — Tex. Civ. App. —, 195 S. W. 988; *Rich v. Park*, — Tex. Civ. App. —, 177 S. W. 184; *Herf & Frerichs Chemical Co. v. Brewster*, 54 Tex. Civ. App. 217, 117 S. W. 880.

Unpaid subscriptions are debts belonging to the corporation, which it could have collected, and therefore are assets which pass to its trustee in bankruptcy. *Rathbone v. Ayre*, 84 N. Y. App. Div. 186, 82 N. Y. Supp. 235.

The liability is contractual and passes to the trustee, and this is equally true although the stockholder claims to have paid the subscription. *Commercial Bank of Augusta v. Warthen*, 119 Ga. 990, 47 S. E. 536.

Title vests in the trustee, and it is his right and duty to compel payment when the interests of the creditors require it. *Herf & Frerichs Chemical Co. v. Brewster*, 54 Tex. Civ. App. 217, 117 S. W. 880.

"This liability can be enforced by the trustee in bankruptcy. For while he represents the corporation in a sense he also represents the creditors. Inasmuch as all the subscribers who have not paid in full can be joined as defendants in one suit, it is manifestly to their interest, to that of the creditors, and to that of the estate, that the trustee should be permitted to be

the rights of a judgment creditor upon whose judgment execution has been issued and returned unsatisfied, which gives him a right to sue.⁹

Where the liability is imposed by the statute, the question whether it may be enforced by the trustee in bankruptcy depends upon whether it is a corporate asset or belongs to the creditors only. In the former case he may enforce it and in the latter not.¹⁰

After the appointment of a trustee in bankruptcy,¹¹ or a receiver with power to collect unpaid subscriptions,¹² creditors cannot main-

the plaintiff in that action. It avoids a multiplicity of suits. It permits the court to pass upon the rights of the several creditors, and to determine whether any are precluded from the right to share in the fund when realized. It also enables the court in one action to have an accounting, to determine the varying rights of each creditor, whether any of the subscribers are insolvent, to mould a decree accordingly, and to do complete equity in one proceeding." *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494.

The trustee may sue upon his own responsibility without obtaining specific authority from the bankruptcy court. *Porter v. Hughes*, — Ala. —, 73 So. 400.

He may sue in a state court. *Clevenger v. Moore*, 71 N. J. L. 148, 58 Atl. 88.

As to the remedies of the trustee, see § 4122, *infra*.

As to the right of a trustee in bankruptcy to enforce a statutory liability of stockholders, see § 4214, *infra*.

⁹ Amendment of June 25, 1910. *Grand Rapids Trust Co. v. Nichols*, — Mich. —, 165 N. W. 667; *Bernard v. Carr*, 167 N. C. 481, 83 S. E. 816.

Under this provision he may maintain a creditors' bill in a state court against persons who have received stock without paying for it, where a judgment creditor could do so. *Grand Rapids Trust Co. v. Nichols*, — Mich. —, 165 N. W. 667.

This provision did not confer on the trustee new means of collecting ordi-

nary claims due the bankrupt. *Kelley v. Gill*, 245 U. S. 116, 62 L. Ed. 185, aff'g 238 Fed. 996.

The amendment, by its terms, did not apply to bankruptcy cases pending when it took effect. *Breck v. Brewster*, 153 N. Y. App. Div. 800, 138 N. Y. Supp. 821, 150 N. Y. App. Div. 202, 134 N. Y. Supp. 697.

¹⁰ See § 4214, *infra*.

¹¹ *Commercial Bank of Augusta v. Warthen*, 119 Ga. 990, 47 S. E. 536; *Lane v. Nickerson*, 99 Ill. 284; *Grand Rapids Furniture Co. v. Nichols*, — Mich. —, 165 N. W. 667; *Herf & Frerichs Chemical Co. v. Brewster*, 54 Tex. Civ. App. 217, 117 S. W. 880.

While the trustee is ready to enforce the liability, no one else can. *Babbitt v. Read*, 173 Fed. 712.

See also § 4215, *infra*.

¹² *United States*. See *Republic Iron & Steel Co. v. Carlton*, 189 Fed. 126.

Connecticut. *Links v. Connecticut River Banking Co.*, 66 Conn. 277, 33 Atl. 1003.

Georgia. *Morgan v. Gibian*, 115 Ga. 145, 41 S. E. 495; *Branch v. Knapp*, 61 Ga. 614.

Indiana. *Big Creek Stone Co. v. Seward*, 144 Ind. 205, 43 N. E. 5, 42 N. E. 464; *Voorhees v. Indianapolis Car & Manufacturing Co.*, 140 Ind. 220, 39 N. E. 738; *Indiana Novelty Mfg. Co. v. McGill*, 15 Ind. App. 1, 43 N. E. 464.

Louisiana. *Dilzell Engineering & Construction Co. v. Lehmann*, 120 La. 273, 45 So. 138; *Gas Light & Banking Co. v. Haynes*, 7 La. Ann. 114; *New*

tain independent suits or proceedings for that purpose. And after an adjudication in bankruptcy, a receiver previously appointed has no right to maintain such a suit.¹³ But the appointment of a receiver for a foreign corporation by the court of the state of its domicile will not preclude a creditor from attaching or garnishing the amount due from a stockholder residing in another state.¹⁴ Nor will the courts of the latter state on grounds of comity, remit the attaching creditor to the jurisdiction of the foreign court.¹⁵ And it has been held that the appointment of a receiver in a statutory suit instituted by the attorney general for the purpose of dissolving the charter of the corporation, or winding up its business when it becomes insolvent, will not prevent creditors from suing.¹⁶

If the receiver refuses or fails to discharge his duty with respect

Orleans Gas Light Co. v. Bennett, 6 La. Ann. 456.

Maryland. Castleman v. Templeman, 87 Md. 546, 41 L. R. A. 367, 67 Am. St. Rep. 363, 40 Atl. 275.

Michigan. Rouse, Hazard & Co. v. Detroit Cycle Co., 111 Mich. 251, 38 L. R. A. 794, 69 N. W. 511.

Minnesota. Merchants' Nat. Bank of Chicago v. Northwestern Manufacturing & Car. Co., 48 Minn. 361, 51 N. W. 119; Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310.

Missouri. Franklin v. Menown, 11 Mo. App. 592.

New York. Rankine v. Elliott, 16 N. Y. 377; Calkins v. Atkinson, 2 Lans. 12.

South Dakota. South Bend Toy Mfg. Co. v. Pierre Fire & Marine Ins. Co., 4 S. D. 173, 56 N. W. 98.

Texas. Showalter v. Laredo Improvement Co., 83 Tex. 162, 18 S. W. 491; Herf & Frerichs Chemical Co. v. Brewster, 54 Tex. Civ. App. 217, 117 S. W. 880.

Washington. Wilson v. Book, 13 Wash. 676, 43 Pac. 939.

Compare Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412.

After the appointment of a receiver with power to collect unpaid subscriptions, and to sue in other states, a creditor cannot sue or proceed by exe-

cution a stockholder in another state to compel payment of his subscription. Castleman v. Templeman, 87 Md. 546, 41 L. R. A. 367, 67 Am. St. Rep. 363, 40 Atl. 275; Showalter v. Laredo Improvement Co., 83 Tex. 162.

In *In re People's Live Stock Ins. Co.*, 56 Minn. 180, it was held that the fact that the court in dissolution proceedings permitted a creditor to prosecute a suit to recover unpaid subscriptions instead of the receiver, did not prejudice stockholders.

That the objection is waived if not properly taken advantage of, see *Harrell v. Blount*, 112 Ga. 711, 38 S. E. 56.

See also § 4215, *infra*.

¹³ *Commercial Bank of Augusta v. Warthen*, 119 Ga. 990, 47 S. E. 536.

¹⁴ *McNelus v. Stillman*, 172 N. Y. App. Div. 307, 158 N. Y. Supp. 428; *Nesom v. City Nat. Bank*, — Tex. Civ. App. —, 174 S. W. 715.

A receiver has no extraterritorial jurisdiction, and his functions and powers, as receiver, are limited to the state in which he is appointed. *Nesom v. City Nat. Bank*, — Tex. Civ. App. —, 174 S. W. 715.

¹⁵ *McNelus v. Stillman*, 172 N. Y. App. Div. 307, 158 N. Y. Supp. 428.

¹⁶ *Drennen v. Jenkins*, 180 Ala. 261, 60 So. 856.

to the collection of unpaid subscriptions, the court will compel him to act, or remove him and appoint another in his stead, at the instance of creditors.¹⁷ And it has been held that a creditor may sue if for any reason the receiver or trustee does not or cannot do so.¹⁸

If a trustee in bankruptcy has no right to enforce the liability, creditors may do so notwithstanding the bankruptcy proceedings.¹⁹

§ 4116. — Limitations on right of receivers, assignees or trustees.

As a general rule a receiver,²⁰ or an assignee for the benefit of creditors,²¹ or a trustee in bankruptcy,²² cannot enforce an unpaid sub-

¹⁷ *Links v. Connecticut River Banking Co.*, 66 Conn. 277, 33 Atl. 1003; *Stark v. Burke*, 9 La. Ann. 341; *Gas Light & Banking Co. v. Haynes*, 7 La. Ann. 114; *New Orleans Gas Light Co. v. Bennett*, 6 La. Ann. 457; *In re People's Live Stock Ins. Co.*, 56 Minn. 180, 57 N. W. 468. See also *Davis v. Scott*, 129 Ark. 226, 195 S. W. 383.

¹⁸ As where he is also a stockholder and it is sought to hold him and other stockholders liable on watered stock. *Dilzell Engineering & Construction Co. v. Lehmann*, 120 La. 273, 45 So. 138.

In *Babbitt v. Read*, 173 Fed. 712, it is said that while the trustee in bankruptcy is ready to enforce the liability, no one else can.

See also § 4215, *infra*.

¹⁹ This is true under the Minnesota statute in respect to the liability of the holders of bonus or watered stock for the difference between its par value and the amount actually paid for it. *Second Nat. Bank of Erie v. Georger*, 246 Fed. 517.

See also § 4215, *infra*.

²⁰ *United States. Hollander v. Heaslip*, 222 Fed. 808; *Winters v. Armstrong*, 37 Fed. 508.

Illinois. Great Western Tel. Co. v. Loewenthal, 154 Ill. 261, 40 N. E. 318; *Fairbanks v. Farwell*, 141 Ill. 354, 30 N. E. 1056; *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150, 12 L. R. A. 328, 25 N. E. 680.

Indiana. Marion Trust Co. v. Blish, 170 Ind. 686, 18 L. R. A. (N. S.) 347,

85 N. E. 344, 84 N. E. 814; *Gainey v. Gilson*, 149 Ind. 58, 48 N. E. 633; *Reel v. Brammer*, 56 Ind. App. 180, 101 N. E. 1043.

New York. Billings v. Robinson, 94 N. Y. 415, 28 Hun 122; *Cutting v. Damerel*, 88 N. Y. 410; *Mann v. Pentz*, 3 N. Y. 415, rev'g 2 Sandf. Ch. 257; *Bostwick v. Young*, 118 App. Div. 490, 103 N. Y. Supp. 607, aff'd 194 N. Y. 516, 87 N. E. 1115.

Ohio. See Smith v. Johnson, 57 Ohio St. 486, 49 N. E. 693.

Texas. Mitchell v. Porter, — Tex. Civ. App. —, 194 S. W. 981.

Washington. Murphy v. Panton, 96 Wash. 637, 165 Pac. 1074.

Generally a receiver can only sue in the right of the corporation, and is subject to all of the equities which would have been available against it. *Marion Trust Co. v. Blish*, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814.

The receiver cannot sue a stockholder who has paid all regular calls made upon him and is therefore not liable to the company. *Mann v. Pentz*, 3 N. Y. 415, rev'g 2 Sandf. Ch. 257.

See also § 3598, *supra*.

²¹ Hence he cannot do so where there has been a cancellation of the subscription which is valid as against the corporation, or where it would be estopped to deny its validity. *Lellyett v. Brooks* (Tenn. Ch. App.), 62 S. W. 596.

²² *Courtney v. Ohl*, 240 Fed. 124;

scription unless the corporation could have done so. But it has been held that a trustee in bankruptcy is not bound by the illegal acts of the corporation,²³ nor by special terms in a contract of subscription which are void as to creditors, though a failure to comply with them would have been a good defense to an action by the corporation.²⁴ And it is generally held that he may collect from the holders of watered or fictitiously paid up stock when necessary to pay creditors, although the corporation would have been estopped to do so;²⁵ however, there is also authority to the contrary.²⁶

In jurisdictions where a receiver is deemed to represent creditors, as well as the corporation, he may enforce an equitable right of creditors to have subscriptions paid, as in the case of watered or fictitiously paid up stock, or subscriptions released by the corporation in fraud

Sternbergh v. Duryea Power Co., 161 Fed. 540. See also § 3598, *supra*.

²³ *Bernard v. Carr*, 167 N. C. 481, 83 S. E. 816.

²⁴ *Sawyer v. Hoag*, 17 Wall. (U. S.) 610, 21 L. Ed. 731; *Upton v. Hansbrough*, 3 Biss. 417, Fed. Cas. No. 16,801; *Bailey v. Anderson*, 142 Ga. 11, 82 S. E. 290.

He represents the creditors as well as the corporation. *Sawyer v. Hoag*, 17 Wall. (U. S.) 610, 21 L. Ed. 731.

²⁵ *Seovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Upton v. Tribilecock*, 91 U. S. 45, 23 L. Ed. 203; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610, 21 L. Ed. 731; *In re Monarch Corporation*, 177 Fed. 464; *In re Remington Automobile & Motor Co.*, 153 Fed. 345, modifying judgment 139 Fed. 766; *Porter v. Hughes*, — Ala. —, 73 So. 400; *Grand Rapids Trust Co. v. Nichols*, — Mich. —, 165 N. W. 667.

The trustee can ask for the levy of an assessment upon unpaid stock to such an amount as is necessary to pay debts and expenses, regardless of the terms under which the stock was issued. *In re Monarch Corporation*, 177 Fed. 464.

In Ohio where partners from a cor-

poration to which they turn over all the partnership property in return for stock, each partner is regarded as an original subscriber for so much of the stock as is issued to him, and is credited on his subscription for only the actual value of his interest in the partnership property transferred to the corporation, and the balance left after applying this credit is deemed a debt due from him to the corporation, and therefore a corporate asset. Hence such liability may be enforced by the trustee. *Kiskadden v. Steinle*, 203 Fed. 375.

See also § 3598, *supra*.

²⁶ The liability of the holders of watered stock under the provision of the Minnesota statute that no corporation shall issue any share of stock for a less amount to be actually paid in than the par value of those first issued is not an asset of the corporation and hence cannot be enforced by its trustee in bankruptcy. *Second Nat. Bank of Erie v. Georger*, 246 Fed. 517; *Courtney v. Croxton*, 239 Fed. 247; *Courtney v. Georger*, 228 Fed. 859, affirming 221 Fed. 502, certiorari denied 241 U. S. 660, 60 L. Ed. 1226 (mem. dec.).

See also § 3598, *supra*.

of the rights of creditors, although the corporation would have no right to enforce the same;²⁷ although, of course, the contrary is true in jurisdictions where the receiver is deemed to stand in the shoes of the corporation and not to be vested with rights which are personal

²⁷ **United States.** See *Great Western Min. & Mfg. Co. v. Harris*, 128 Fed. 321, rev'g judgment 111 Fed. 38.

Louisiana. *Jackson Fire & Marine Ins. Co. v. Walle*, 105 La. 89, 29 So. 503.

Missouri. *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644.

New Jersey. *Gilson v. Appleby*, 82 N. J. L. 400, 81 Atl. 724, aff'g 80 N. J. L. 542, 77 Atl. 1084; *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375, rev'g 87 N. J. Eq. 124, 99 Atl. 103; *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069; *Johnson v. Tennessee Oil, etc., Co.*, 74 N. J. Eq. 32, 69 Atl. 788.

Ohio. See *Smith v. Johnson*, 57 Ohio St. 486, 49 N. E. 693.

Texas. *McWhirter v. First State Bank of Amarillo*, — Tex. Civ. App. —, 182 S. W. 682; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Washington. *Murphy v. Pantan*, 96 Wash. 637, 165 Pac. 1074; *Cole v. Satsop R. Co.*, 9 Wash. 487, 43 Am. St. Rep. 858, 37 Pac. 700.

Under the New Jersey statute payment for stock by property fraudulently overvalued can be questioned by the receiver representing creditors, because such issue is a violation of the corporation act, and is, as against creditors, to be treated as absolutely void for the purpose of payment, thus leaving the stockholders within reach of the sections of the act providing a remedy for creditors against stockholders for the amount unpaid on their stock. *Johnson v. Tennessee Oil, etc., Co.*, 74 N. J. Eq. 32, 69 Atl. 788.

"The receiver so far represents the general creditors that he may avoid transactions in fraud of their rights." *Marion Trust Co. v. Blish*, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814.

"A receiver stands in a different position in respect to the right in question from that of an assignee. The assignee derives his authority from the assignor, and, except where the statute makes different provision, he has no greater power than the assignor. A contract, therefore, that the assignor could not attack, the assignee cannot attack. But a receiver derives his authority from the court, which in a case like this, has ample authority and jurisdiction to adjudge the rights of all the parties and enforce them. The receiver is the officer of the court, and when thereto directed represents the interests of either and all the parties to the record. The receiver of an insolvent corporation may, under the direction of the court, maintain a suit to collect assets of the corporation which the corporation had wrongfully put beyond its own power to collect, when such assets are required for the payment of its debts and the winding up of its affairs. This power is in the general equity jurisdiction of the court." *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644.

A receiver can enforce a stockholder's liability for unpaid stock issued as full paid only in the right of creditors. *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375, rev'g 87 N. J. Eq. 124, 99 Atl. 103.

See also § 3598, supra.

to the creditors.²⁸ It has been held that a receiver cannot represent creditors whose rights rest on the ground of estoppel, since their interests are opposed to his, and hence that he cannot enforce, for the benefit of subsequent creditors, subscriptions obtained through fraud,²⁹ or recover the difference between the price paid for stock sold at a discount and its par value for the benefit of persons who extended credit to the corporation on the faith of the full capital stock being paid in.³⁰

It has been held that in the collection of subscriptions the receiver represents the entire body of creditors; that it is his duty to maintain their rights as a whole, and to be indifferent as between various sets of creditors; and that "his claim must be founded on the theory that the subscription belonged to the corporation, and therefore is a part of the general assets."³¹ And on this theory it has been held that he cannot base a recovery on the right of a particular class of creditors only to enforce a subscription which the corporation could not have enforced, and the proceeds of which would inure to the benefit of that class of creditors alone.³² On the other hand, it has been held that a trustee in bankruptcy represents the bankrupt and all its creditors, and is not prevented from acting because those interests are conflicting. So it is no defense to an action by him to collect unpaid subscriptions that some of the creditors have waived, or estopped themselves to assert, the right to resort to the liability of the stockholders, where there are other creditors who have not done so.³³ The fact that all of the creditors are not entitled

²⁸ *Fairbanks v. Farwell*, 141 Ill. 354, 30 N. E. 1056; *Bostwick v. Young*, 118 App. Div. 490, 103 N. Y. Supp. 607, aff'd 194 N. Y. 516, 87 N. E. 1115.

See also § 3598, *supra*.

²⁹ *Marion Trust Co. v. Blish*, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814.

³⁰ *Reel v. Brammer*, 56 Ind. App. 180, 101 N. E. 1043.

³¹ *Marion Trust Co. v. Blish*, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814.

³² So where the subscriber sets up as a defense that his subscription was procured through fraud, which would be a defense as to creditors who became such before the subscription was made, but not as to those who became such afterwards, he cannot recover in the right of creditors of the latter class.

Marion Trust Co. v. Blish, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 85 N. E. 344, 84 N. E. 814. In this case it was further held that while he might be able to set up the rights of subsequent creditors as a defense to a counterclaim by the subscriber to recover what he had paid for the stock, since this was an attempt to secure a judgment of allowance against assets in his hands, his answer to the counterclaim was insufficient for that purpose. See also *Reel v. Brammer*, 56 Ind. App. 180, 101 N. E. 1043.

³³ *Babbitt v. Read*, 173 Fed. 712.

The setting up of such a waiver as a defense does not make the trustee named in the mortgage securing the bonds a necessary or a proper party defendant. *Babbitt v. Read*, 173 Fed. 712.

to participate in the fund will not prevent him from reducing it to possession for the benefit of those creditors who are entitled to share in it, since he represents all the creditors, and is therefore the representative of each.³⁴

§ 4117. — Purchasers from receivers or trustees. Where the statute permits a sale of the corporate assets by a receiver under order of court, he may sell unpaid subscriptions pursuant to such an order,³⁵ after the same have been made payable for the benefit of creditors by a call by the court, if they are payable only on call.³⁶ The purchaser takes them with all the rights had by the receiver,³⁷ in the absence of any provision in the terms of the sale to the contrary,³⁸ and may maintain an action thereon against the subscribers.³⁹ The liability of the subscriber is not discharged, under such circumstances, by reason of the fact that the amount paid by the purchaser makes the corporation solvent.⁴⁰ Nor are the rights of the transferee affected by the fact that the corporate indebtedness may have been discharged by the receiver from funds derived from the sale.⁴¹ It has been held that where subscription notes are sold by the receiver under such circumstances, a subscriber is liable to the purchaser for the full amount of his note, with the right to share equitably in any actual surplus arising in the hands of the receiver, even though the notes were sold at a discount, provided it appears that their sale or collection was necessary to enable the receiver to pay the corporate

³⁴Grand Rapids Trust Co. v. Nichols, — Mich. —, 165 N. W. 667.

³⁵Fish v. Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711; Cosmopolitan Life Ins. Co. v. Sheats, 20 Ga. App. 622, 93 S. E. 507.

³⁶Fish v. Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

As to the necessity for a call, see § 4118, *infra*.

³⁷Cosmopolitan Life Ins. Co. v. Sheats, 20 Ga. App. 622, 93 S. E. 507.

³⁸Cosmopolitan Life Ins. Co. v. Sheats, 20 Ga. App. 622, 93 S. E. 507. In the above case it was held that a provision in the order authorizing the sale that the purchasers of subscription notes should take the same subject to the rights of the makers thereof to make such defenses

as might be legally established meant that the purchasers would take subject to the rights of the makers to make such defenses as might be legally established against the receiver, and hence that a subscriber could not set up as against the purchaser that his subscription was procured by fraud, where that defense would not have been available against the receiver.

³⁹Fish v. Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711; Cosmopolitan Life Ins. Co. v. Sheats, 20 Ga. App. 622, 93 S. E. 507.

⁴⁰Fish v. Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

⁴¹Cosmopolitan Life Ins. Co. v. Sheats, 20 Ga. App. 622, 93 S. E. 507.

debts in full.⁴² The laws of the state of the corporation's domicile control as to the validity of such a sale, and an order of the court of that state before which the proceedings were pending confirming the sale is conclusive upon the courts of other states as to the validity of the sale, in actions by the purchaser to recover on the subscriptions.⁴³

A sale of a stock subscription note by a trustee in bankruptcy under order of court passes the legal title to the purchaser, who may sue thereon in his own name.⁴⁴

§ 4118. Calls and assessments—Necessity for call or assessment; by whom made. As we have seen in a previous chapter, where subscriptions are payable only on call, a call or assessment must be made before they can be enforced by the corporation, where it is a solvent going concern.⁴⁵ And many courts have held that this is equally true where the corporation has become insolvent, and proceedings have been instituted to wind up its affairs.⁴⁶ But this does not

⁴² *Cosmopolitan Life Ins. Co. v. Sheats*, 20 Ga. App. 622, 93 S. E. 507.

⁴³ *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

⁴⁴ *Bailey v. Anderson*, 142 Ga. 11, 82 S. E. 290.

⁴⁵ See § 669 et seq., supra.

⁴⁶ *United States. Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Seovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Covell v. Fowler*, 144 Fed. 535; *In re Crystal Bottling Co.*, 96 Fed. 945; *Priest v. Glenn*, 51 Fed. 405; *Id.* 51 Fed. 400; *Glenn v. Soule*, 22 Fed. 417.

Alabama. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46; *Bingham v. Rushing*, 5 Ala. 403.

California. *Union Sav. Bank of San Jose v. Leiter*, 145 Cal. 696, 79 Pac. 441.

Iowa. *Chandler v. Keith*, 42 Iowa 99.

Maryland. *Castleman v. Templeman*, 87 Md. 546, 41 L. R. A. 367, 67 Am. St. Rep. 363, 40 Atl. 275; *Glenn v. Williams*, 60 Md. 93.

Missouri. *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644.

Ohio. *Thomas v. Kalbfus*, 119 N. E. 412.

Pennsylvania. *Bunn's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166.

Tennessee. *Simmons v. Taylor*, 106 Tenn. 729, 63 S. W. 1123.

This is particularly true where the total amount due from the shareholders, if collected, will be more than sufficient to pay the corporate debts. *Thomas v. Kalbfus*, — Ohio St. —, 119 N. E. 412.

A receiver cannot maintain an action at law to recover subscriptions payable on call unless a call has been made, either by the corporation or by the court. *Liggett v. Glenn*, 51 Fed. 381; *Glenn v. Soule*, 22 Fed. 417; *Chandler v. Sidell*, 3 Dill. 477, Fed. Cas. No. 2,594; *Chandler v. Keith*, 42 Iowa 99; *Hannah v. Moberly Bank*, 67 Mo. 678; *Mann v. Pentz*, 3 N. Y. 415.

In an action at law upon the contract brought by a receiver "there

mean that a call or assessment must have been made by the corporation or its board of directors under such circumstances. If they have failed to make it, a call may be made by the court in which the winding up proceedings are pending,⁴⁷ or by a receiver under its

must be a call or assessment, or something standing in the place thereof or equivalent thereto, either by the company or by a proper court, in order to make the defendant liable." *Chandler v. Siddle*, 3 Dill. 477, Fed. Cas. No. 2,594.

Where a subscription is payable only on call, it is not due, and cannot be reached by garnishment or trustee process until a call has been made. See:

United States. *Chandler v. Siddle*, 10 N. B. R. 236, Fed. Cas. No. 2,594.

Alabama. *Cooper v. Frederick*, 9 Ala. 739; *Bingham v. Rushing*, 5 Ala. 403.

Louisiana. *Brown v. Union Ins. Co.*, 3 La. Ann. 177.

Missouri. *Simpson v. Reynolds*, 71 Mo. 594; *Hannah v. Moberly Bank*, 67 Mo. 678.

Nevada. *McKelvey v. Crockett*, 18 Nev. 238, 2 Pac. 386.

Oregon. *Hughes v. Oregonian Ry. Co.*, 11 Ore. 158, 2 Pac. 94.

Pennsylvania. *Bunn's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166.

A federal court in Pennsylvania held to the contrary in *In re Glen Iron Works*, 20 Fed. 674. This holding was disapproved in *Bunn's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166.

⁴⁷**United States.** *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, aff'g judgment 83 Iowa 430, 50 N. W. 45; *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790; *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Covell v. Fowler*, 144 Fed. 535; *Land Title & Trust Co. v. Asphalt Co. of America*, 127 Fed. 1; *Kroegher v. Calivada Colonization Co.*, 119 Fed. 641; *Foote v.*

Glenn, 52 Fed. 529; *Priest v. Glenn*, 51 Fed. 400; *Liggett v. Glenn*, 51 Fed. 381, rev'g judgment 47 Fed. 472; *Glenn v. Soule*, 22 Fed. 417.

Alabama. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46; *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 So. 44; *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92.

Arkansas. *Davis v. Scott*, 129 Ark. 226, 195 S. W. 383.

California. *Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204. See also *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440.

Connecticut. *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Georgia. *Dalton & M. R. Co. v. McDaniel*, 56 Ga. 191. See also *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

Illinois. *Great Western Tel. Co. v. Gray*, 122 Ill. 630, 14 N. E. 214.

Iowa. *Chandler v. Keith*, 42 Iowa 99.

Maryland. *Castleman v. Templeman*, 87 Md. 546, 41 L. R. A. 367, 67 Am. St. Rep. 363, 40 Atl. 275; *Glenn v. Williams*, 60 Md. 93.

Minnesota. *In re Minnehaha Driving-Park Ass'n*, 53 Minn. 423, 55 N. W. 598; *Marson v. Deither*, 49 Minn. 423, 52 N. W. 38.

Missouri. *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644; *Lionberger v. Broadway Sav. Bank*, 10 Mo. App. 499.

New Jersey. *Clevenger v. Moore*, 71 N. J. L. 148, 58 Atl. 88; *Cumberland Lumber Co. v. Clinton Hill Lum-*

direction.⁴⁸ So if the corporation has been adjudged a bankrupt, a call or assessment may be made by the bankruptcy court, or by

ber & Manufacturing Co., 64 N. J. Eq. 517, 54 Atl. 450.

New York. McNelus v. Stillman, 172 App. Div. 307, 158 N. Y. Supp. 428.

Ohio. Thomas v. Kalbfus, 119 N. E. 412.

Pennsylvania. Bunn's Appeal, 105 Pa. St. 49, 51 Am. Rep. 166.

Tennessee. See Simmons v. Taylor, 106 Tenn. 729, 63 S. W. 1123.

Virginia. Lewis' Adm'r v. Glenn, 84 Va. 947, 6 S. E. 866.

Washington. McKay v. Elwood, 12 Wash. 579, 41 Pac. 919; Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089. See also Bergman v. Evans, 92 Wash. 158, Ann. Cas. 1918 C 848, 158 Pac. 961.

Wisconsin. See Parker v. Stoughton Mill Co., 97 Wis. 74, 51 Am. St. Rep. 881, 64 N. W. 751.

"The court will, in such cases, do, in behalf of creditors, what it is the duty of the corporation to do in respect to calls, and may itself make the call, although by the terms of the contract of subscription, the money is payable on the call of the directors." Marson v. Deither, 49 Minn. 423, 52 N. W. 38, quoted with approval in McKay v. Elwood, 12 Wash. 579, 41 Pac. 919.

The fact that a call was made by the corporation while it was a going concern and that actions at law are pending in a state court for its collection will not bar a suit in equity in a federal court brought by a receiver to collect an assessment levied by him. Brown v. Allebach, 166 Fed. 488.

Under a statute authorizing creditors to enforce the liability of stockholders to the extent of their unpaid subscriptions they may proceed by a bill in equity to procure the appointment of a receiver who, in case there is a deficiency of assets, may enforce

the liability of stockholders who have not paid for their stock in full, and as a step in such proceedings, may apply to the court to levy assessment against such stockholders. John W. Cooney Co. v. Arlington Hotel Co., — Del. Ch. —, 101 Atl. 879.

"A court of equity will disregard the formality of a call and will order the unpaid subscriptions to be paid to a receiver for the benefit of the corporate creditors." Knight & Wall Co. v. Tampa Sand Lime Brick Co., 55 Fla. 728, 46 So. 285.

⁴⁸ **United States.** Brown v. Allebach, 166 Fed. 488.

Connecticut. A receiver may make a call under the express provisions of the Connecticut statute. Rosoff v. Gilbert Transp. Co., 221 Fed. 972.

Florida. Knight & Wall Co. v. Tampa Sand Lime Brick Co., 55 Fla. 728, 46 So. 285.

Georgia. See Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Maryland. Hall v. United States Ins. Co., 5 Gill 484.

Michigan. See Mutual Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170, 34 L. R. A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095.

New Jersey. Swing v. Consolidated Fruit Jar Co., 74 N. J. L. 145, 63 Atl. 899; Barkalow v. Totten, 53 N. J. Eq. 573, 32 Atl. 2. And see Falk v. Whitman Cigar Co., 55 N. J. Eq. 396, 36 Atl. 1094.

New York. See Rankine v. Elliott, 16 N. Y. 377.

A notice by the receiver extending the time for payment of an assessment for 30 days was held to obviate the objection that the first notice given by him required payment within 15 days although the statute required 30 days' notice. Brown v. Allebach, 166 Fed. 488.

the trustee in bankruptcy under its direction.⁴⁹ And where the statute intrusts the liquidation of the affairs of a corporation which has been adjudged insolvent to its directors or trustees, the call may be made by them.⁵⁰

It is generally held that before a receiver⁵¹ or an assignee for the

49 United States. *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *In re Phoenix Hardware Co.*, 249 Fed. 410; *In re Canister Co.*, 248 Fed. 587; *In re M. Stipp Const. Co.*, 221 Fed. 372; *In re Newfoundland Syndicate*, 201 Fed. 917, modifying judgment 196 Fed. 443; *In re Monarch Corporation*, 177 Fed. 464; *In re Eureka Furniture Co.*, 170 Fed. 485; *In re Munger Vehicle Tire Co.*, 168 Fed. 910; *In re Remington Automobile & Motor Co.*, 153 Fed. 345, modifying judgment 139 Fed. 766; *In re Miller Electrical Maintenance Co.*, 111 Fed. 515; *In re Crystal Spring Bottling Co.*, 96 Fed. 945; *Upton v. Burnham*, 3 Biss. 520, Fed. Cas. No. 16,799; *Upton v. Hansbrough*, 3 Biss. 417, Fed. Cas. No. 16,801.

California. *Perkins v. Cowles*, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711.

Connecticut. The Connecticut statute expressly provides that if a corporation be placed in the hands of a trustee in bankruptcy, he shall have the powers of the board of directors in calling for instalments on stock. *In re Monarch Corporation*, 203 Fed. 664, rev'g judgment 196 Fed. 252.

Georgia. *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494.

New Jersey. *Clevenger v. Moore*, 71 N. J. L. 148, 58 Atl. 88.

New York. *Rathbone v. Ayer*, 84 App. Div. 186, 82 N. Y. Supp. 235.

Texas. *Rich v. Park*, — Tex. Civ. App. —, 177 S. W. 184.

An order of the bankruptcy court permitting the trustee to sue is a suf-

ficient judicial call or assessment to entitle him to sue. *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494.

The bankruptcy court has authority to direct the levying of an assessment as against nonresident stockholders. *In re Monarch Corporation*, 177 Fed. 464.

50 Union Sav. Bank of San Jose v. Leiter, 145 Cal. 696, 79 Pac. 441; *Union Sav. Bank of San Jose v. Dunlap*, 135 Cal. 628, 67 Pac. 1084; *People's Home Sav. Bank v. Rauer*, 2 Cal. App. 445, 84 Pac. 329; *Hurd v. Tallman*, 60 Barb. (N. Y.) 272.

A by-law providing that after a certain amount has been paid on the stock no further call shall be made except by a vote of two-thirds of the outstanding stock does not affect the right of the directors in liquidation to levy an assessment when necessary to pay creditors, since the statute gives them that right. *Union Sav. Bank of San Jose v. Leiter*, 145 Cal. 696, 79 Pac. 441.

51 United States. *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972; *Covell v. Fowler*, 144 Fed. 535.

Arkansas. *Davis v. Scott*, 129 Ark. 226, 195 S. W. 383.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Iowa. *Chandler v. Keith*, 42 Iowa 99.

Nebraska. *Wyman v. Williams*, 53 Neb. 670, 74 N. W. 48; *State v. German Sav. Bank*, 50 Neb. 734, 70 N. W. 221.

New Jersey. *Gilson v. Appleby*, 80 N. J. L. 542, 77 Atl. 1084, aff'd 82 N. J. L. 400, 81 Atl. 724; *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101

benefit of creditors,⁵² or trustee in bankruptcy,⁵³ or a superintendent of banks to whom the statute intrusts the winding up of the affairs of an insolvent corporation,⁵⁴ can collect unpaid subscriptions payable on call and not called in by the corporation, the court or a receiver or trustee under its direction, must ascertain the debts of the corporation, and take an account of its assets, and then make a call or assessment upon stockholders for so much only as is necessary to pay debts, since the liability of the stockholders is limited, under such circumstances, to that amount.⁵⁵

Atl. 375, rev'g judgment 87 N. J. Eq. 124, 99 Atl. 103; Wolcott v. Waldstein, 86 N. J. Eq. 63, 97 Atl. 951; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069; See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843; Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co., 57 N. J. Eq. 627, 42 Atl. 585; Kirkpatrick v. American Alkali Co., 140 Fed. 186, 135 Fed. 230. See also Sivin v. Mutual Match Co. (N. J. Eq.), 66 Atl. 921.

North Carolina. Worth v. Wharton, 122 N. C. 376, 29 S. E. 370.

Pennsylvania. Bell's Appeal, 115 Pa. St. 88, 2 Am. St. Rep. 532, 8 Atl. 177.

Virginia. Elliott v. Ashby, 104 Va. 716, 52 S. E. 383.

Washington. Hosner v. Conservative Casualty Co., 99 Wash. 161, 168 Pac. 1122; Rea v. Eslick, 87 Wash. 125, 151 Pac. 256; Chamberlain v. Piercy, 82 Wash. 157, 143 Pac. 977; Beddow v. Huston, 65 Wash. 585, 118 Pac. 752.

Until an assessment has been made by a court of equity the receiver cannot maintain attachment proceedings against a stockholder to recover the amount of his unpaid subscription. Gilson v. Appleby, 80 N. J. L. 542, 77 Atl. 1084, aff'd 82 N. J. L. 400, 81 Atl. 724.

That this has been done must be shown in a petition by a receiver in an action at law to recover on a sub-

scription. Chandler v. Keith, 42 Iowa 99.

It will be presumed on demurrer that this has been done, where the complaint alleges that it will take the whole amount due by the defendant to pay the creditors. Worth v. Wharton, 122 N. C. 376, 29 S. E. 370.

"Any order the court might make should direct proceedings against all stockholders whose stock subscriptions were unpaid, for such an amount as, together with the admitted assets, would be sufficient to meet the liabilities and cost of the receivership." Beddow v. Huston, 65 Wash. 585, 118 Pac. 752, quoted with approval in Chamberlain v. Piercy, 82 Wash. 157, 143 Pac. 977.

The court has no authority to single out one stockholder and direct proceedings against him alone for \$240,000, when the admitted liabilities of the corporation are less than \$4,000. Beddow v. Huston, 65 Wash. 585, 118 Pac. 752.

⁵² Citizens' & Miners' Sav. Bank & Trust Co. v. Gillespie, 115 Pa. St. 564, 9 Atl. 73.

⁵³ Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; In re Newfoundland Syndicate, 196 Fed. 443, judgment modified 201 Fed. 917; Hunt v. Sharkey, 20 Cal. App. 690, 130 Pac. 21.

⁵⁴ Sargent v. Waterbury, 83 Ore. 159, 161 Pac. 443, rehearing denied 163 Pac. 416.

⁵⁵ See § 4100, *supra*.

Some courts hold that, upon the declared or notorious insolvency of the corporation, the liability of the stockholders upon their unpaid subscriptions becomes fixed, and such subscriptions become immediately due, and that no call or assessment is necessary to enable creditors or an assignee or receiver to sue for the same,⁵⁶ especially

56 California. Daggett v. Southwest Packing Co., 153 Cal. 762, 103 Pac. 204.

Kansas. West v. Topeka Sav. Bank, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

Missouri. Washington Sav. Bank v. Butchers' & Drovers' Bank, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644.

Nevada. Thompson v. Reno Sav. Bank, 19 Nev. 242, 3 Am. St. Rep. 883, 9 Pac. 121.

Pennsylvania. Swearingen v. Sewickley Dairy Co., 198 Pa. 68, 53 L. R. A. 471, 47 Atl. 941.

Washington. Chilberg v. Siebenbaum, 41 Wash. 663, 84 Pac. 598; Adamant Mfg. Co. v. Wallace, 16 Wash. 614, 48 Pac. 415.

When the corporation becomes insolvent and abandons all action under its charter, the original mode of making calls upon the stockholders cannot be pursued, and therefore the debt, from that time, must be treated as due, without further demand. Henry v. Vermillion & A. R. Co., 17 Ohio 187.

A creditor may proceed in equity without a call. Edwards v. Schilling, 245 Ill. 231, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048, aff'g 148 Ill. App. 227.

No call is necessary where the corporation closes its doors and ceases all its usual and ordinary business, leaving debts unpaid. West v. Topeka Sav. Bank, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

No call or assessment is necessary when the corporation becomes insolvent, and proceedings are instituted by creditors to wind up its affairs and

distribute its assets. Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co., 72 Fed. 957.

Upon an assignment for the benefit of creditors induced by the admitted insolvency of the company, the unpaid stock becomes payable to the assignees without further call or assessment. Branch, Sons & Co. v. Knapp, 61 Ga. 614.

From the time of an assignment by the corporation for the benefit of its creditors "the obligation of each stockholder to make payment of the amount remaining unpaid on his subscription to stock, or so much thereof as might be necessary to satisfy the indebtedness of the corporation, must be treated as a debt that is presently due, because after the assignment no power remains in the directors to make a call, and it would be contrary to all considerations of right to permit the stockholder thereby to avoid making payment for his stock as against creditors of the corporation." McKay v. Ellwood, 12 Wash. 579, 41 Pac. 919, quoted with approval in Adamant Mfg. Co. v. Wallace, 16 Wash. 614, 48 Pac. 415.

When the corporation has ceased to be a going concern and its affairs are in process of liquidation through the medium of a receiver, the court will treat any stock liability in favor of creditors as immediately due. Carnahan v. Campbell, 158 Ind. 226, 63 N. E. 384.

A receiver may recover unpaid subscriptions without any previous call by the corporation. Winans v. McKean R. & Nav. Co., 6 Blatchf. 215, Fed. Cas. No. 17,862.

To entitle a trustee in bankruptcy

where the corporation has gone out of business and there are no officers who could make calls.⁵⁷ So it has been held by a number of courts that no call is necessary where the corporation has been adjudged insolvent and it is necessary to collect the whole of the unpaid subscriptions in order to pay the corporate debts.⁵⁸ It has also been held that no call is necessary to enable a creditor to proceed by execution against a stockholder,⁵⁹ or to bring an action directly against him,⁶⁰ where he is given such remedies by

to sue stockholders in equity, it is not necessary that there be a call by the corporation or the bankruptcy court. *Edwards v. Schillinger*, 245 Ill. 231, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048, aff'g 148 Ill. App. 227.

In *Woman's Temperance Bldg. Ass'n v. Devore*, 160 Ill. App. 153, it was held that a call by the board of directors was not necessary to enable a creditor of a West Virginia corporation to garnish a stockholder in Illinois. This holding was followed in *Woman's Temperance Bldg. Ass'n v. Mutual Reserve Contract Co.*, 161 Ill. App. 370, 371.

In *In re Glen Iron Works*, 20 Fed. 674, it was held that unpaid subscriptions might be reached by attachment execution where the corporation had become insolvent, although no calls had been made.

If a court of equity administering the estate of an insolvent corporation determines that its assets should be marshalled, it may direct its receiver to sue the stockholders for the amount due on their subscriptions without first ascertaining the amount due from each of them. *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187.

In a suit by a receiver, it is not an essential prerequisite to a recovery that the amount due by each subscriber be ascertained and determined, since the court, having all the parties before it, will ascertain and adjust the rights of the subscribers in the distribution through the receiver of

any surplus that may arise. *Cosmopolitan Life Ins. Co. v. Sheats*, 20 Ga. App. 622, 93 S. E. 507; *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17.

⁵⁷ *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885.

⁵⁸ *Citizens' & Miners' Sav. Bank & Trust Co. v. Gillespie*, 115 Pa. St. 564, 9 Atl. 73; *Yeager v. Scranton Trust Co. & Savings Bank*, 14 Wkly. Notes Cas. (Pa.) 296; *McKay v. Elwood*, 12 Wash. 579, 41 Pac. 919. See also *Lionberger v. Broadway Sav. Bank*, 10 Mo. App. 499.

It is not necessary for the bankruptcy court to ascertain the amount of the debts and make an assessment where it appears that it will be necessary to collect the full amount of unpaid subscriptions in order to pay the debts. *Rathbone v. Ayer*, 84 N. Y. App. Div. 186, 82 N. Y. Supp. 235.

Where the corporation is insolvent, and a receiver has been appointed, and there are no assets except the unpaid subscriptions which are insufficient to pay the debts, the court may direct or authorize the receiver to sue the delinquent subscribers without alleging an assessment and demand for payment, though the subscriptions are payable only on call. *Carnahan v. Campbell (Ind.)*, 59 N. E. 1054.

⁵⁹ *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644; *Hannah v. Moberly Bank*, 67 Mo. 678.

⁶⁰ *Washington Savings Bank v. Butchers' & Drovers' Bank*, 107 Mo.

the statute. And also that no call is necessary under a statute requiring a receiver appointed on a voluntary dissolution of a corporation to "immediately proceed and collect" any sum remaining due on stock subscriptions.⁶¹ Statutes sometimes expressly dispense with the necessity for a call in suits by or for the benefit of creditors.⁶² And no call is necessary where the statute expressly permits garnishment by a creditor regardless of whether the corporation could maintain a suit against the stockholder for his subscription or not.⁶³ Of course no call is necessary if the subscription is payable immediately, or on a specified day, or in instalments at specified times, or on demand.⁶⁴

133, 28 Am. St. Rep. 405, 17 S. W. 644.

Under a statute making each stockholder liable for the debts of the corporation for the amount remaining "due or unpaid" on his stock, and providing that he may be sued therefor by any creditor of the corporation, a stockholder may be sued and garnished by a creditor, although his subscription was payable only on call and no call has been made. *Scott v. Windham*, 73 Minn. 76, 16 So. 206.

⁶¹ *Webber v. Hovey*, 108 Mich. 49, 65 N. W. 619.

⁶² The Illinois statute provides that in an action to recover any indebtedness against a corporation it shall be competent to proceed against one or more stockholders at the same time, to the extent of any balance remaining unpaid on their stock, "whether called or not," as in cases of garnishment. *Coalfield Co. v. Peck*, 98 Ill. 139; *Robertson v. Noeninger*, 20 Ill. App. 227. See also *Stoddard v. Lum*, 159 N. Y. 265, 45 L. R. A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108, rev'g judgment 32 N. Y. App. Div. 565, 53 N. Y. Supp. 607.

⁶³ Under Code 1896, § 2182, providing that "any creditor" may subject stock subscriptions to the payment of his debt by garnishment, "without regard to whether the corporation can maintain suit against the stockholder for such subscription or not," a cred-

itor may subject an unpaid subscription without regard to whether a call has been previously made or not. *Enslen v. Nathan*, 136 Ala. 412, 34 So. 929.

Prior to the enactment of this statute it was held that, under an act of incorporation making the stockholders liable to creditors to the extent of their stock subscribed and not paid in, and under a statute expressly permitting judgment creditors of a corporation to garnish persons supposed to be indebted to the corporation as stockholders, a judgment creditor could garnish a stockholder in respect to the amount due on his subscription although there had been no call. *Curry v. Woodward*, 53 Ala. 371.

In *Paschall v. Whitsett*, 11 Ala. 472, the question whether the act of 1841, giving creditors a right of garnishment against delinquent stockholders, permitted garnishment where there had been no call, was said to be an open one.

In *Cooper v. Frederick*, 9 Ala. 738, it was said that the design of the act of 1841 appeared to be to permit the garnishment of a stockholder without any call.

In *Bingham v. Rushing*, 5 Ala. 403, it was held that there was no right of garnishment until there had been a call unless it was given by the act of 1841.

⁶⁴ *United States v. Kelley v. Gill*, 245

The making of a call for less than the balance due on the stock does not exhaust the power of the court, but it may make additional calls up to the full amount unpaid.⁶⁵ The fact that the corporation, while it was a going concern, made a call for the amount due on the stock, which was not paid, does not prevent the court from making a call or assessment after the corporation becomes insolvent.⁶⁶ Nor is the pendency of actions at law in a state court to collect calls made by the board of directors of a corporation before the appointment of a receiver a defense to a bill in equity by the receiver in a federal court to collect an assessment levied by him after it became insolvent.⁶⁷ And power to levy assessments on a stockholder of an insolvent corporation lodged in its directors is not exhausted by the levy of an assessment for the full amount remaining due on the stock, where no part of the amount is paid and the levy is afterwards rescinded.⁶⁸

U. S. 116, 62 L. Ed. 185, aff'g 238 Fed. 996; *Hill v. Merchants Mut. Ins. Co.*, 134 U. S. 515, 33 L. Ed. 994, aff'g 86 Mo. 466.

California. *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741.

Kansas. *West v. Topeka Sav. Bank*, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

Maryland. *Williams v. Watters*, 97 Md. 113, 54 Atl. 767.

Missouri. *Hannah v. Moberly Bank*, 67 Mo. 678.

Nebraska. *Bohrer v. Adair*, 61 Neb. 824, 86 N. W. 495.

New York. *McNelis v. Stillman*, 172 App. Div. 307, 158 N. Y. Supp. 428; *Rathbone v. Ayre*, 84 App. Div. 186, 82 N. Y. Supp. 235.

Oregon. *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691, 908; *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320.

Virginia. *Williams v. Matthews*, 103 Va. 180, 48 S. E. 861.

An order directing the payment of subscriptions is not a condition precedent to the existence of causes of action against stockholders whose subscriptions, by their terms, are payable at fixed times, so that no call is necessary, and where their liability is not

pro rata and limited to such sums as may be necessary, in the aggregate, to pay the claims of creditors, and if made under such circumstances, it adds nothing to the rights of the trustee. *Kelley v. Gill*, 245 U. S. 116, 62 L. Ed. 185, aff'g 238 Fed. 996.

A plea alleging that the time of payment of an unconditional subscription has been extended by the board of directors presents no defense to an action by a receiver on the subscription, where it is not alleged that there was any consideration for such extension or that the directors were authorized by the stockholders to make it. *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187.

See also § 669, *supra*.

⁶⁵ The court, or another court to which the cause has been properly transferred, may make a further call, although the right to do so is not expressly reserved. *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262.

⁶⁶ *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

⁶⁷ *Brown v. Allebach*, 166 Fed. 488.

⁶⁸ *Union Sav. Bank of San Jose v. Leiter*, 145 Cal. 696, 79 Pac. 441.

§ 4119. — Procedure to procure assessment. As we have seen in the preceding section, when subscriptions are payable only on call and no call has been made by the corporation, and it has become insolvent, a call or assessment may be made by the court having charge of the administration of its affairs, or by a receiver or trustee in bankruptcy under its direction.⁶⁹ The call or assessment must be made in the state of the corporation's domicile,⁷⁰ and in a proceeding to which the corporation is a party.⁷¹ The proper tribunal to levy the assessment is a court of equity, "since courts of law have no procedure adapted to the marshaling of assets and liabilities requisite in such a calculation."⁷²

In receivership proceedings the assessment may be made on the application of the receiver, either by original bill,⁷³ or by petition in the insolvency suit.⁷⁴ In bankruptcy proceedings the proper

⁶⁹ See § 4118, supra.

⁷⁰ *Covell v. Fowler*, 144 Fed. 535; *Young v. Farwell*, 139 Ill. 326, 28 N. E. 845.

The propriety and amount of such an assessment are internal affairs of the corporation, with which the courts of another jurisdiction will not interfere. *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375, rev'g 87 N. J. Eq. 124, 99 Atl. 103.

The courts of one state have no power to direct an assessment and call upon the resident stockholders of a foreign corporation at the instance of a receiver appointed to take possession of the assets of the corporation within the state of the forum. The making of such an assessment is one of the incidents of a general receivership, and hence it can be made only by the courts of the corporation's domicile. The proper procedure in such cases is to have a general receiver appointed by the courts of the domicile and an ancillary receivership in any other state where it is sought to collect unpaid subscriptions from stockholders residing there. *Pacific Coast Coal Co. v. Esary*, 85 Wash. 448, 148 Pac. 579.

The liability of a stockholder of a New York corporation cannot be en-

forced in New Jersey until the amount of his liability has been ascertained by proceedings in New York. *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375, rev'g 87 N. J. Eq. 124, 99 Atl. 103.

⁷¹ The corporation is an indispensable party to the proceeding in which the assessment is levied. *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375, rev'g judgment 87 N. J. Eq. 124, 99 Atl. 103.

⁷² *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069; *Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co.*, 57 N. J. Eq. 627, 42 Atl. 585.

The right of an assignee for the benefit of creditors to collect unpaid subscriptions must be asserted in equity, because a court of law cannot compel a call. *Banta v. Hubbell*, 167 Mo. App. 38, 150 S. W. 1089; *Lionberger v. Broadway Sav. Bank*, 10 Mo. App. 499.

⁷³ *Wolcott v. Waldstein*, 86 N. J. Eq. 63, 97 Atl. 951.

⁷⁴ *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069.

"The ascertainment may be made on a petition filed by the receiver

practice for the trustee to file a petition in the bankruptcy court for an order directing him to make an assessment upon the unpaid stock for the purpose of paying the corporate debts.⁷⁵ The only issue involved is the necessity for a call or assessment and its amount.⁷⁶ To enable it to determine the necessity for an assessment, the court or officer to whom the matter is referred, is required to inquire into and decide whether the corporation is indebted in excess of its assets, the amount of its indebtedness, and the amount remaining unpaid on the shares held by each stockholder,⁷⁷ and generally its au-

against the stockholders in the suit wherein the corporation was adjudged insolvent." *Wolcott v. Waldstein*, 86 N. J. Eq. 63, 97 Atl. 951; *Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co.*, 57 N. J. Eq. 627, 42 Atl. 585.

⁷⁵ *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *In re Newfoundland Syndicate*, 196 Fed. 443, judgment modified 201 Fed. 917; *In re Remington Automobile & Motor Co.*, 153 Fed. 345, modifying judgment 139 Fed. 766. See also *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *In re Phoenix Hardware Co.*, 249 Fed. 410; *In re M. Stipp Const. Co.*, 221 Fed. 372; *In re Monarch Corporation*, 177 Fed. 464; *Bernard v. Carr*, 167 N. C. 481, 83 S. E. 816.

Such a proceeding is not a suit within the meaning of § 23b of the Bankruptcy Act requiring suits by the trustee to be brought only in courts where the bankrupt could have brought them, but the relief sought is administrative in its nature. *In re Newfoundland Syndicate*, 196 Fed. 443, judgment modified 201 Fed. 917.

⁷⁶ Where the matter is referred for determination to the referee as special master, the issue before him "should be confined solely to the question: Should there be a call upon the stockholders of unpaid stock, and, if so, to what amount?" *In re Munger Vehicle Tire Co.*, 168 Fed. 910.

⁷⁷ *In re Monarch Corporation*, 203 Fed. 664, rev'g judgment 196 Fed.

252; *Southworth v. Morgan*, 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490, rev'g judgment 143 N. Y. App. Div. 648, 128 N. Y. Supp. 196, which aff'd 71 N. Y. Misc. 214, 128 N. Y. Supp. 598. See also *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968.

The court has power to make a preliminary inquiry as to the need to assess subscriptions which appear to be unpaid. *In re M. Stipp Const. Co.*, 221 Fed. 372.

In New Jersey the court is required to determine judicially what proportion of the unpaid subscriptions will probably be needed to meet the liabilities of the insolvent corporation, and the assessment must be confined to the amount so needed. *Kirkpatrick v. American Alkali Co.*, 140 Fed. 186, 135 Fed. 230; *Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co.*, 57 N. J. Eq. 627, 42 Atl. 585.

The court will ascertain the whole amount of the unpaid debts, and the names of the stockholders who have not paid for their stock in full, with the amounts due from each, and will then make an assessment against such stockholders. See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843.

It is necessary for the court to decide "whether at the time of the issue of any particular share the full value was or was not paid in, whether any subsequent payments were made on account of it, whether the corporation was indebted in excess of its assets, and what is the amount of

thority extends no further than this.⁷⁸ The proceeding is purely a judicial one "of an administrative character, intended to give to the receiver the same status which the company itself had, or might reasonably be claimed to have, to make a call for the payment of its debts against its stockholders or persons claimed to be such."⁷⁹ It is not designed for or adapted to the settlement of disputed ques-

its indebtedness." In *re Remington Automobile & Motor Co.*, 153 Fed. 345, modifying judgment 139 Fed. 766.

Where the matter is referred to the referee, he must determine whether, in view of the debts and assets of the corporation, an assessment is necessary, and if so, the amount thereof. In *re Newfoundland Syndicate*, 201 Fed. 917, modifying judgment 196 Fed. 443.

In order to make such an assessment, "it is necessary for the referee, *inter alia*, to find: (1) That the assets of the bankrupt company are insufficient to pay its debts; (2) That the stock, or some of it, was not paid for in full and that the holders thereof had, or are chargeable with, knowledge of that fact in the acquirement of said stock; (3) The pro rata share that the holders of said stock must pay, up to the par value thereof, in order to liquidate the indebtedness of the bankrupt company." In *re Canister Co.*, 248 Fed. 587.

On such an application it is the duty of the court to determine the validity and amount of the claims of the creditors, and it is neither necessary nor proper to reserve such matter for determination in a suit which the receiver is authorized to bring against the stockholders. *Hosner v. Conservative Casualty Co.*, 99 Wash. 161, 168 Pac. 1122.

In such a proceeding the amount of the corporate indebtedness may be proved by presentation of the proofs of claim filed in the bankruptcy proceedings. In *re Remington Automobile & Motor Co.*, 153 Fed. 345, modi-

fying judgment 139 Fed. 766.

Where the receiver makes a *prima facie* showing that there are no assets other than unpaid subscriptions with which to pay claims allowed against the estate, it is a duty of the court to order that a call be made upon the unpaid subscriptions. *Hosner v. Conservative Casualty Co.*, 99 Wash. 161, 168 Pac. 1122.

It is error, as a condition of granting an order giving the receiver authority to sue the stockholders, to require him to give a bond for the payment of the costs of such suit. *Hosner v. Conservative Casualty Co.*, 99 Wash. 161, 168 Pac. 1122.

In ascertaining the amount unpaid on outstanding stock it is necessary for the court to inquire into the value of any property turned over in payment for stock. *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972.

⁷⁸ On an application by a receiver for the assessment of stockholders for subscriptions, the court's authority is limited to the ascertainment of the amount of the debts which are valid as against the corporation itself, the stockholders who have not paid in full for their stock, and the amount that must be called for to pay the debts, taking into account the assets of the company in the receiver's hands, and the solvency or insolvency of the stockholders liable, or claimed to be liable. *Cumberland Lumber Co. v. Clinton Hill Lumber & Manufacturing Co.*, 64 N. J. Eq. 517, 54 Atl. 450.

⁷⁹ *Cumberland Lumber Co. v. Clinton Hill Lumber & Manufacturing Co.*, 64 N. J. Eq. 517, 54 Atl. 450.

tions as to the status of certain persons as stockholders,⁸⁰ or for the determination of defenses which they may have to liability upon their subscriptions,⁸¹ but those matters will be left to be determined when set up as defenses in actions to enforce the assessment or call.⁸² The final ascertainment in the insolvency proceedings in which the receiver was appointed of the amount of the debts owing by the company must be taken as final and cannot be questioned on such an application.⁸³

§ 4120. — Conclusiveness of call or assessment. According to the weight of authority, a call or assessment made by the court in receivership or insolvency proceedings,⁸⁴ or in bankruptcy proceed-

⁸⁰ If the status of supposed stockholders is disputed, but the receiver shows a case which entitles him to test the question by suit, the court should direct the assessment, leaving the liability of such persons to be settled by suit, if necessary. *Cumberland Lumber Co. v. Clinton Hill Lumber & Manufacturing Co.*, 64 N. J. Eq. 517, 54 Atl. 450.

⁸¹ *In re Monarch Corporation*, 203 Fed. 664, rev'g judgment 196 Fed. 252.

Stockholders cannot set up as a defense to such a proceeding that the company never became a corporation de jure or de facto, or that the agreement to incorporate was abandoned and the subscriptions canceled, or that their liability is barred by the statute of limitations. *Cumberland Lumber Co. v. Clinton Hill Lumber & Manufacturing Co.*, 64 N. J. Eq. 517, 54 Atl. 450.

⁸² See § 4120, *infra*.

⁸³ *Cumberland Lumber Co. v. Clinton Hill Lumber & Manufacturing Co.*, 64 N. J. Eq. 517, 54 Atl. 450.

⁸⁴ **United States.** *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, aff'g judgment 83 Iowa 430, 50 N. W. 45; *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Glenn v. McAllister's Ex'rs*, 46 Fed. 883.

Alabama. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46; *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 So. 44.

Connecticut. *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Illinois. *Great Western Tel. Co. v. Gray*, 122 Ill. 630, 14 N. E. 214.

Kentucky. *Otter View Land Co.'s Receiver v. Bolling's Ex'x*, 24 Ky. L. Rep. 1157, 70 S. W. 834.

Maryland. *Castleman v. Templeman*, 87 Md. 546, 41 L. R. A. 367, 67 Am. St. Rep. 363, 40 Atl. 275; *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196, 211; *Glenn v. Williams*, 60 Md. 93.

Michigan. *Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 34 L. R. A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095.

New Jersey. *Swing v. Consolidated Fruit Jar Co.*, 74 N. J. L. 145, 63 Atl. 899; *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375, rev'g judgment 87 N. J. Eq. 124, 99 Atl. 103; *Wolcott v. Waldstein*, 86 N. J. Eq. 63, 97 Atl. 951; *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069; *Gilson v. Appleby*, 79 N. J.

ings,⁸⁵ or by a trustee, receiver or assignee under its direction, is binding and conclusive upon all the stockholders as to the necessity for and amount of the assessment and all other matters necessarily decided in making it, in suits subsequently brought against them to recover their proportion of the assessment, and is not open to collateral attack. And this principle applies to stockholders who are residents of other states, as well as to resident stockholders.⁸⁶ The

Eq. 590, 81 Atl. 925, aff'g 78 N. J. Eq. 96, 78 Atl. 668; See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843; *Cumberland Lumber Co. v. Clinton Hill Lumber Co.*, 57 N. J. Eq. 627, 42 Atl. 585.

New York. *Hammond v. Knox*, 125 App. Div. 9, 109 N. Y. Supp. 367, aff'd 194 N. Y. 555, 87 N. E. 1120.

Ohio. *Swing v. Rose*, 75 Ohio St. 355, 79 N. E. 757.

Pennsylvania. *French v. Harding*, 235 Pa. 79, Ann. Cas. 1914 B 744, 83 Atl. 586, aff'g 46 Pa. Super. Ct. 363; *Kramer v. Hamsher*, 63 Pa. Super. Ct. 211.

Texas. *Rich v. Park*, — Tex. Civ. App. —, 177 S. W. 184; *Cole v. Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052.

Washington. *Silvain v. Benson*, 83 Wash. 271, 145 Pac. 175; *Barto v. Nix*, 15 Wash. 563, 46 Pac. 1033; *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089.

West Virginia. *Swing v. Taylor & Crate*, 68 W. Va. 621, 70 S. E. 373.

Wisconsin. *Parker v. Stoughton Mill Co.*, 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751.

The decree itself is sufficient to establish the liability of the stockholders, and the whole of the record of the suit in which it was rendered need not be made a part of the bill in a suit to enforce the assessment. *Glenn v. McAllister's Ex'rs*, 46 Fed. 883.

A decree appointing receivers and directing them to make collections of all outstanding indebtedness, passed with the consent of all the parties to the suit, is admissible to prove the

due appointment of the receivers and their authority to sue. *Frank v. Morrison*, 58 Md. 423; *Hall v. United States Ins. Co. of Baltimore*, 5 Gill (Md.) 484.

As to the conclusiveness of assessments in suits to enforce a statutory liability of stockholders, see § 4237, *infra*.

⁸⁵ *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Enright v. Heckscher*, 240 Fed. 863; *In re M. Stipp Const. Co.*, 221 Fed. 372; *In re Newfoundland Syndicate*, 196 Fed. 443, judgment modified 201 Fed. 917; *In re Remington Automobile & Motor Co.*, 153 Fed. 345, modifying judgment 139 Fed. 766; *Upton v. Burnham*, 3 Biss. 520, Fed. Cas. No. 16,799; *Upton v. Hansbrough*, 3 Biss. 417, Fed. Cas. No. 16,801; *Clevenger v. Moore*, 71 N. J. L. 148, 58 Atl. 88; *Southworth v. Morgan*, 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490, rev'g judgment 143 N. Y. App. Div. 648, 128 N. Y. Supp. 196, which aff'd 71 N. Y. Misc. 214, 128 N. Y. Supp. 598.

As to the conclusiveness of assessments in suits to enforce a statutory liability of stockholders, see § 4237, *infra*.

⁸⁶ **United States.** *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, aff'g judgment 83 Iowa 430, 50 N. W. 45; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184.

Alabama. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265,

corporation represents the stockholders under such circumstances, and hence the stockholders are bound although they have no notice of the proceeding in which the call or assessment is made and are not personally made parties to it.⁸⁷ In some jurisdictions, however,

6 So. 46; *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 So. 44.

Connecticut. *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Kentucky. *Otter View Land Co.'s Receiver v. Bolling's Ex'x*, 24 Ky. L. Rep. 1157, 70 S. W. 834.

Maryland. *Castleman v. Templeman*, 87 Md. 546, 41 L. R. A. 367, 67 Am. St. Rep. 363, 40 Atl. 275; *Glenn v. Williams*, 60 Md. 93.

Michigan. *Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 34 L. R. A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095.

New Jersey. *Swing v. Consolidated Fruit Jar Co.*, 74 N. J. L. 145, 63 Atl. 899; *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375, rev'g judgment 87 N. J. Eq. 124, 99 Atl. 103; *Wolcott v. Waldstein*, 86 N. J. Eq. 63, 97 Atl. 951; *Gilson v. Appleby*, 79 N. J. Eq. 590, 81 Atl. 925, aff'g 78 N. J. Eq. 96, 78 Atl. 668.

New York. *Hammond v. Knox*, 125 App. Div. 9, 109 N. Y. Supp. 367, aff'd 194 N. Y. 555, 87 N. E. 1120.

Wisconsin. *Parker v. Stoughton Mill Co.*, 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751.

Such a decree does not deprive a nonresident stockholder of his property without due process of law nor deny him the equal protection of the law. *Gilson v. Appleby*, 79 N. J. Eq. 590, 81 Atl. 925, aff'g 78 N. J. Eq. 96, 78 Atl. 668.

A decree in quo warranto proceedings against a mutual assessment insurance company, ascertaining its liabilities and assessing the policy-

holders to pay the same, is conclusive on the policyholders as to the necessity for and the amount of such assessment, and cannot be collaterally attacked in an action in another state to enforce such assessment. *Swing v. Taylor & Crate*, 68 W. Va. 621, 70 S. E. 373.

That this is true of an assessment in proceedings to enforce a statutory liability of stockholders, see § 4237, *infra*.

87 United States. *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986; aff'g judgment 83 Iowa 430, 50 N. W. 45; *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972; *In re Newfoundland Syndicate*, 196 Fed. 443; *Priest v. Glenn*, 51 Fed. 400; *Glenn v. Soule*, 22 Fed. 417.

Alabama. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46; *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 So. 44.

Connecticut. *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

Illinois. *Great Western Tel. Co. v. Gray*, 122 Ill. 630, 14 N. E. 214.

Maryland. *Castleman v. Templeman*, 87 Md. 546, 41 L. R. A. 367, 67 Am. St. Rep. 363, 40 Atl. 275; *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196, 211; *Glenn v. Williams*, 60 Md. 93.

Michigan. *Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 34 L. R. A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095.

New Jersey. *Gilson v. Appleby*, 79 N. J. Eq. 590, 81 Atl. 925, aff'g 78 N. J. Eq. 96, 78 Atl. 668; *Cumberland*

the decree is not conclusive as to the amounts and validity of the claims of corporate creditors, where the stockholder has no notice of the proceedings in which it is rendered and no opportunity to contest the validity of such claims,⁸⁸ although, of course, the rule is

Lumber Co. v. Clinton Hill Lumber Co., 57 N. J. Eq. 627, 42 Atl. 585.

Ohio. *Thomas v. Kalbfus*, 119 N. E. 412; *Swing v. Rose*, 75 Ohio St. 355, 79 N. E. 757.

Texas. *Rich v. Park*, — Tex. Civ. App. —, 177 S. W. 184.

Wisconsin. *Parker v. Stoughton Mill Co.*, 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751.

"The stockholders are deemed to be privy to the proceedings taken against the corporation, in such sense that they are bound by the decrees ordering the calls upon the capital stock, and cannot, in the actions at law brought to enforce payment of the assessments made, question the validity of the calls thus made." *Priest v. Glenn*, 51 Fed. 400.

"The stockholders of a bankrupt corporation, in their corporate capacity, are in court from the institution of the bankruptcy proceedings, and are as much bound by the administration of such estate as the corporate entity itself." *In re Newfoundland Syndicate*, 196 Fed. 443.

In *Williams v. Watters*, 97 Md. 113, 54 Atl. 767, it is said that the purpose of Virginia Act of Dec. 22, 1897, requiring actions to enforce assessments to be brought in courts of law, and providing that all pleas, defenses and evidence which would be admissible if the corporation were solvent shall be equally admissible and have the same effect in law in any action brought after insolvency, was to do away with the doctrine that the corporation represents the stockholders. The defenses sustained in this case were the statute of limitations and a release of liability under a charter amendment passed before the indebt-

edness of the corporation was incurred and which was known to the creditor at that time.

That this is true of an assessment in proceedings to enforce a statutory liability of stockholders, see § 4237, *infra*.

⁸⁸ *Rea v. Eslick*, 87 Wash. 125, 151 Pac. 256; *Chamberlain v. Piercy*, 82 Wash. 157, 143 Pac. 977; *Beddow v. Huston*, 65 Wash. 585, 118 Pac. 752; *Grady v. Graham*, 64 Wash. 436, 36 L. R. A. (N. S.) 177, 116 Pac. 1098.

Compare *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089.

"Doubtless the stockholders of an insolvent corporation which is in the hands of the court through its receiver are obligated and bound by all orders of the court affecting the property of such corporation of which the receiver has possession, whether or not they have received personal notice of such orders; but it is a different matter to say that the court may, on petition of the receiver in an *ex parte* order, conclusively obligate a stockholder to turn over to the receiver property or money claimed by the receiver as property of the corporation, without giving the stockholder an opportunity to question the validity of that claim. So in this case, no doubt the court can require the receiver to apply the property in his hands to the satisfaction of such debts as shall be adjudged valid by the court on a hearing in which only the receiver and the creditors are parties, but the court cannot, on such a hearing, conclusively obligate a stockholder to create a fund for the payment of an indebtedness disputed by the stockholder, or on which the stockholder denies liability. Before

otherwise where he has such notice and opportunity.⁸⁹ And the stockholders must be joined in order to be bound where the statute expressly requires that they shall be made parties to the suit.⁹⁰ In Missouri it is held that the decree in the receivership proceedings is prima facie evidence against foreign stockholders who were not parties thereto.⁹¹

The assessment can have no greater effect elsewhere than it has in the state where it is rendered, and hence if it is not conclusive on a stockholder sued there it cannot be conclusive on a stockholder sued in another state.⁹²

In determining the amount of the assessment it is not incumbent upon the court to pass upon the defenses of the individual stockholders,⁹³ and the order or decree is not conclusive as to the liability,

this can be done, the stockholder must be given an opportunity to defend against the order; he must be given his day in court." Grady v. Graham, 64 Wash. 436, 36 L. R. A. (N. S.) 177, 116 Pac. 1098, quoted with approval in Chamberlain v. Piercy, 82 Wash. 157, 143 Pac. 977.

In Rea v. Eslick, 87 Wash. 125, 151 Pac. 256; Chamberlain v. Piercy, 82 Wash. 157, 143 Pac. 977; and Beddow v. Huston, 65 Wash. 585, 118 Pac. 752, it was held that a complaint in an action by a receiver does not state a cause of action where it does not show that the defendant had notice and an opportunity to be heard upon the validity of the claims against the corporation before the entry of the order directing that suit be instituted against him.

In Grady v. Graham, 64 Wash. 436, 36 L. R. A. (N. S.) 177, 116 Pac. 1098, it was held that such an order was not conclusive as to the amount or validity of the claims of creditors as against a stockholder who had no notice or opportunity to be heard, and that he was entitled to dispute such claims in an action against him by the receiver on the assessment.

See also Williams v. Watters, 97 Md. 113, 54 Atl. 767, construing a Virginia statute.

⁸⁹ Silvain v. Benson, 83 Wash. 271, 145 Pac. 175; Grady v. Graham, 64 Wash. 436, 36 L. R. A. (N. S.) 177, 116 Pac. 1098.

⁹⁰ Lamar Ins. Co. v. Gulick, 102 Ill. 41; Chandler v. Brown, 77 Ill. 333.

⁹¹ Guilbert v. Kessinger, 173 Mo. App. 680, 160 S. W. 17. See also § 4236 et seq., *infra*.

⁹² Williams v. Watters, 97 Md. 113, 54 Atl. 767. See also § 4237, *infra*.

⁹³ Rosoff v. Gilbert Transp. Co., 221 Fed. 972.

Personal defenses such as the statute of limitations, releases from liability, or that a person appearing to be a stockholder is not one, will not be determined. John W. Cooney Co. v. Arlington Hotel Co., — Del. Ch. —, 101 Atl. 879.

Where plenary proceedings are necessary, it is not necessary for the bankruptcy court to find the amount due from the stockholders, but may leave that question for the determination of the courts in which the plenary proceedings are instituted. Babbitt v. Read, 173 Fed. 712.

Whether a stockholder has done anything that prevents him from setting up a defense to which he would otherwise be entitled is a matter to be decided ordinarily by the tribunal

or the amount of the liability of any particular stockholder,⁹⁴ unless he appears in the proceedings and has an opportunity to contest these matters,⁹⁵ and does not preclude him, when sued for the amount of an assessment, from setting up any individual defenses personal to himself.⁹⁶ So the defendant may show that he is not a stock-

trying the suit against him on the assessment, and will not be decided on the proceedings to assess. In *re* M. Stipp Const. Co., 221 Fed. 372.

See also In *re* Newfoundland Syndicate, 201 Fed. 917, modifying judgment 196 Fed. 443.

⁹⁴In *re* M. Stipp Const. Co., 221 Fed. 372; In *re* Newfoundland Syndicate, 201 Fed. 917, modifying judgment 196 Fed. 443; Southworth v. Morgan, 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490, rev'g judgment 143 N. Y. App. Div. 648, 128 N. Y. Supp. 196, which aff'd 71 N. Y. Misc. 214, 128 N. Y. Supp. 598.

"The court's call for the unpaid subscriptions to stock stands precisely as does a call by the directors of an operating corporation. Such a call does not determine absolutely the liability of the stockholders. It has not the effect of a judgment. Its effect is to make whatever the stockholders are liable for, within the call, become due and payable, so that suit may be brought to enforce such liability." In *re* Minnehaha Driving-Park Ass'n, 53 Minn. 423, 55 N. W. 598.

⁹⁵In *re* Newfoundland Syndicate, 201 Fed. 917, modifying judgment 196 Fed. 443.

The decree is conclusive as to the amounts unpaid by the stockholders where they appear and are heard upon this point. *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972.

Nonresidents who submit themselves to the jurisdiction of the court by appearing and litigating the question of their liability are subject to the decree, though recourse to the courts of the state where they reside may be necessary in order to enforce

the same. See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843.

⁹⁶**United States.** *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, aff'g judgment 83 Iowa 430, 50 N. W. 45; *Enright v. Heckscher*, 240 Fed. 863; *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972; In *re* M. Stipp Const. Co., 221 Fed. 372; In *re* Monarch Corporation, 203 Fed. 664, rev'g judgment 196 Fed. 252; In *re* Newfoundland Syndicate, 201 Fed. 917, modifying judgment 196 Fed. 443; *Babbitt v. Read*, 173 Fed. 712; In *re* Haley, 158 Fed. 74, certiorari denied 209 U. S. 546, 52 L. Ed. 920 (mem. dec.); In *re* Remington Automobile & Motor Co., 153 Fed. 345, modifying judgment 139 Fed. 766.

Alabama. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Iowa. *Spinney v. Miller*, 114 Iowa 210, 89 Am. St. Rep. 351, 86 N. W. 317.

Kentucky. *Otter View Land Co.'s Receiver v. Bolling's Ex'x*, 24 Ky. L. Rep. 1157, 70 S. W. 834.

Maryland. *Williams v. Watters*, 97 Md. 113, 54 Atl. 767.

Michigan. *Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 34 L. R. A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095.

New Jersey. *Swing v. Consolidated Fruit Jar Co.*, 74 N. J. L. 145, 63 Atl. 899; *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375, rev'g judgment 87 N. J. Eq. 124, 99 Atl. 103.

Pennsylvania. *French v. Harding*, 235 Pa. 79, Ann. Cas. 1914 B 744, 83

holder;⁹⁷ or has paid for his stock in full;⁹⁸ or purchased it in good

Atl. 586, aff'g 46 Pa. Super. Ct. 363; *Kramer v. Hamsher*, 63 Pa. Super. Ct. 211.

Texas. *Rich v. Park*, — Tex. Civ. App. —; 177 S. W. 184.

West Virginia. *Swing v. Taylor & Crate*, 68 W. Va. 621, 70 S. E. 373.

He may set up any defense going to show that he is not liable upon his contract of subscription. *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, aff'g judgment 83 Iowa 430, 50 N. W. 45.

An order of a referee in bankruptcy finding the amount due from the various stockholders, and making a call, is a mere administrative order made for the purpose of authorizing the trustee to file a suit to enforce said call, and hence is not conclusive in such a suit of the amounts due upon the stock, and does not prevent a stockholder from showing that he has transferred his stock, especially when the order is silent on the question, and in terms gives to the stockholders the right to interpose any defense to the suit to enforce the call that may be justified by the facts. *Rich v. Park*, — Tex. Civ. App. —, 177 S. W. 184.

In *In re Remington Automobile & Motor Co.*, 153 Fed. 345, modifying judgment 139 Fed. 766, it is said that the stockholder cannot be heard to question the findings as to the amount paid for the stock.

In *In re Newfoundland Syndicate*, 193 Fed. 443, it is said that while this is seemingly authority to prevent a stockholder from showing that he has paid for his stock in full, there were no facts in the case calling for such a decision.

This is equally true of an assessment in proceedings to enforce a statutory liability of stockholders. See § 4236 et seq., *infra*.

⁹⁷ **United States.** In *re Newfoundland*

land Syndicate, 196 Fed. 443, judgment modified 201 Fed. 917.

Alabama. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Kentucky. *Otter View Land Co.'s Receiver v. Bolling's Ex'x*, 24 Ky. L. Rep. 1157, 70 S. W. 834.

Maryland. *Williams v. Watters*, 97 Md. 113, 54 Atl. 767; *Castleman v. Templeman*, 87 Md. 546, 41 L. R. A. 367, 67 Am. St. Rep. 363, 40 Atl. 275.

New Jersey. *Swing v. Consolidated Fruit Jar Co.*, 74 N. J. L. 145, 63 Atl. 899; *Gilson v. Appleby*, 79 N. J. Eq. 590, 81 Atl. 925, aff'g 78 N. J. Eq. 96, 78 Atl. 668.

Ohio. *Swing v. Rose*, 75 Ohio St. 355, 79 N. E. 757.

Virginia. *Elliott v. Ashby*, 104 Va. 716, 52 S. E. 383.

West Virginia. *Swing v. Taylor & Crate*, 68 W. Va. 162, 70 S. E. 373.

Wyoming. *Natwick v. Terwilliger*, 24 Wyo. 253, 160 Pac. 338, 157 Pac. 696.

An order of the bankruptcy court authorizing the trustee to institute and prosecute a suit against a certain person to recover the amount of his subscription does not determine that such person is liable as a stockholder, or preclude him from showing that his subscription was conditional, and that the condition was not performed. *Natwick v. Terwilliger*, 24 Wyo. 253, 160 Pac. 338, 157 Pac. 696.

See also § 4236 et seq., *infra*.

⁹⁸ **United States.** *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, aff'g judgment 83 Iowa 430, 50 N. W. 45; In *re M. Stipp Const. Co.*, 221 Fed. 372; In *re Newfoundland Syndicate*, 196 Fed. 443, judgment modified 201 Fed. 917.

Alabama. *Semple v. Glenn*, 91 Ala.

faith in the open market without knowing that it was not fully paid; ⁹⁹ or that he has been released from liability; ¹ or that he has a valid set-off against the assessment; ² or that the indebtedness is of a character for which the stockholders are not liable; ³ or that the

245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46.

Maryland. Castleman v. Templeman, 87 Md. 546, 41 L. R. A. 367, 67 Am. St. Rep. 363, 40 Atl. 275.

Michigan. Mutual Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170, 34 L. R. A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095.

New Jersey. Swing v. Consolidated Fruit Jar Co., 74 N. J. L. 145, 63 Atl. 899; Gilson v. Appleby, 79 N. J. Eq. 590, 81 Atl. 925, aff'g 78 N. J. Eq. 96, 78 Atl. 668.

Ohio. Swing v. Rose, 75 Ohio St. 255, 79 N. E. 757.

See also § 4236 et seq., *infra*.

⁹⁹ Enright v. Heckscher, 240 Fed. 863; French v. Harding, 235 Pa. 79, Ann. Cas. 1914 B 744, 83 Atl. 586, aff'g 46 Pa. Super. Ct. 363.

That such a purchaser is not liable, see §§ 3597, 3771, *supra*.

¹ **United States.** Great Western Tel. Co. v. Purdy, 162 U. S. 329, 40 L. Ed. 986, aff'g judgment 83 Iowa 430, 50 N. W. 45.

Delaware. John W. Cooney Co. v. Arlington Hotel Co., — Del. Ch. —, 101 Atl. 879.

Kentucky. Otter View Land Co.'s Receiver v. Bolling's Ex'x, 24 Ky. L. Rep. 1157, 70 S. W. 834.

New Jersey. Swing v. Consolidated Fruit Jar Co., 74 N. J. L. 145, 63 Atl. 899.

New York. Milliken v. Caruso, 205 N. Y. 559, 98 N. E. 493, aff'g 146 App. Div. 940, 131 N. Y. Supp. 1129; Southworth v. Morgan, 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490, rev'g judgment 143 App. Div. 648, 128 N. Y. Supp. 196, which aff'd 71 Misc. 214, 128 N. Y. Supp. 598.

Virginia. Elliott v. Ashby, 104 Va. 716, 52 S. E. 383.

He may show that under his contract he was completely discharged from liability by payment of a sum less than the par value of the stock, where such an agreement is not contrary to the statute. Southworth v. Morgan, 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490, rev'g judgment 143 N. Y. App. Div. 648, 128 N. Y. Supp. 196, which aff'd 71 N. Y. Misc. 214, 128 N. Y. Supp. 598, followed in Milliken v. Caruso, 205 N. Y. 559, 98 N. E. 493, aff'g 146 N. Y. App. Div. 940, 131 N. Y. Supp. 1129.

In Williams v. Watters, 97 Md. 113, 54 Atl. 767, it is held that under Virginia Act of Dec. 22, 1897, a stockholder could show that a creditor for whose benefit an assessment was levied became such after an amendment to the corporate charter permitting the issuance of full paid stock to subscribers who had paid 50 per cent of the par value of the stock subscribed for, and providing that the holders of such stock should not be liable for further assessments to pay debts subsequently contracted.

See also § 4253 et seq., *infra*.

As to the validity of a release, see §§ 639, 640, *supra*.

² Gilson v. Appleby, 79 N. J. Eq. 590, 81 Atl. 925, aff'g 78 N. J. Eq. 96, 78 Atl. 668; Swing v. Rose, 75 Ohio St. 255, 79 N. E. 757.

See also § 4245, *infra*.

As to the right of a stockholder to set off a debt due him from the corporation against his liability on his subscription, see § 4132, *infra*.

³ Covell v. Fowler, 144 Fed. 535.

See also § 4236 et seq., *infra*.

statute of limitations applies.⁴ And of course he may also attack the decree for fraud⁵ or want of jurisdiction.⁶ It has also been held that a decree allowing a claim of a creditor, in an action in equity for the appointment of a receiver and to adjust and wind up the affairs of an insolvent corporation, is not final as to equities existing between such creditor and a stockholder who has paid the full amount called for by his subscription but less than the par value of his stock.⁷

By the weight of authority, a stockholder, when sued by a receiver for the balance due on his stock, cannot collaterally attack the decree by which the receiver was appointed,⁸ or the decree giving him authority to sue.⁹ Nor, when sued by a trustee in bankruptcy, can he collaterally attack the judgment of the federal court adjudicating the corporation a bankrupt by showing that the corporation was defectively organized,¹⁰ or question the validity or regularity of the proceedings.¹¹

§ 4121. Remedies—General principles. The remedy or method of enforcing the liability must conform to the procedure of the forum

4 United States. *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, aff'g judgment 83 Iowa 430, 50 N. W. 45.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Kentucky. *Otter View Land Co.'s Receiver v. Bolling's Ex'x*, 24 Ky. L. Rep. 1157, 70 S. W. 834.

Maryland. *Glenn v. Williams*, 60 Md. 93.

Virginia. *Williams v. Watters*, 97 Md. 113, 54 Atl. 767, construing a Virginia statute.

As to the application of the statute of limitations, see § 4133 et seq., *infra*.

⁵ *Glenn v. Williams*, 60 Md. 93; *Swing v. Taylor & Crate*, 68 W. Va. 621, 70 S. E. 373. See also *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262. See also § 4235 et seq., *infra*.

⁶ *Glenn v. Williams*, 60 Md. 93.

See also § 4236 et seq., *infra*.

⁷ *Dickinson v. Kline*, 96 Neb. 435, 148 N. W. 141.

⁸ **Connecticut.** *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

Iowa. *Schoonover v. Hineckley*, 48 Iowa 82.

Minnesota. *Basting v. Ankeny*, 64 Minn. 133, 66 N. W. 266.

Missouri. *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17.

Washington. *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089.

In *Silvain v. Benson*, 68 Wash. 286, 123 Pac. 457, it was held that the evidence was insufficient to show that a judgment appointing a receiver, which was valid on its face, was void for want of jurisdiction.

See also § 4236 et seq., *infra*.

⁹ *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187.

¹⁰ *Chappell v. Lowe*, 145 Ga. 717, 89 S. E. 777.

¹¹ *Southworth v. Morgan*, 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490, rev'g judgment 143 N. Y. App. Div. 648, 128 N. Y. Supp. 196, which aff'd 71 N. Y. Misc. 214, 128 N. Y.

whose aid is invoked.¹² But it has been held that where the statutes of the state of the corporation's domicile permit a single stockholder to be sued separately, a receiver will be permitted to sue a single stockholder residing in a state whose laws require all of the stockholders to be joined in a single suit.¹³

State statutes giving judgment creditors of corporations a remedy against stockholders who have not paid their subscriptions do not apply to national banks.¹⁴ Nor can the jurisdiction of federal courts of equity be enlarged or affected by state statutes.¹⁵

Where a corporation is adjudged a bankrupt, the bankruptcy court may make a call or assessment upon its stockholders for such an amount as may be necessary to pay the corporate debts.¹⁶ Such an assessment cannot be enforced against individual stockholders in the bankruptcy proceedings, however, but only in a separate action or proceeding instituted by the trustee for that purpose.¹⁷ And under the express provisions of the Bankruptcy Act such an action can be brought only in the court where the bankrupt corporation could have brought it if the bankruptcy proceedings had not been instituted, unless by consent of the defendant.¹⁸

§ 4122. — Actions at law and suits in equity. A contract of subscription for stock in a corporation, express or implied, is a contract

Supp. 598; *Bernard v. Carr*, 167 N. C. 481, 83 S. E. 816.

¹² *Covell v. Fowler*, 144 Fed. 535; *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606; *Rule v. Omega Stove & Grate Co.*, 64 Minn. 326, 67 N. W. 60; *Johnson v. Tennessee Oil, etc., Co.*, 74 N. J. Eq. 32, 69 Atl. 788.

¹³ *Sullivan v. Farnsworth*, 132 Tenn. 691, 179 S. W. 317.

¹⁴ The remedy by a bill in equity given by the Alabama statute is not available to a judgment creditor of a national bank, since it would interfere with the remedy given to such banks by the National Banking Act which authorizes a forfeiture and sale of the stock of delinquent shareholders. *McQuiddy v. King*, 191 Ala. 205, 67 So. 1015.

¹⁵ See § 4122, *infra*.

¹⁶ See § 4118, *supra*.

¹⁷ *In re Howe Mfg. Co.*, 193 Fed. 524; *In re Remington Automobile & Motor Co.*, 153 Fed. 345, modifying judgment 139 Fed. 766.

The bankruptcy court has no authority to order the issuance of an execution therefor against a stockholder. *In re Remington Automobile & Motor Co.*, 153 Fed. 345, modifying judgment 139 Fed. 766.

As to whether the remedy of the trustee is at law or in equity, see § 4122, *infra*.

¹⁸ Section 23b of the act so provides in respect to all suits by the trustee, and this provision applies to an action to recover an assessment. *In re Newfoundland Syndicate*, 196 Fed. 443, judgment modified 201 Fed. 917.

Where the corporation could have sued only in the state court, the trustee cannot sue in the federal

between the subscriber and the corporation,¹⁹ and there is no privity of contract whatever between the subscriber and creditors of the corporation. It follows, therefore, that creditors of a corporation, even though it may be insolvent or may have been dissolved, cannot maintain an action at law against subscribers, in the absence of a statute, to recover against them to the extent of the balance due on their subscriptions.²⁰ Another reason sometimes given for the rule is that all the creditors are entitled to share in the assets of the corporation when it is insolvent, and "no one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law, so as to appropriate it exclusively to himself."²¹ In some jurisdictions, however, there are statutes expressly imposing upon the stockholders of corporations, under certain conditions, a direct liability for corporate debts to the extent of any balance unpaid on their stock,²² and permitting creditors of the corporation to maintain actions at law against them.²³

court, and this would be true even though he were authorized to sue in equity in order to avoid a multiplicity of actions while the corporation could only have sued at law. *Kelley v. Gill*, 245 U. S. 116, 62 L. Ed. 185, aff'g 238 Fed. 996.

A suit to collect unpaid subscriptions is not one to determine a controversy concerning property in the possession of the trustee so as to give the bankruptcy court jurisdiction. *Kelley v. Gill*, 245 U. S. 116, 62 L. Ed. 185, aff'g 238 Fed. 996.

The bankruptcy court has no jurisdiction where it is sought to hold the stockholder for the difference between the par value of his stock and the actual value of property turned over to the corporation at an overvaluation in payment therefor. *In re Haley*, 158 Fed. 74, certiorari denied 209 U. S. 546, 52 L. Ed. 920 (mem. dec.).

¹⁹ See § 521 et seq., supra.

²⁰ **United States.** *Patterson v. Lynde*, 106 U. S. 519, 27 L. Ed. 265; *In re Putnam*, 193 Fed. 464; *Brown v. Fisk*, 23 Fed. 228.

Alabama. *Cooper v. Frederick*, 9 Ala. 739.

Arkansas. *Jones v. Jarman*, 34 Ark. 323.

Massachusetts. *Spear v. Grant*, 16 Mass. 9.

New Jersey. *Thompson-Houston Elec. Co. v. Murray*, 60 N. J. L. 20, 37 Atl. 443.

Oregon. See *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691, 908.

Washington. *Montesano v. Carr*, 80 Wash. 384, 141 Pac. 894.

A creditor may not sue a stockholder directly and obtain judgment against him because he is indebted to the corporation. *Dotson v. Hogan*, 44 Utah 295, 140 Pac. 128.

A single creditor cannot maintain an action at law against a stockholder, but the remedy is by a bill in equity for the benefit of all the creditors of the corporation and against all the stockholders. *Reed v. Burg*, 2 Neb. Unoff. 117, 96 N. W. 414.

²¹ *Patterson v. Lynde*, 106 U. S. 519, 27 L. Ed. 265; *Reed v. Burg*, 2 Neb. Unoff. 117, 96 N. W. 414; *Montesano v. Carr*, 80 Wash. 384, 141 Pac. 894.

²² See § 4152 et seq., infra.

²³ See § 4210 et seq., infra.

It is very generally held that courts of equity have jurisdiction of suits by creditors to compel delinquent stockholders to pay any balance remaining unpaid on their stock for the purpose of having the same applied in payment of their claims. And in some jurisdictions the right to sue in equity is expressly given by the statute.²⁴ It is

24 United States. *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885; *Burke v. Smith*, 16 Wall. 390, 21 L. Ed. 361; *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 349; *John A. Roebling's Sons Co. of California v. Kinnicutt*, 248 Fed. 596; *In re Putman*, 193 Fed. 464; *Holmes v. Sherwood*, 3 McCrary 405, 16 Fed. 725; *Marsh v. Burroughs*, 1 Woods 463, Fed. Cas. No. 9,112.

Alabama. Code 1896, § 823; Code 1907, § 3744. *Bellview Cemetery Co. v. Faulks*, 73 So. 927; *Hall & Farley v. Alabama Terminal & Improvement Co.*, 173 Ala. 398, 56 So. 235; *Montgomery Iron Works v. Roman*, 147 Ala. 434, 41 So. 811; *Montgomery Iron Works v. Capital City Ins. Co.*, 137 Ala. 134, 34 So. 210; *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92; *Smith v. Huckabee*, 53 Ala. 191; *Goodwin v. McGehee*, 15 Ala. 232; *Allen v. Montgomery R. Co.*, 11 Ala. 437.

In *Hall & Farley v. Alabama Terminal & Improvement Co.*, 173 Ala. 398, 56 So. 235, overruling *Henderson v. Hall*, 134 Ala. 455, 32 So. 840, it was held that equity had jurisdiction of such a suit before the enactment of the statute, and that the inadequacy of the legal remedy, and not fraud vel non, was the better test of equity jurisdiction in such cases.

Arkansas. *Bank of Des Arc v. Moody*, 110 Ark. 39, 161 S. W. 134; *Jones v. Jarman*, 34 Ark. 323.

California. *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986; *R. H. Herron Co. v. Shaw*, 165 Cal. 668, Ann. Cas. 1915 A 1265, 133 Pac. 488; *Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204; *Blood v. Serena Land & Water Co.*, 150 Cal. 764, 89 Pac.

1090; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776, 27 Pac. 674; *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777; *Harmon v. Page*, 62 Cal. 448; *In re Putman*, 193 Fed. 464.

Connecticut. *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593.

Delaware. Rev. Code 1915, ¶ 1963, expressly authorizes creditors to sue in equity. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Florida. *Knight & Wall Co. v. Tampa Sand Lime Brick Co.*, 55 Fla. 728, 46 So. 285.

Georgia. *Commercial Bank of Augusta v. Warthen*, 119 Ga. 990, 47 S. E. 536; *Dalton & M. R. Co. v. McDaniel*, 56 Ga. 191; *Stinson v. Williams*, 35 Ga. 170; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

Illinois. 2 J. & A. Ann. St. ¶ 2242; *Hurd's Rev. St.* 1917, c. 32, § 25; *Standard Distilling & Distributing Co. v. Springfield Coal Mining & Tile Co.*, 239 Ill. 600, 88 N. E. 236, aff'g 146 Ill. App. 144; *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725, aff'g 105 Ill. App. 271; *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725; *Fox v. Produce Cold Storage Exchange*, 192 Ill. App. 301; *De Shelter v. American Spring Water Supply Co.*, 182 Ill. App. 403; *Teich v. Midland Mach. Co.*, 177 Ill. App. 354; *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330. This provision is not unconstitutional as a denial of the right of trial by jury. *Standard Distilling & Distributing Co. v. Springfield Coal Min-*

also generally held that the jurisdiction of courts of equity in such cases is not taken away by a statute providing a remedy at law, even though such remedy may be adequate, unless the remedy so given is made exclusive, either in express terms or by necessary implica-

ing & Tile Co., 239 Ill. 600, 88 N. E. 236, aff'g 146 Ill. App. 144.

Indiana. Indiana Novelty & Manufacturing Co. v. McGill, 15 Ind. App. 1, 43 N. E. 464.

Maine. Rev. St. c. 47, § 89; Barron v. Paine, 83 Me. 312, 22 Atl. 218; John A. Roebeling's Sons Co. of California v. Kinnicutt, 248 Fed. 596 (under the Maine statute).

Massachusetts. Spear v. Grant, 16 Mass. 9.

Michigan. Comp. Laws 1915, § 12302; Grand Rapids Trust Co. v. Nichols, 165 N. W. 667; C. H. Little Co. v. Woodward Ave. Cemetery Ass'n, 135 Mich. 248, 97 N. W. 682; Schaub v. Welded-Barrel Co., 130 Mich. 606, 90 N. W. 335; McBryan v. Universal Elevator Co., 130 Mich. 111, 97 Am. St. Rep. 453, 89 N. W. 683.

Minnesota. Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606; Wallace v. Carpenter Elec. Heating Mfg. Co., 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189; Rule v. Omega Stove & Grate Co., 64 Minn. 326, 67 N. W. 60.

Mississippi. Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74.

Missouri. Rev. St. 1909, § 3006; Shields v. Hobart, 172 Mo. 491, 95 Am. St. Rep. 529, 72 S. W. 669; Washington Sav. Bank v. Butchers' & Drovers' Bank, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644; Rood v. Crocus Hill Min. Co., 157 Mo. App. 405, 139 S. W. 222; State v. Goodrich, 138 Mo. App. 283, 120 S. W. 646; Lamont v. Lamont Crystallized Egg Co., 109 Mo. App. 46, 81 S. W. 1269. See also First Nat. Bank of Deadwood,

South Dakota v. Rockefeller, 195 Mo. 15, 93 S. W. 761.

Nevada. Thompson v. Reno Sav. Bank, 19 Nev. 242, 3 Am. St. Rep. 883, 9 Pac. 121, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

New Jersey. Gilson v. Appleby, 80 N. J. L. 542, 77 Atl. 1084, aff'd 82 N. J. L. 400, 81 Atl. 724; Johnson v. Tennessee Oil, etc., Co., 74 N. J. Eq. 32, 69 Atl. 788; Wetherbee v. Baker, 35 N. J. Eq. 501. See also Sevin v. Mutual Match Co. (N. J. Eq.), 66 Atl. 921.

New York. Dayton v. Borst, 31 N. Y. 435; Rankine v. Elliott, 16 N. Y. 377; Gillet v. Moody, 3 N. Y. 479, 5 Barb. 185; Mann v. Pentz, 3 N. Y. 415; Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 N. Y. Supp. 918; Briggs v. Penniman, 8 Cow. 387, 18 Am. Dec. 454.

North Carolina. Cooper v. Adel Security Co., 127 N. C. 219, 37 S. E. 216.

Ohio. Umsted v. Buskirk, 17 Ohio St. 113; Henry v. Vermillion & A. R. Co., 17 Ohio 187.

Oregon. Macbeth v. Banfield, 45 Ore. 553, 106 Am. St. Rep. 670, 78 Pac. 693; Hawkins v. Donnerberg, 40 Ore. 97, 66 Pac. 691, 908; Brundage v. Monumental Gold & Silver Min. Co., 12 Ore. 322, 7 Pac. 314.

Pennsylvania. Johnston v. Markle Paper Co., 153 Pa. St. 189, 25 Atl. 560, 885; Bell's Appeal, 115 Pa. St. 88, 2 Am. St. Rep. 532, 8 Atl. 177; Bunn's Appeal, 105 Pa. St. 49, 51 Am. Rep. 166.

South Carolina. Efrid v. Piedmont Land Improvement & Investment Co., 55 S. C. 78, 32 S. E. 758, 897.

Vermont. Bassett v. St. Albans Hotel Co., 47 Vt. 313.

tion.²⁵ And, where this rule obtains, a creditors' bill may be maintained to reach unpaid subscriptions, notwithstanding a statute allowing a creditor to issue execution and levy on the property of a stockholder, or to bring suit directly against a stockholder,²⁶ or although he has a remedy by mandamus to compel the officers of the corporation to make calls upon unpaid subscriptions for the purpose of raising funds to pay its debts.²⁷ Nor is the remedy in equity taken away by a statute providing a legal remedy for enforcing a constitutional liability of stockholders in excess of the amount due on their stock.²⁸ Statutes in some states expressly provide that a judgment

Virginia. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

Washington. *Montesano v. Carr*, 80 Wash. 384, 141 Pac. 894; *Burch v. Taylor*, 1 Wash. St. 245, 24 Pac. 438.

Wisconsin. *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57.

²⁵ *Holmes v. Sherwood*, 3 McCrary 405, 16 Fed. 725; *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777; *Harmon v. Page*, 62 Cal. 448; *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74; *Shields v. Hobart*, 172 Mo. 491, 95 Am. St. Rep. 529, 72 S. W. 669; *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644.

"In cases in which equity originally possessed jurisdiction, such jurisdiction is not taken away by a statute conferring jurisdiction on a court of law. At most the jurisdiction from that period becomes concurrent." *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74.

See also the cases cited in the following notes.

²⁶ *Shields v. Hobart*, 172 Mo. 491, 95 Am. St. Rep. 529, 72 S. W. 669; *Steam Stone-Cutter Co. v. Scott*, 157 Mo. 520, 57 S. W. 1076; *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644; *Rood v. Crocus Hill Min. Co.*, 157 Mo. App. 405, 139 S. W. 222; *Lamont v. Lamont Crystal-*

ized Egg Co., 109 Mo. App. 46, 81 S. W. 1269.

The statutory remedy by execution is cumulative and not exclusive, and does not deprive a court of equity of jurisdiction. *State v. Goodrich*, 138 Mo. App. 283, 120 S. W. 646.

²⁷ *Hatch v. Dana*, 101 U. S. 205, 215, 25 L. Ed. 885; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593; *Dalton & M. R. Co. v. McDaniel*, 56 Ga. 191; *Thompson v. Reno Sav. Bank*, 19 Nev. 242, 3 Am. St. Rep. 883, 9 Pac. 121.

As to whether mandamus will lie, see § 4125, *infra*.

²⁸ *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776, 27 Pac. 674; *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777; *Harmon v. Page*, 62 Cal. 448.

Such a remedy "is purely statutory, and furnishes to creditors of corporations additional security by making the stockholder directly liable for his proportion of the corporate debts, and was not intended to diminish the assets of the corporation by releasing the stockholder from his indebtedness to the corporation on account of his unpaid subscription for stock, or to take away from the creditor the right to resort to a court of equity to compel its payment." *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776, 27 Pac. 674.

creditor may sue either at law or in equity at his election,²⁹ while in other states it is provided that all actions to enforce subscriptions must be brought in courts of law.³⁰

A court of equity is the proper tribunal to order an assessment to be made upon unpaid subscriptions to meet the claims of corporate

29 Alabama. The statute expressly authorizes creditors to proceed either by bill in equity or by garnishment. Code 1896, §§ 823, 2182. *Montgomery Iron Works v. Roman*, 147 Ala. 434, 41 So. 811; *Enslin v. Nathan*, 136 Ala. 412, 34 So. 929. The provision authorizing a suit in equity did not apply to suits pending when it took effect. *Henderson v. Hall*, 134 Ala. 455, 63 L. R. A. 673, 32 So. 840. Prior to the enactment of this statute it was held that since a creditor had an adequate remedy at law by garnishment a suit in equity would not lie. *Henderson v. Hall*, 134 Ala. 455, 63 L. R. A. 673, 32 So. 840; *Allen v. Montgomery R. Co.*, 11 Ala. 437.

Delaware. Rev. Code 1915, ¶ 1963; *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Maine. Rev. St. c. 47, § 89; *John A. Roebbing's Sons Co. of California v. Kinnicutt*, 248 Fed. 596; *Alderson v. Dole*, 74 Fed. 29; *Sullivan v. Farnsworth*, 132 Tenn. 691, 179 S. W. 317.

30 The statutes of Virginia provide that all suits or motions for the recovery of unpaid subscriptions shall be brought in the courts of common law, and that such courts shall have exclusive jurisdiction to hear and determine all questions involving the validity of such subscriptions. Code 1904, § 1103a; *Dickens v. Radford-Willis Southern Ry. Co.*, — Va. —, 93 S. E. 625; *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751; *Williams v. Watters*, 97 Md. 113, 54 Atl. 767.

This provision does not violate Const. § 52, relative to the title of

statutes, in that it deprives courts of equity of jurisdiction to determine the validity of subscriptions without mention of such purpose in the title. *Dickens v. Radford-Willis Southern Ry. Co.*, — Va. —, 93 S. E. 625. . . .

This provision "imposes no limitation upon the right of a stockholder who chooses to take the initiative (before suit or motion under section 1103a has been instituted) to resort to any appropriate remedy for relief from liability on his subscription. If, however, he delays action until after suit or motion has been brought against him to recover his unpaid subscription, he cannot then by resort to equity, or otherwise, oust the exclusive jurisdiction acquired by the common-law court under the statute." So after the institution of proceedings by motion to collect subscriptions, a subscriber cannot maintain a bill in equity to restrain the prosecution of the motion and to cancel and rescind his subscription on the ground of fraud. *Dickens v. Radford-Willis Southern Ry. Co.*, — Va. —, 93 S. E. 625.

The provision leaves unimpaired the right of a stockholder proceeded against under it to avail himself of all defenses afforded by § 3299. *Dickens v. Radford-Willis Southern Ry. Co.*, — Va. —, 93 S. E. 625.

Equity has jurisdiction of a suit by a resident creditor of a foreign corporation against a resident equitable owner of stock, the legal title to which is in a nonresident, to enforce his liability to the extent that the stock has not been paid. The statute requiring unpaid subscriptions to be

creditors in a suit to wind up the affairs of an insolvent corporation.³¹ And the bankruptcy court, or the trustee under its direction, may make such an assessment where the corporation has been adjudged a bankrupt.³²

Generally where a call or assessment has been made, or where none is necessary, a receiver, assignee for the benefit of creditors, or trustee in bankruptcy, may sue at law.³³ And in some jurisdictions it is held that he must sue at law under such circumstances, and cannot join all the stockholders as defendants in a single suit in equity,³⁴

enforced by actions at law has no application under such circumstances. *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

³¹ *Clevenger v. Moore*, 71 N. J. L. 148, 58 Atl. 88.

A suit by a receiver to obtain a decree ascertaining which of the stockholders have paid and which have not, and the amount necessary for each to pay is properly brought in equity. See *v. Heppenheimer*, 55 N. J. Eq. 240, *aff'd* 56 N. J. Eq. 453, 41 Atl. 1116 (mem. dec.).

Equity has jurisdiction of a suit by an assignee for the benefit of creditors where it is in effect one to wind up the affairs of the corporation, and by the express terms of the articles the stockholders are liable only for such ratable proportions of their subscriptions as may be necessary for the payment of the corporate debts after exhausting the other assets. *Rutenbeck v. Hohn*, 143 Iowa 13, 136 Am. St. Rep. 731, 121 N. W. 698.

The right of an assignee for the benefit of creditors must be asserted in equity, because a court of law cannot compel a call. *Banta v. Hubbell*, 167 Mo. App. 38, 150 S. W. 1089; *Lionberger v. Broadway Sav. Bank*, 10 Mo. App. 499.

"Where it is sought to impound the unpaid stock subscriptions of the stockholders of a foreign corporation in one action, and have the amount thereof applied equitably in payment

of all of the debts of the corporation, an action in the nature of a creditors' bill is a proper remedy, if not the only one, unless otherwise provided by statute." *Rule v. Omega Stove & Grate Co.*, 64 Minn. 326, 67 N. W. 60.

The Virginia statute requiring all actions for the recovery of unpaid subscriptions to be at law provides that it shall not be construed to deprive courts of chancery of their jurisdiction to wind up the affairs of insolvent corporations or to make assessments on unpaid stock subscriptions, but that in all such cases the court shall direct the trustee, assignee or receiver to sue at law when necessary to recover any call or assessment. *Williams v. Watters*, 97 Md. 113, 54 Atl. 767.

³² See § 4115, *supra*.

³³ *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972; *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187; *Clevenger v. Moore*, 71 N. J. L. 148, 58 Atl. 88; *Wagenen v. Clark*, 22 Hun (N. Y.) 497. And see the cases cited in the following notes.

³⁴ *Burke v. Scheer*, 89 Neb. 80, 33 L. R. A. (N. S.) 1057, 130 N. W. 962; *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375, *rev'g* judgment 87 N. J. Eq. 124, 99 Atl. 103; *Barkalow v. Totten*, 53 N. J. Eq. 573, 32 Atl. 2; *Smith v. Johnson*, 57 Ohio St. 486.

The Virginia statute in terms requires all actions for the recovery of

at least unless there are some special grounds of equitable jurisdiction,³⁵ as where there has been a fictitious payment for the stock by the application of a dividend which was fraudulent as to creditors,³⁶ or where it is sought to avoid, as a fraudulent preference, releases and assignments of subscriptions upon which the defendants rely to establish a defense of payment.³⁷ On the other hand some courts hold that a receiver, assignee for creditors, or trustee in bankruptcy, may sue all the delinquent stockholders in equity where a call or assessment has been made, or where none is necessary, although he might also have sued each individual stockholder at law.³⁸ In Wash-

unpaid subscriptions to be brought in courts of common law and gives such courts exclusive jurisdiction to hear and determine all questions involving the validity of such subscriptions. *Elliott v. Ashby*, 104 Va. 716, 52 S. E. 383. As to this statute see note 30, supra, this section.

In Louisiana a receiver cannot sue several stockholders jointly on their subscriptions, but must sue each separately. *Winterhalter v. Hoffman*, 119 La. 125, 43 So. 980.

³⁵ *Peck v. Elliott*, 79 Fed. 10; *Bausman v. Denny*, 73 Fed. 69; *Ross-Meehan Brake-Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. 957; *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375, rev'g judgment 87 N. J. Eq. 124, 99 Atl. 103; *Naumberg v. See*, 56 N. J. Eq. 453, 41 Atl. 1116, aff'g *See v. Heppenheimer*, 55 N. J. Eq. 240, 36 Atl. 966; *Calkins v. Atkinson*, 2 Lans. (N. Y.) 12.

In *Calkins v. Atkinson*, 2 Lans. (N. Y.) 12, it was held that a receiver of an insolvent corporation may sue in equity, making the stockholders and creditors parties, to obtain an accounting of the debts due the creditors, to ascertain and enforce the liability of the stockholders, and to restrain creditors from prosecuting independent suits against the stockholders.

³⁶ *Edwards v. Schillinger*, 245 Ill.

231, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048, aff'g 148 Ill. App. 227.

³⁷ A bill by a receiver to enforce payment of subscriptions to stock presents a subject of equitable cognizance where a chief part of the relief sought is the avoidance, as a fraudulent preference, of releases and assignments of a large part of the subscriptions, evidenced by the records of the board of directors of the corporation, upon which the defendants rely to establish their defense of payment. *Wyman v. Bowman*, 127 Fed. 257.

The superintendent of banks may sue a single stockholder in equity, where the books of the bank show a regular purchase and issue of stock, and a payment therefor in property, which is alleged to be worthless, and an apparently valid release of the subscriber from liability, which is in fact void. *Sargent v. American Bank & Trust Co.*, 80 Ore. 16, 154 Pac. 759, rehearing denied 156 Pac. 431.

³⁸ *Georgia*. Code 1911, § 2251, permitting the joinder of stockholders as defendants applies to suits by or for the benefit of creditors, and does not authorize a receiver, appointed in a suit brought by a stockholder on behalf of himself and the other stockholders, to proceed in one suit against all stockholders who have not paid their subscriptions. *Greer v. Jack-*

ington it is held that a suit by the receiver to recover unpaid subscriptions is an equitable action, even though there has been a previous call by the corporation,³⁹ and that an action on a subscription previously begun by the corporation as a law action becomes an equitable action when a receiver or trustee in bankruptcy is appointed and is substituted as a party plaintiff.⁴⁰ In some jurisdic-

son, 146 Ga. 376, 91 S. E. 417. But under this provision a trustee in bankruptcy may recover from any number of delinquent stockholders in one equitable action. *Spratling v. Westbrook*, 140 Ga. 625, 79 S. E. 536; *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494. And he may sue all of the subscribers in one action though not all of them reside in the same county. *Chappell v. Lowe*, 145 Ga. 717, 89 S. E. 777.

Indiana. Under the equitable provisions of the code, a receiver may sue all of the stockholders in one suit in equity although he might have sued each separately at law. *Gainey v. Gilson*, 149 Ind. 58, 48 N. E. 633. When authorized by the court appointing him, a receiver may sue all delinquent stockholders together in any county where a part of them reside. *Carnahan v. Campbell*, 158 Ind. 226, 63 N. E. 384, 59 N. E. 1054.

Maine. This is true under the Maine statute. *Sullivan v. Farnsworth*, 132 Tenn. 691, 179 S. W. 317.

Pennsylvania. A bill in equity against a large number of stockholders to recover unpaid subscriptions may be maintained by the assignee of an insolvent corporation irrespective of the fact that it is shown by the bill that in order to liquidate corporate debts the entire capital will be required, rendering an accounting unnecessary. While in the granting of equitable relief in such case the necessity for an accounting is an influential element, its presence or absence is not conclusive on the question of equity jurisdiction. The remedy by

separate actions at law against each of the stockholders is not so full and adequate as to bar equitable relief. *Cook v. Carpenter*, 212 Pa. 165, 1 L. R. A. (N. S.) 900, 108 Am. St. Rep. 854, 4 Ann. Cas. 723, 61 Atl. 799.

Texas. A trustee in bankruptcy may join all the stockholders as defendants in a single suit in equity to recover assessments, thus preventing a multiplicity of suits, and permitting the issues between all the parties to be disposed of in a single action. *Rich v. Park*, — Tex. Civ. App. —, 177 S. W. 184.

³⁹ *Chamberlain v. Piercy*, 82 Wash. 157, 143 Pac. 977; *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489.

In *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089, it was held that a receiver could maintain an action at law against an individual stockholder.

⁴⁰ *Chamberlain v. Piercy*, 82 Wash. 157, 143 Pac. 977. In this case the court distinguishes *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089, where it was held that the receiver might maintain separate actions at law against the stockholders on the ground that that action was based on an assessment made by the court.

The trustee must proceed as though the action had been instituted by him at the time of his substitution, and the complaint must show that the stockholders had notice and an opportunity to be heard at some time and in some place as to the validity of the claims against the corporation, and that the court held an accounting and determined the proportion-

tions the assessment is made and the liability enforced in the same suit, which must be in equity and to which all the delinquent stockholders must be made parties.⁴¹ It has been held that where it is sought to recover the full amount for which each stockholder is liable, the action must be at law, but where the amount for which each stockholder is liable is unknown, and must be determined in the action, and depends upon equities to be adjusted among creditors or stockholders, or both, the action must be in equity.⁴²

"The equity jurisdiction of the federal courts and the mode of administering it are uniform throughout the United States, and are not affected by state legislation providing an equitable remedy for the enforcement of stockholders' liability."⁴³ To afford relief in such a controversy in a federal court of equity, there must be original ground for equitable relief.⁴⁴ So a single creditor cannot main-

ate which each stockholder must pay in order to meet the claims. *Chamberlain v. Piercy*, 82 Wash. 157, 143 Pac. 977.

⁴¹ In Oregon where the affairs of an insolvent bank are being wound up by the superintendent of banks, he can enforce the liability of the stockholders only by a single suit in equity against all stockholders whose subscriptions remain unpaid, in which an accounting can be had, and the amount necessary to be collected from each determined. *Sargent v. Waterbury*, 83 Ore. 159, 161 Pac. 443, rehearing denied 163 Pac. 416.

He cannot sue a single stockholder, but all whose subscriptions are unpaid must be joined. *Sargent v. Waterbury*, 83 Ore. 159, 161 Pac. 443, rehearing denied 163 Pac. 416.

In an action against the trustee in bankruptcy of a corporation to foreclose a corporate mortgage, the trustee cannot procure an assessment for the unpaid balance due on stock held by the plaintiff. *Myers v. Indiana Min. Co.*, 86 Ore. 664, 168 Pac. 719.

In *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57, 63, it was held that a receiver appointed in proceedings under Rev. St. 1858, c. 148, §§ 18,

19, in an action against the corporation alone, could not sue a delinquent stockholder, but that the proper practice was to make the stockholders defendants in the action against the corporation.

A receiver may maintain a suit in equity in behalf of all of the creditors against all of the delinquent stockholders to recover from each such an amount as may be necessary to satisfy the debts of the corporation. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

An assignee for creditors may maintain a suit in equity in another state to enforce the liability of all the stockholders residing there. *Stoddard v. Lum*, 159 N. Y. 265, 45 L. R. A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108, rev'g 35 N. Y. App. Div. 565, 53 N. Y. Supp. 607.

⁴² *Dickinson v. Kline*, 96 Neb. 435, 148 N. W. 141.

⁴³ *John A. Roebeling's Sons Co. of California v. Kinnicutt*, 248 Fed. 596; *Second Nat. Bank of Erie v. Georger*, 246 Fed. 517; *Alderson v. Dole*, 74 Fed. 29.

⁴⁴ *Second Nat. Bank of Erie v. Georger*, 246 Fed. 517; *Alderson v. Dole*, 74 Fed. 29.

tain a suit in equity in the federal courts to recover unpaid subscriptions for the benefit of himself alone where there are other creditors, even though by statute he might do so in a state court.⁴⁵ And a federal court of equity has no jurisdiction of a suit by a creditor against several independent subscribers to stock to enforce a statutory liability to the extent of the amount remaining unpaid on their subscriptions solely on the ground of preventing a multiplicity of actions, where there is an adequate remedy by a separate action against each at law, even though a state statute authorizes such a suit.⁴⁶ There have been holdings by some of the federal courts that a federal court of equity having jurisdiction of a suit for the administration of the estate of an insolvent corporation, in which it has appointed a receiver, has jurisdiction of an ancillary or auxiliary bill by the receiver to enforce the liability of the stockholders.⁴⁷ And also that a receiver may maintain a suit in equity in a federal court against several stockholders for the purpose of avoiding a multiplicity of actions, although he might have sued them separately at law.⁴⁸ But, on the other hand, it has also been held that a federal court of equity has no jurisdiction of a suit by a receiver appointed by a federal court of equity sitting in another state against numerous

⁴⁵ *John A. Roebling's Sons Co. of California v. Kinnicutt*, 248 Fed. 596; *George W. Signor Tie Co. v. Monett & S. W. Const. Co.*, 198 Fed. 412.

⁴⁶ A state statute permitting any creditor to institute joint or several actions against any of its stockholders who have not fully paid for their stock cannot enlarge the jurisdiction of a federal court of equity. *John A. Roebling's Sons Co. of California v. Kinnicutt*, 248 Fed. 596; *Clinton Mining & Mineral Co. v. Cochran*, 247 Fed. 449.

⁴⁷ *Hollander v. Heaslip*, 222 Fed. 808.

The mere fact that a receiver might maintain separate actions at law against each holder of unpaid stock does not deprive a federal court of equity of jurisdiction of a suit in equity instituted by him against all the stockholders. *Bausman v. Denny*, 73 Fed. 69, judgment rev'd on other grounds 79 Fed. 172.

A federal court of equity which has appointed a receiver has jurisdiction of an ancillary suit in equity to enforce the liability of all of the stockholders, without regard to the citizenship of the parties. The suit is one arising under the Constitution and laws of the United States under such circumstances. *Bausman v. Denny*, 73 Fed. 69, judgment rev'd on other grounds 79 Fed. 172.

⁴⁸ A bill by a receiver to collect unpaid subscriptions of nine defendants separately liable at law may be maintained on the ground that it avoids a multiplicity of actions at law, where the defendants have a community of interests in the questions of law and fact presented by the controversies, and the convenience of all parties will be better served by determining these questions in a single suit in equity than by deciding them in nine actions at law. *Wyman v. Bowman*, 127 Fed. 257.

stockholders to collect assessments levied by the court appointing him, either on the ground that such suit is ancillary to the receivership proceedings or that it will prevent a multiplicity of actions, where the bill does not set up any special grounds for equitable relief.⁴⁹ The Supreme Court of the United States has held that a trustee in bankruptcy cannot maintain a single suit in equity in a federal court against several stockholders to enforce their several unpaid subscriptions solely on the ground of avoiding a multiplicity of actions, where there is no common issue between such stockholders and the corporation, and the subscriptions are payable at fixed times so that no call is necessary, but that his remedy is by separate actions at law.⁵⁰

§ 4123. — Discovery. In a proper case the complainant in a creditor's suit may pray for a discovery as incident to the relief sought.⁵¹

⁴⁹ A court of equity has no jurisdiction of such a suit where the bill does not pray for an account, nor involve contribution between the defendants, or seek any equitable relief, but merely seeks to recover from each defendant the specific amount assessed against him. Under such circumstances the receiver's remedy is by an action at law. *Fidelity Trust & Safe Deposit Co. v. Archer*, 179 Fed. 32, rev'g *Brown v. Allebach*, 156 Fed. 697, 166 Fed. 488.

In *Brown v. Allebach*, 182 Fed. 264, it was held that the judgment of the lower court in the above case holding that it had jurisdiction in equity was not void, and that it would not be stricken off after the expiration of the term as to a defendant who did not appeal therefrom and as to whom the time within which to appeal had expired.

⁵⁰ *Kelley v. Gill*, 245 U. S. 116, 62 L. Ed. 185, aff'g judgment 238 Fed. 996. The lower court held that a suit in equity would lie under such circumstances, but dismissed the bill for want of jurisdiction. In the course of its opinion the court says: "We have no occasion to consider wheth-

er a different rule applies in those cases where an order of the court of bankruptcy is a condition precedent to the existence of any liability, either because stockholders are liable only after a call, or because the liability of stockholders is pro rata and limited to such sums as may, in the aggregate, be necessary to satisfy the claims of creditors."

An order of the bankruptcy court directing subscriptions to be paid adds nothing to the rights of the trustee under such circumstances, nor does an order of that court directing him "to institute a suit in equity" confer equity jurisdiction. *Kelley v. Gill*, 245 U. S. 116, 62 L. Ed. 185, aff'g 238 Fed. 996.

In *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220, it was held that an assignee under a former bankruptcy act could sue at law, and it was said in the course of the opinion that he might have filed a bill in equity against all of the delinquent shareholders jointly.

⁵¹ Where a bill is for discovery and relief, and the discovery sought is incident to the relief, if the bill fails to set forth any foundation for re-

And a receiver may maintain a bill for discovery in a proper case for the purpose of ascertaining the names of stockholders liable for assessments or calls.⁵²

§ 4124. — Execution. Unless such a remedy is provided by statute, creditors of a corporation, having recovered a judgment against it, cannot levy an execution upon the individual property of its stockholders, even though the latter may be liable for a balance on their stock.⁵³ In some jurisdictions, however, it is expressly provided by statute that when an execution has been issued upon a judgment against a corporation, and returned unsatisfied, the judgment creditor may have execution against a stockholder to the extent of the unpaid balance due on his stock. These statutes will be considered when we come to treat of the individual liability of stockholders under statutory or constitutional provisions.⁵⁴

§ 4125. — Mandamus. In England, mandamus has been held to lie, at the instance of creditors, to compel the officers of a corporation to make calls upon unpaid subscriptions for the purpose of raising funds to pay its debts. And in this country there are dicta in some of the cases to the effect that this remedy is available. There seem to be no decisions to this effect, however, and the question is at least doubtful.⁵⁵ Assuming that mandamus will lie, a creditor is not bound to resort to such remedy instead of suing in equity.⁵⁶

§ 4126. — Garnishment and attachment. When subscriptions are due and payable without any call being necessary, or when a call, if necessary, has been duly made, so that the subscribers are in default, creditors of the corporation may reach the same by garnishment or attachment, as in the case of any other debt due the corporation, and in some states such a remedy is expressly given to them by the statute.⁵⁷ And it has been held by a number of courts that a

lief, the right to the discovery will fall with it. *John A. Roebling's Sons Co. of California v. Kinnicutt*, 248 Fed. 596; *Montgomery Iron Works v. Capital City Ins. Co.*, 137 Ala. 134, 34 So. 210.

See also § 4220, *infra*.

⁵² He may maintain such a bill against stockbrokers for the purpose of ascertaining the names of the persons for whom they purchased stock,

where the stock is permitted to remain in the names of the vendors, who are insolvent. *Huey v. Brown*, 171 Fed. 641, *aff'd* 166 Fed. 483.

⁵³ See § 4221, *infra*.

⁵⁴ See § 4221, *infra*.

⁵⁵ See § 3281, *supra*.

⁵⁶ See § 4122, *supra*.

⁵⁷ *United States v. Prentice v. United States & Central American Steamship Co.*, 78 Fed. 106; *Faull v. Alaska*

creditor of a foreign corporation may reach the balance due from a stockholder on his subscription by garnishment or attachment pro-

Gold & Silver Min. Co., 8 Sawy. 420, 14 Fed. 657.

Alabama. Code 1907, § 4311; First Nat. Bank of Montgomery v. Dimmick, 190 Ala. 359, 67 So. 309; Trotter Bros. v. Blount, 162 Ala. 289, 50 So. 130; Henderson v. Mayfield Woolen Mills, 153 Ala. 625, 45 So. 211; Montgomery Iron Works v. Roman, 147 Ala. 434, 41 So. 811; Enslen v. Nathan, 136 Ala. 412, 34 So. 929; Henderson v. Hall, 134 Ala. 455, 63 L. R. A. 673, 32 So. 840; Joseph v. Davis, 10 So. 830; Davis v. Montgomery Furnace & Chemical Co., 101 Ala. 127, 8 So. 496; Curry v. Woodward, 53 Ala. 371; De Mony v. Johnston, 7 Ala. 51; Bingham v. Rushing, 5 Ala. 403.

Under Code 1886, § 2972, only judgment creditors having a return of execution "no property found" were entitled to garnish stockholders. The right was extended to any creditor by Code 1907, § 4311. First Nat. Bank of Montgomery v. Dimmick, 190 Ala. 359, 67 So. 309.

A simple contract creditor could not subject an unpaid subscription under a garnishment writ issued before the enactment of the new statute although such statute took effect before the garnishee filed his answer. First Nat. Bank of Montgomery v. Dimmick, 190 Ala. 359, 67 So. 309.

Arkansas. Tiger Bros. v. Rogers Cotton Cleaner & Gin Co., 96 Ark. 1, 30 L. R. A. (N. S.) 694, Ann. Cas. 1912 B 488, 130 S. W. 585.

California. Marshall v. Popert, 28 Cal. App. 551, 156 Pac. 881, 153 Pac. 247; Marshall v. Wentz, 28 Cal. App. 540, 153 Pac. 244.

Illinois. The statute expressly provides that, whenever an action is brought to recover an indebtedness against a corporation, it shall be com-

petent to proceed against stockholders to the extent of any unpaid balances on the stock owned by them respectively, "as in cases of garnishment." Parmelee v. Price, 208 Ill. 544, 70 N. E. 725, aff'g 105 Ill. App. 271; Meints v. East St. Louis Co-operative Rail-Mill Co., 89 Ill. 48; Pease v. Underwriters' Union, 1 Ill. App. 287. As to the procedure under this statute, see World's Fair Excursion & Transportation Boat Co. v. Gaseh, 162 Ill. 402, 44 N. E. 724, rev'g 59 Ill. App. 391; Kern v. Chicago Co-operative Brewery Ass'n, 140 Ill. 371, 29 N. E. 1035.

Iowa. Langford v. Ottumwa Water Power Co., 59 Iowa 283, 13 N. W. 303.

Louisiana. Brown v. Union Ins. Co., 3 La. Ann. 177.

Mississippi. Scott v. Windham, 73 Miss. 76, 16 So. 206; Safford v. Barnes, 39 Miss. 399; Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74; King v. Elliott, 5 Smedes & M. 428.

Missouri. Simpson v. Reynolds, 71 Mo. 594; Hannah v. Moberly Bank, 67 Mo. 678.

Nebraska. Bohrer v. Adair, 61 Neb. 824, 86 N. W. 495.

New York. McNelus v. Stillman, 172 App. Div. 307, 158 N. Y. Supp. 428.

North Carolina. Cooper v. Adel Security Co., 122 N. C. 463, 30 S. E. 348.

Pennsylvania. Bunn's Appeal, 105 Pa. St. 49, 51 Am. Rep. 166; Peterson v. Sinclair, 83 Pa. St. 250.

Tennessee. The liability may be reached by a garnishment bill in equity. Doak v. Stahlman (Tenn. Ch. App.), 58 So. 741.

Texas. Nesom v. City Nat. Bank, — Tex. Civ. App. —, 174 S. W. 715.

Utah. Dotson v. Hoggan, 44 Utah 295, 140 Pac. 128.

See also § 3145 et seq., supra.

ceedings in the state where such stockholder resides.⁵⁸ In some jurisdictions, however, the assets of an insolvent corporation are held to be a trust fund for all its creditors, so that one creditor cannot acquire a preference by attachment or otherwise;⁵⁹ and where this doctrine is recognized, one creditor cannot attach or garnish unpaid subscriptions when the corporation has become insolvent, and suspended or committed a positive act of insolvency.⁶⁰ And generally unpaid subscriptions cannot be garnished or attached after the appointment of a receiver of the assets of the corporation, including its unpaid subscriptions.⁶¹

In order to prevail in any case, the garnishing creditor must show that there is something due the corporation on the stock.⁶² And he cannot collect a subscription from one who has been legally released from any liability thereon.⁶³

It has been held that a garnishing creditor can assert no greater rights against the stockholder than could the corporation, and hence that he cannot proceed by garnishment to collect the difference between the actual value of property received for stock and a fraudulent overvaluation at which it was accepted, where, as between the stockholder and the corporation, the transaction was valid and the stock fully paid.⁶⁴ But it has also been held that though a subscription payable in property at a fictitious valuation is void as to the corporation and hence unenforceable by it, it is valid as to cred-

⁵⁸ *McNelus v. Stillman*, 172 N. Y. App. Div. 307, 158 N. Y. Supp. 428; *Doak v. Stahlman* (Tenn. Ch. App.), 58 S. W. 741.

The unpaid balance on subscriptions to the stock of a foreign corporation is property of the corporation within the state where the stockholders reside, and hence may be reached by attachment there, service being had on the corporation by publication. *Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348.

A resident creditor may enforce the liability of a resident stockholder of a foreign corporation in a foreign attachment suit in equity. *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

See also §3439, *supra*.

⁵⁹ See the chapter on Insolvency.

⁶⁰ *Bunn's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166.

⁶¹ See § 4115, *supra*, and see the chapters on Receivers and Insolvency.

⁶² *Trotter Bros. v. Blount*, 162 Ala. 289, 50 So. 130.

If the garnishee is an assignee of the stock, the creditor must show that the transferrer had not paid the company for the stock. The amount paid by the assignee to the transferrer for the stock is immaterial. *Trotter Bros. v. Blount*, 162 Ala. 289, 50 So. 130.

⁶³ *Nesom v. City Nat. Bank*, — Tex. Civ. App. —, 174 S. W. 715.

⁶⁴ *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725, *aff'g* 105 Ill. App. 271; *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330.

itors, and that its invalidity cannot be set up as a defense to garnishment proceedings by a creditor.⁶⁵

A judgment discharging the garnishee is *res adjudicata* as to the right of the judgment creditor to recover in a suit in equity subsequently instituted by him against the garnishee.⁶⁶

A receiver may sue out an attachment in a proper case to collect an unpaid subscription.⁶⁷

This subject has been considered more at length in a previous chapter.⁶⁸ The liability of shares of stock to attachment and garnishment at the instance of creditors of the stockholder has been considered in previous sections of this chapter.⁶⁹

§ 4127. — Parties. Most of the courts hold that a creditors' bill to reach unpaid subscriptions to the capital stock of a corporation, when it is insolvent, while it need not make all the creditors actual parties, must be brought on behalf of all who may come in, on the ground that, when a corporation becomes insolvent, a court of equity looks upon its assets, including unpaid subscriptions, as a trust fund for the benefit of all its creditors, and that no one creditor can go into equity and appropriate such assets exclusively to himself.⁷⁰

⁶⁵ *Joseph v. Davis* (Ala.), 10 So. 830.

⁶⁶ *Hall & Farley v. Alabama Terminal & Improvement Co.*, 173 Ala. 398, 56 So. 235; *Montgomery Iron Works v. Roman*, 147 Ala. 434, 41 So. 811; *Henderson v. Hall*, 134 Ala. 455, 63 L. R. A. 673, 32 So. 840.

⁶⁷ *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741.

⁶⁸ See § 3145 et seq., supra.

⁶⁹ See § 3436 et seq., supra.

⁷⁰ *United States*. *Patterson v. Lynde*, 106 U. S. 519, 27 L. Ed. 265; *John A. Roebling's Sons Co. of California v. Kinnicutt*, 248 Fed. 596; *George W. Signor Tie Co. v. Monett & S. W. Const. Co.*, 198 Fed. 412; *First Nat. Bank of Sioux City v. Peavey*, 75 Fed. 154; *Cleveland Rolling-Mill Co. v. Texas & St. Louis Ry. Co.*, 27 Fed. 250; *Holmes v. Sherwood*, 3 McCrary 405, 16 Fed. 725; *Marsh v. Burroughs*, 1 Woods 463, Fed. Cas. No. 9,112.

Georgia. *Wilkinson v. Bertock*, 111 Ga. 187, 36 S. E. 623.

Massachusetts. *First Nat. Bank of Barre v. Hingham Mfg. Co.*, 127 Mass. 563; *Grew v. Breed*, 10 Mete. 569; *Crease v. Babcock*, 10 Mete. 525, 531.

Nevada. *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

New Jersey. *Bickley v. Schlag*, 46 N. J. Eq. 533, 20 Atl. 250; *Wetherbee v. Baker*, 35 N. J. Eq. 501.

New York. *Mann v. Pentz*, 3 N. Y. 415; *Graeber v. Ehrgott*, — App. Div. —, 169 N. Y. Supp. 32; *Warth v. Moore Blind Sticher & Overseamer Co.*, 146 App. Div. 28, 130 N. Y. Supp. 748, aff'd 207 N. Y. 673, 100 N. E. 1135.

Oregon. *Brundage v. Monumental Gold & Silver Min. Co.*, 12 Ore. 322, 7 Pac. 314; *Ladd v. Cartwright*, 7 Ore. 329.

Pennsylvania. *Bunn's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166.

Washington. *Montesano v. Carr*, 80 Wash. 384, 141 Pac. 894.

And even when the bill is not brought on behalf of all creditors who may come in, other creditors have a right to come in and share in the distribution.⁷¹ When a creditors' suit is brought on behalf of the complainant and other creditors who may come in, the other creditors must come into that suit if they wish to enforce their claims. They cannot bring separate suits, and, if they attempt to do

Wisconsin. *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57.

The bill must be filed either by all the creditors or in behalf of all the creditors who desire to make themselves parties. *George W. Signor Tie Co. v. Monett & S. W. Const. Co.*, 198 Fed. 412.

The objection that the action is not brought on behalf of the plaintiff and all other creditors goes to a defect of parties, and is waived if not taken advantage of by demurrer or answer. *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606.

When a creditor sues in equity on his own behalf only to reach unpaid stock subscriptions, he may amend so as to make the suit on behalf of himself and other creditors who may choose to come in. *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

And when a bill or complaint by a creditor to reach unpaid subscriptions does not show upon its face that there are any other creditors, it is good as against a general demurrer, or even a special demurrer, notwithstanding a failure to allege that the suit is brought for the benefit of all the creditors. In such a case, the objection must be raised by answer. *Tatum v. Rosenthal*, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136.

Since several judgment creditors owning distinct judgments may properly join in such a suit, where it is

brought by one creditor only, others may be brought in by amendment. *Montgomery Iron Works v. Capital City Ins. Co.*, 137 Ala. 134, 34 So. 210.

A creditor instituted action at law against the stockholders of an insolvent corporation in enforcement of their liability on unpaid stock. He was unaware, at the time, that there were other creditors. While the action was pending a stockholder defendant instituted suit in the same court for the appointment of a receiver. Thereafter the receiver appointed as petitioner was substituted as plaintiff in behalf of all creditors. Objection was raised that the original action was one at law and, therefore, was not maintainable in favor of all creditors. The court held, however, that the form of the action was immaterial, the facts stated in the complaint justifying relief in favor of all creditors. *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807.

As to parties to suits to enforce the statutory liability of stockholders, see § 4227 et seq., *infra*.

⁷¹ *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387, 21 N. W. 375.

"Other creditors may come in under such a proceeding if they so desire, and the court may make an order for serving notice upon them. A judgment creditor is under no legal or moral obligation to bring in other creditors. He may proceed to secure his own rights independently of them." *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 97 Am. St. Rep. 453, 89 N. W. 683.

so, they may be enjoined.⁷² By statute in some states a single creditor may sue.⁷³

The right of a receiver, trustee in bankruptcy, or assignee for the benefit of creditors,⁷⁴ and of creditors who are also stockholders,⁷⁵ to sue to collect unpaid subscriptions has been considered in previous sections.

All of the delinquent stockholders may be joined as defendants in a creditor's suit to reach unpaid subscriptions,⁷⁶ as may the personal representatives of deceased stockholders.⁷⁷ And the fact that a number of stockholders are joined does not make the bill multifarious or objectionable for misjoinder of parties.⁷⁸ The authorities are in conflict as to whether all of the delinquent stockholders may be joined as defendants in a single suit in equity by a receiver, assignee for the benefit of creditors, or trustee in bankruptcy, when no call or assessment is necessary to fix their liability, or when, if necessary, it has been made, or whether under such circumstances, they must be sued separately at law.⁷⁹

According to the weight of authority, a creditors' bill to reach unpaid subscriptions may be maintained against the corporation and one or more stockholders, without making all the stockholders parties. The fact that the other stockholders are also liable is immaterial. If one of them is thus compelled to pay more than his share,

⁷² Crease v. Babcock, 10 Metc. (Mass.) 525; Pierce v. Milwaukee Const. Co., 38 Wis. 253. See also § 4227 et seq., *infra*.

⁷³ Maine Rev. St. c. 47, § 89; John A. Roebling's Sons Co. of California v. Kinnicutt, 248 Fed. 596; South Dakota Civ. Code, § 441; Clinton Mining & Mineral Co. v. Cochran, 247 Fed. 449.

⁷⁴ See § 4115, *supra*.

⁷⁵ See § 4114, *supra*.

⁷⁶ Code 1911, § 2251; Greer v. Jackson, 146 Ga. 376, 91 S. E. 417; Spratling v. Westbrook, 140 Ga. 625, 79 S. E. 536; Dalton & M. R. Co. v. McDaniel, 56 Ga. 191; Dilzell Engineering & Const. Co. v. Lehmann, 120 La. 273, 45 So. 138; Shipman v. Portland Const. Co., 64 Ore. 1, 128 Pac. 989.

Delinquent stockholders may be joined as defendants in a creditors' bill against a corporation, and if not

originally joined may be made parties later by amendment. Shaub v. Welded-Barrel Co., 130 Mich. 606, 90 N. W. 335.

⁷⁷ Warth v. Moore Blind Stitcher & Overseamer Co., 146 N. Y. App. Div. 28, 130 N. Y. Supp. 748, *aff'd* 207 N. Y. 673, 100 N. E. 1135; Hamilton v. Clarion, M. & P. R. Co., 144 Pa. St. 34, 13 L. R. A. 779, 23 Atl. 53.

⁷⁸ Bellview Cemetery Co. v. Faulks, — Ala. —, 73 So. 927; Montgomery Iron Works v. Capital City Ins. Co., 137 Ala. 134, 34 So. 210; Spratling v. Westbrook, 140 Ga. 625, 79 S. E. 536; Dalton & M. R. Co. v. McDaniel, 56 Ga. 191.

The rights of the creditors against each are the same, and the obligation of each of them to the creditors is the same. Henderson v. Hall, 134 Ala. 455, 63 L. R. A. 673, 32 So. 840.

⁷⁹ See § 4122, *supra*.

he may sue the others for contribution, or have them made parties to the suit, in a proper case, so that all rights may be adjusted, but with this matter the creditors are not concerned.⁸⁰ And it follows

80 United States. *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885; *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 349; *Marsh v. Burroughs*, 1 Woods 468, Fed. Cas. No. 9,112.

Alabama. Code, § 823, expressly provides that a creditor may maintain such a suit without joining the other stockholders. *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 So. 611.

California. *Blood v. Serena Land & Water Co.*, 150 Cal. 764, 89 Pac. 1090; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776, 27 Pac. 674; *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777. See also *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70.

Georgia. *Harrell v. Blount*, 112 Ga. 711, 38 S. E. 56.

Illinois. *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388, aff'g 83 Ill. App. 675; *Siegel v. A. H. Andrews & Co.*, 181 Ill. 350, 54 N. E. 1008, aff'g 78 Ill. App. 611; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725; *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330; *Manufacturers' Paper Co. v. Lindblöm*, 80 Ill. App. 267. In *Patterson v. Lynde*, 112 Ill. 196, where it was sought to hold a stockholder in an Oregon corporation, it was held that to enforce the liability of a stockholder for his unpaid subscription in equity "it is indispensable that the corporation (or, if it has ceased to exist, all its stockholders and creditors) should be before the court, so as to be bound and concluded by its action."

Kentucky. *Williams v. Chamberlain*, 29 Ky. L. Rep. 606, 94 S. W. 29.

Maine. Under the Maine statute each stockholder may be sued separately by a creditor or a receiver. *Sul-*

livan v. Farnsworth, 132 Tenn. 691, 179 S. W. 317.

Missouri. *Meyer v. Ruby-Trust Mining & Milling Co.*, 192 Mo. 162, 90 S. W. 821.

Nevada. *Thompson v. Reno Sav. Bank*, 19 Nev. 242, 3 Am. St. Rep. 883, 9 Pac. 121, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

New York. *Bartlett v. Drew*, 57 N. Y. 587.

North Carolina. *Cooper v. Adel Security Co.*, 127 N. C. 219, 37 S. E. 216.

Oregon. *Sargent v. American Bank & Trust Co.*, 80 Ore. 16, 154 Pac. 759, rehearing denied 156 Pac. 431; *Brundage v. Monumental Gold & Silver Min. Co.*, 12 Ore. 322, 7 Pac. 314. Where the object of the bill is to settle or wind up the affairs of a corporation which is insolvent, all of the stockholders must be joined, but when the suit is not brought for that purpose, but seeks solely to obtain payment of the plaintiff's judgment, it is not necessary for him to make them parties. If the defendants desire to have the other stockholders made parties they can bring them in. *Brundage v. Monumental Gold & Silver Min. Co.*, 12 Ore. 322, 7 Pac. 314.

South Dakota. Civ. Code, § 441; *Clinton Mining & Mineral Co. v. Cochran*, 247 Fed. 449.

Virginia. *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 So. 751; *Martin v. South Salem Land Co.*, 94 Va. 28, 28 S. E. 591.

Wisconsin. *Gibbons v. Grinsel*, 79 Wis. 365, 48 N. W. 255; *Pierce v. Milwaukee Const. Co.*, 38 Wis. 253.

"The creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their

that it is immaterial that some of the original defendants in such a suit die pendente lite and that the suit is not revived against their personal representatives,⁸¹ or that the suit is dismissed as to some of the stockholders originally joined.⁸²

demands, the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equities between its various stockholders or partners, corporators or debtors. If A. is bound to pay his debt to the corporation, in order to satisfy its creditors, he cannot defend himself by pleading that these complainants might have got their satisfaction out of B. quite as well. It is true, if it be necessary to a complete satisfaction of the complainants that the corporation be treated as an insolvent, the court may appoint a receiver, with authority to collect and receive all the debts due to the company, and administer all its assets. In this way, all the other stockholders or debtors may be made to contribute." *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380, 15 L. Ed. 349.

"A judgment creditor, who has exhausted his legal remedy, may pursue, in a court of equity, any equitable interest, trust or demand of his debtor, in whosoever hands it may be. And if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate shares of the liability, he might never get his money." *Marsh v. Burroughs*, 1 Woods 463, Fed. Cas. No. 9,112.

This is true although the plaintiff is himself a stockholder and has not paid his subscription in full. *Blood v. Serena Land & Water Co.*, 150 Cal. 764, 89 Pac. 1090.

And it is particularly true where the charter expressly makes the stockhold-

ers liable for the corporate debts to the extent of their unpaid subscriptions. *Harrell v. Blount*, 112 Ga. 711, 38 S. E. 56.

It is also true of a suit to compel payment of the balance due on watered or fictitiously paid up stock. *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725.

Those stockholders who are made defendants cannot object that the remaining stockholders were not joined where they took no steps to have them brought in. *Blood v. Serena Land & Water Co.*, 150 Cal. 764, 89 Pac. 1090.

It is no defense that all the stockholders are not joined as defendants in an action by a receiver, where it does not appear that those who are joined will be called upon to pay more than their just proportion of the liabilities of the corporation. *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489.

The liability is a several one. See § 4099, *supra*.

Where only a part of the stockholders are made parties, they may bring the others in by a cross-bill, and enforce contributions, or they may sue for contribution in an independent suit, after having been compelled to pay more than their share. See § 4102, *supra*.

⁸¹ *Meyer v. Ruby-Trust Mining & Milling Co.*, 192 Mo. 162, 90 S. W. 821.

It is proper to refuse to postpone the trial until representatives of the deceased stockholders can be made parties. *Harrell v. Blount*, 112 Ga. 711, 38 S. E. 56.

⁸² *Cooper v. Adel Security Co.*, 127 N. C. 219, 37 S. E. 216.

This doctrine is not recognized in all jurisdictions. In some states it is held that when a corporation becomes insolvent, and it is necessary to resort to unpaid stock subscriptions for the payment of its debts, only so much of the unpaid capital can be called in as is necessary for the payment of debts, after exhausting all the other assets, and that it is necessary in such a case that an account shall be taken of the amount of debts, assets and unpaid capital, and a decree made for an assessment of the amount due by each stockholder; and where this doctrine is held, it is necessary, of course, that all the stockholders shall be made parties to a creditors' suit to reach unpaid stock subscriptions, unless sufficient excuse is shown for not making them all parties.⁸³ And if the object of a suit is to wind up the affairs of the corporation, all the stockholders, so far as they can be ascertained, should be made parties, so that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits, although the

⁸³ **Indiana.** See *Indiana Novelty Mfg. Co. v. McGill*, 15 Ind. App. 1, 43 N. E. 464.

Nebraska. *Fremont Package Mfg. Co. v. Storey*, 2 Neb. Unoff. 325, 96 N. W. 416.

New York. *Graeber v. Ehrgott*, — App. Div. —, 169 N. Y. Supp. 32; *Warth v. Moore Blind Stitche & Overseamer Co.*, 146 App. Div. 28, 130 N. Y. Supp. 748, aff'd 207 N. Y. 673, 100 N. E. 1135.

Pennsylvania. *Bell's Appeal*, 115 Pa. St. 88, 2 Am. St. Rep. 532, 8 Atl. 177; *Bunn's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166. See also *Cook v. Carpenter*, 212 Pa. 165, 1 L. R. A. (N. S.) 900, 108 Am. St. Rep. 854, 4 Ann. Cas. 723, 61 Atl. 799.

Tennessee. *Sullivan v. Farnsworth*, 132 Tenn. 691, 179 S. W. 317.

Texas. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

The bill should join all the stockholders or charge the impracticability of doing so. *Union City Lumber Co. v. Traverse City, L. & M. R. Co.*, 170 Mich. 205, 136 N. W. 463; *Dunston v. Hoptonic Co.*, 83 Mich. 372, 47 N. W. 322.

A bill will not be dismissed on appeal for failure to charge the impracticability of joining all of the stockholders, where such impracticability is made to appear and no demurrer was interposed. *Union City Lumber Co. v. Traverse City, L. & M. R. Co.*, 170 Mich. 205, 136 N. W. 463.

Stockholders who have been inadvertently omitted may be brought in by leave of court by supplemental summons and complaint. *Warth v. Moore Blind Stitche & Overseamer Co.*, 146 N. Y. App. Div. 28, 130 N. Y. Supp. 748, aff'd 207 N. Y. 673, 100 N. E. 1135.

In a suit to enforce the liability of the holders of bonus or watered stock for the difference between its par value and the amount paid for it, if it appears that there are other stockholders within the jurisdiction who also received stock at less than par or gratuitously, they may be brought in by cross-bill for the purpose of adjusting the equities between them. *Second Nat. Bank of Erie v. Georger*, 246 Fed. 517.

joinder of all of them would not otherwise be necessary.⁸⁴ It is not necessary to join stockholders who are beyond the jurisdiction of the court, or who are insolvent.⁸⁵

Whether a receiver, trustee in bankruptcy or assignee for creditors may join all delinquent stockholders as defendants in a single suit in equity to reach unpaid subscriptions or must sue them separately in actions at law has been considered in a previous section.⁸⁶

As against an objection seasonably and properly made, the corporation itself is a necessary party to a creditors' suit to reach unpaid subscriptions,⁸⁷ unless it is beyond the jurisdiction of the court,⁸⁸ or has been dissolved.⁸⁹ But objection to its nonjoinder is waived if it is not made by demurrer or answer.⁹⁰ It is not a necessary

⁸⁴ *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885; *Brundage v. Monumental Gold & Silver Min. Co.*, 12 Ore. 322, 7 Pac. 314; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57. See also *Pierce v. Milwaukee Const. Co.*, 38 Wis. 253.

In *Patterson v. Lynde*, 112 Ill. 196, it was held that in equity "it is indispensable that the corporation (or if it has ceased to exist, all its stockholders and creditors) should be before the court."

⁸⁵ *Second Nat. Bank of Erie v. Georger*, 246 Fed. 517; *Wilson v. California Wine Co.*, 95 Mich. 117, 54 N. W. 643.

All of the stockholders need not be joined as defendants in an action by a receiver of a foreign corporation to enforce a stockholder's liability on his unpaid subscription. *Leman v. MacLennan*, 28 Ohio Cir. Ct. 137, judgment aff'd 75 Ohio St. 643, 80 N. E. 1129.

⁸⁶ See § 4122, *supra*.

⁸⁷ *United States. Clinton Mining & Mineral Co. v. Cochran*, 247 Fed. 449; *Walsh v. Memphis, C. & N. W. R. Co.*, 2 McCrary 156, 6 Fed. 797; *First Nat. Bank of Hannibal v. Smith*, 6 Fed. 215.

Georgia. King v. Sullivan, 93 Ga. 621, 20 S. E. 76.

Illinois. Patterson v. Lynde, 112 Ill. 196.

Indiana. Indiana Novelty Mfg. Co. v. McGill, 15 Ind. App. 1, 43 N. E. 464.

Mississippi. Perkins v. Sanders, 56 Miss. 733.

New Jersey. Wetherbee v. Baker, 35 N. J. Eq. 501.

New York. Mann v. Pentz, 3 N. Y. 415; *Brinckerhoff v. Brown*, 7 Johns. Ch. 217, 226.

Wisconsin. Coleman v. White, 14 Wis. 700; 80 Am. Dec. 797; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57.

If only part of the stockholders are joined, the corporation is an indispensable party, if it retains its corporate existence. If it has been dissolved, all the stockholders must be made parties. *Continental Adjustment Co. v. Cook*, 152 Fed. 652; *Patterson v. Lynde*, 112 Ill. 196.

⁸⁸ *Walser v. Seligman*, 21 Blatchf. 130, 13 Fed. 415.

⁸⁹ *Clinton Mining & Mineral Co. v. Cochran*, 247 Fed. 449. See also *Walser v. Seligman*, 21 Blatchf. 130, 13 Fed. 415.

⁹⁰ *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777. And see *Wetherbee v. Baker*, 35 N. J. Eq. 501.

"While the corporation is a party to the suit, it is not an indispensable party." *Blood v. Serena Land & Water Co.*, 150 Cal. 764, 89 Pac. 1090.

party to a suit by a trustee in bankruptcy of the corporation, however, since he represents it and stands in its place.⁹¹

§ 4128. — Joinder and splitting of causes of action. A judgment creditor may unite in the same action a claim to compel stockholders to pay up their subscriptions and a claim to enforce their statutory liability for debts of the corporation.⁹² And he may also unite such a claim with one to set aside fraudulent conveyances of the corporate property. And any number of fraudulent grantees and stockholders subject as such for unpaid stock may be joined in one bill.⁹³

Since the liability is contractual,⁹⁴ the right of action to enforce it is indivisible and may not be split.⁹⁵ "Ownership of stock is indeed one of the facts essential to the cause of action, but the number of shares owned is not material. The ownership by one person of different shares does not create different causes of action against him, but the number of shares he owns simply measures the extent of his liability. The contract to pay the debts of the corporation is the foundation of the action, and, as that contract is single, the cause of action upon it is one and indivisible. An action upon that contract and the enforcement of the liability appurtenant to it upon a single share of stock would necessarily bar a subsequent action between the same parties to enforce a liability upon any other shares, under the familiar rule that one may not split his cause of action."⁹⁶ But it has been held that a creditor who has recovered judgment against a stockholder for the amount unpaid on stock subscribed for by him and procured satisfaction of the same may thereafter sue him for the amount due on stock purchased by him from another without violating the rule against splitting causes of action. The two causes of action are based on different contracts and are separate and distinct, and the creditor may either join them in a single action or bring separate actions upon each of them.⁹⁷

⁹¹ *Edwards v. Schillinger*, 245 Ill. 231, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048, aff'g 148 Ill. App. 227.

⁹² See § 4229, *infra*.

⁹³ *Bellview Cemetery Co. v. Faulks*, — Ala. —, 73 So. 927.

⁹⁴ See § 4099, *supra*.

⁹⁵ *Harrison v. Remington Paper Co.*,

140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.).

⁹⁶ *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.).

⁹⁷ *Rogers v. Yoder*, 198 Mo. App. 27, 195 S. W. 50.

§ 4129. — Exhausting legal remedies against corporation; judgment and execution. It is a general principle in relation to creditors' suits, applicable, of course, to suits by creditors of corporations, that a creditor cannot maintain a bill in equity to reach equitable assets of his debtor, and subject them to the payment of his claim, until he has first exhausted his legal remedy;⁹⁸ and this principle applies where a creditor sues in equity to reach unpaid subscriptions and subject them to the payment of his claim.⁹⁹ As a general rule, therefore, a creditor of a corporation cannot maintain such a suit until he has recovered a judgment against the corporation, and an execution thereon has been returned wholly or partly unsatisfied, unless he shows a good excuse.¹

⁹⁸ See § 3206, *supra*.

⁹⁹ *Drennen v. Jenkins*, 180 Ala. 261, 60 So. 856; *Davis v. Scott*, 129 Ark. 226, 195 S. W. 383; *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518; *Fletcher v. Bank of Lonoke*, 71 Ark. 1, 69 S. W. 580; *Merchants' Mut. Adjusting Agency v. Davidson*, 23 Cal. App. 274, 137 Pac. 1091; *Rolapp v. Ogden & N. W. R. Co.*, 37 Utah 540, 110 Pac. 364. And see the cases cited in the following notes.

The liability of a stockholder to answer to the creditors of the corporation or their representatives for the full par value of his shares, where they have been issued to him at less than par, is a secondary liability only, analogous to that of a guarantor, and does not arise until default of the corporation has been judicially ascertained. *Gillin v. Sawyer*, 93 Me. 151, 44 Atl. 677.

The burden of proof, in such case, is upon creditors to show the exhaustion of legal remedies as against the corporation. *Fletcher v. Bank of Lonoke*, 71 Ark. 1, 69 S. W. 580.

A defense that the creditors have not exhausted their legal remedies interposed by certain of the defendants in such a suit inures to the benefit of other defendants who have not answered. *Fletcher v. Bank of Lonoke*, 71 Ark. 1, 69 S. W. 580.

Where the creditor recovers a judgment against the corporation and certain other persons, a showing that the corporation was insolvent, so as to excuse the issuance and return of an execution against it, is not sufficient without a showing that he could not have made his judgment out of the property of the other judgment defendants. *Burch v. Taylor*, 1 Wash. 245.

As to the necessity for exhausting the legal remedies against the corporation before suing to enforce a statutory liability of stockholders to creditors, see § 4129, *infra*.

¹ **United States.** *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 37 L. Ed. 1113; *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 37 L. Ed. 577; *National Tube-Works Co. v. Ballou*, 146 U. S. 517, 36 L. Ed. 1070; *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365; *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 349; *New Hampshire Sav. Bank v. Richey*, 121 Fed. 956; *Holmes v. Sherwood*, 3 McCrary 405, 16 Fed. 725; *Walser v. Seligman*, 13 Fed. 415.

Alabama. Code 1907, § 3744; Code 1896, § 823; *Drennen v. Jenkins*, 180 Ala. 261, 60 So. 856; *Dickinson v. Traphagan*, 147 Ala. 442, 41 So. 272; *Vaughn v. Alabama Nat. Bank*, 143 Ala. 572, 5 Ann. Cas. 665, 42 So. 64;

Where the insolvency of the corporation has been established by the recovery of a judgment by the creditors instituting the suit and a return of no property, it is not necessary for other creditors, who are subsequently joined as parties, to go to the useless expense of reducing their claims to judgment and having an execution returned.²

A creditor proves that he has exhausted his legal remedy by introducing in evidence his judgment against the corporation, with the return unsatisfied of the execution thereon.³ The return of execution unsatisfied is conclusive evidence that the creditor has exhausted his legal remedy, and stockholders cannot avoid its effect by showing

Montgomery Iron Works v. Capital City Ins. Co., 137 Ala. 134, 34 So. 210; **Harris v. Gateway Land Co.**, 128 Ala. 652, 29 So. 611.

Arkansas. **Lester v. Bemis Lumber Co.**, 71 Ark. 379, 74 S. W. 518.

California. **Llewellyn Iron Works v. Abbott Kinney Co.**, 172 Cal. 210, 155 Pac. 986; **Merchants' Mut. Adjusting Agency v. Davidson**, 23 Cal. App. 274, 137 Pac. 1091.

Delaware. **Rev. Code 1915**, ¶ 1965; **John W. Cooney Co. v. Arlington Hotel Co.**, — Del. Ch. —, 101 Atl. 879.

Florida. **Knight & Wall Co. v. Tampa Sand Lime Brick Co.**, 55 Fla. 728, 46 So. 285.

Georgia. **Tichenor v. Williams Block Pavement Co.**, 116 Ga. 303, 42 S. E. 505.

Illinois. **Patterson v. Lynde**, 112 Ill. 196; **Turner Bros. v. Alabama Min. & Mfg. Co.**, 25 Ill. App. 144.

Kentucky. **Hanger v. Apperson**, 168 Ky. 609, 182 S. W. 831.

Maine. **Gillin v. Sawyer**, 93 Me. 151, 44 Atl. 677.

Massachusetts. **E. Remington & Sons v. Samana Bay Co.**, 140 Mass. 494, 5 N. E. 292.

Minnesota. **McConey v. Belton Oil & Gas Co.**, 97 Minn. 190, 106 N. W. 900; **Rule v. Omega Stove & Grate Co.**, 64 Minn. 326, 67 N. W. 60.

Mississippi. **Payne v. Bullard**, 23 Miss. 88, 55 Am. Dec. 74.

Missouri. **Schickle v. Watts**, 94 Mo. 410, 7 S. W. 274.

Montana. **King v. Pony Gold Min. Co.**, 28 Mont. 74, 72 Pac. 309.

New Jersey. **Wetherbee v. Baker**, 35 N. J. Eq. 501.

New Mexico. **Albright v. Texas, S. F. & N. R. Co.**, 8 N. M. 422, 46 Pac. 448.

New York. The statute contains an express provision to this effect. **Sturges v. Vanderbilt**, 73 N. Y. 384; **Graeber v. Ehr Gott**, — App. Div. —, 169 N. Y. Supp. 32; **Warth v. Moore Blind Sticheer & Overseamer Co.**, 146 App. Div. 28, 130 N. Y. Supp. 748, aff'd 207 N. Y. 673, 100 N. E. 1135. See also § 4231 et seq., *infra*.

Pennsylvania. **Driesbach v. Price**, 133 Pa. St. 560, 19 Atl. 569.

Tennessee. **Blake v. Hinkle**, 10 Yerg. 218.

Utah. **Rolapp v. Ogden & N. W. R. Co.**, 37 Utah 540, 110 Pac. 364.

Washington. **Burch v. Taylor**, 1 Wash. St. 245, 24 Pac. 438.

Wisconsin. **Adler v. Milwaukee Patent Brick Mfg. Co.**, 13 Wis. 57.

As to the necessity for exhausting the legal remedies against the corporation before suing to enforce a statutory liability of stockholders to creditors, see § 4231 et seq., *infra*.

² **Williams v. Chamberlain**, 29 Ky. L. Rep. 606, 94 S. W. 29. See also § 4231 et seq., *infra*.

³ **Baines v. Babcock**, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776, 27 Pac. 674. See also § 4231 et seq., *infra*.

that the corporation was in fact the owner and in possession of a large amount of personal property which might have been levied upon.⁴ Nor is it necessary for the creditor to show that the assets of the corporation have been exhausted.⁵

A simple contract creditor cannot maintain such a suit in the federal courts, although a statute of the state may authorize such a proceeding in the state courts.⁶

The excuses for failure to comply with the rule,⁷ and questions relating to the sufficiency and validity of the judgment, execution and return,⁸ will be considered in subsequent sections.

§ 4130. — Conclusiveness of judgment against corporation as against stockholders. It is a well-settled rule that a judgment rendered by a court of competent jurisdiction is conclusive, in the absence of fraud or collusion, against the parties to the suit, and against all persons represented by the parties; and it is also well settled that a corporation represents its stockholders in all matters within the scope of its corporate powers transacted in good faith by its officers. In an action against a corporation by a creditor, the stockholders are represented by the corporation, within this principle; and it follows that the judgment rendered against the corporation therein, if the court has jurisdiction, is conclusive upon the stockholders, in the absence of fraud or collusion, in any collateral suits or proceedings against them, in equity or at law, to compel payment of the balance due on their stock. They cannot attack the judgment, for example, in the absence of fraud or collusion, on the ground that the corporation was not indebted to the creditor in whose favor it has been rendered,⁹ or on the ground that the alleged indebtedness arose out of

⁴ *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776, 27 Pac. 674. See also *Jones v. Green*, 1 Wall. (U. S.) 330, 17 L. Ed. 553.

⁵ *Calder v. Calder Packing Co.*, 160 Ill. App. 620.

⁶ *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 37 L. Ed. 1113.

⁷ See § 4232, *infra*.

⁸ See § 4233, *infra*.

⁹ *United States*. *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 59 L. Ed. 1027, *rev'g* judgment 71 Fla. 89, 71 So. 374, 63 Fla. 64, 58 So. 231; *Hendrickson v. Bradley*, 85 Fed. 508; *Glenn v. Springs*, 26 Fed. 494; *Bisset v.*

Kentucky River Nav. Co., 15 Fed. 353; *Marsh v. Burroughs*, 1 Woods 463, Fed. Cas. No. 9,112.

Alabama. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46; *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 So. 44.

California. *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776, 27 Pac. 674; *Tatum v. Rosenthal*, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136.

Colorado. See *Montgomery v. Whitehead*, 40 Colo. 320, 11 L. R. A. (N. S.) 230, 90 Pac. 509.

Georgia. *Wheatley v. Glover*, 125

an ultra vires transaction, etc.¹⁰ This principle applies to stockholders who are residents of other states.¹¹

The judgment may be attacked by stockholders for want of jurisdiction, or for fraud or collusion between the officers of the corporation and the creditor,¹² nor does it conclude them as to defenses

Ga. 710, 54 S. E. 626. See also *Harrell v. Blount*, 112 Ga. 711, 38 S. E. 56.

Illinois. *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388, aff'g 83 Ill. App. 675; *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330.

Kansas. *Ball v. Reese*, 58 Kan. 614, 62 Am. St. Rep. 638, 50 Pac. 875.

Maine. *Barron v. Paine*, 83 Me. 312, 22 Atl. 218.

Maryland. *Hambleton v. Glenn*, 72 Md. 351, 20 Atl. 121; *Glenn v. Williams*, 60 Md. 93. But see *Williams v. Watters*, 97 Md. 113, 54 Atl. 767, construing a statute of Virginia.

Michigan. *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 97 Am. St. Rep. 453, 89 N. W. 683; *Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 34 L. R. A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095.

Minnesota. *Holland v. Duluth Iron Mining & Development Co.*, 65 Minn. 524, 60 Am. St. Rep. 480, 68 N. W. 50.

Missouri. *Nichols v. Stevens*, 123 Mo. 96, 45 Am. St. Rep. 514, 27 S. W. 613, 25 S. W. 578.

New York. *Stephens v. Fox*, 83 N. Y. 313. And see *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380. Compare *Hastings v. Drew*, 76 N. Y. 9.

Ohio. *Bank of Wooster v. Stevens*, 1 Ohio St. 233; *Henry v. Vermilion & A. R. Co.*, 17 Ohio 187.

Oregon. *Robinson v. Phegley*, 84 Ore. 124, 163 Pac. 1166; *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320; *Saylor v. Commonwealth Investment & Banking Co.*, 38 Ore. 204, 62 Pac. 652.

Compare, however, *Doak v. Stahlman* (Tenn. Ch. App.), 58 S. W. 741.

As to the conclusiveness of a call or assessment in a suit to collect the same, see § 4120, *supra*.

As to the conclusiveness of a judgment against the corporation in a suit against stockholders to enforce their statutory liability, see § 4236, *infra*.

¹⁰ *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776, 27 Pac. 674; *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330.

¹¹ *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46; *Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 34 L. R. A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095.

See also § 4251, *infra*.

¹² **United States.** *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 59 L. Ed. 1027, rev'g judgment 71 Fla. 89, 71 So. 374, 63 Fla. 64, 58 So. 231; *Bissit v. Kentucky River Nav. Co.*, 15 Fed. 353.

California. See *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258, where a judgment was held not to be void for want of jurisdiction or fraud.

Michigan. *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 97 Am. St. Rep. 453, 89 N. W. 683.

Missouri. *Missouri Valley Trust Co. v. St. Joseph, P. & K. C. R. Co.*, 162 Mo. App. 158, 144 S. W. 511. Compare *Nichols v. Stevens*, 123 Mo. 96, 45 Am. St. Rep. 514, 25 S. W. 578.

Oregon. *Robinson v. Phegley*, 84

which are personal to themselves.¹³ "It may be conceded," said the Federal Supreme Court, "that a judgment recovered against a corporation, without fraud or collusion, in a court having jurisdiction over the subject-matter and the party, may consistently with the Fourteenth Amendment be treated as concluding the stockholder respecting the existence and amount of the indebtedness so adjudged. But before a third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself."¹⁴

§ 4131. — Enforcing liability in other states. Since the liability is contractual,¹⁵ it may be enforced in any state where jurisdiction of the stockholder may be obtained.¹⁶

Ore. 124, 163 Pac. 1166; *Saylor v. Commonwealth Investment & Banking Co.*, 38 Ore. 204, 62 Pac. 652.

Texas. *Nesom v. City Nat. Bank*, — Tex. Civ. App. —, 174 S. W. 715.

Utah. *Wilson v. Kiesel*, 9 Utah 397, 35 Pac. 488.

See other cases in the note preceding.

Compare *Hambleton v. Glenn*, 72 Md. 351, 20 Atl. 121.

See also *Stanton v. Gilpin*, 38 Wash. 191, 80 Pac. 290, where it was held that a stockholder might procure the vacation of a judgment rendered against a corporation on service upon a trustee after his connection with the corporation had ended and the corporation had ceased to do business.

A stockholder who negotiated a sale of the judgment to the person who seeks to enforce the same against him is not estopped to set up that it is void for want of jurisdiction where he was ignorant of that fact at the time. *Missouri Valley Trust Co. v. St. Joseph, P. & K. C. R. Co.*, 162 Mo. App. 158, 144 S. W. 511.

There is no presumption in favor of

the regularity and validity of a judgment entered by the clerk of a court of another state in vacation, and such a judgment cannot be made the basis of an action against a stockholder without proof of statutory authority for its rendition in that manner. *Schroeder v. Edwards*, 267 Mo. 459, 184 S. W. 108.

See also § 4235, *infra*.

¹³ *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 59 L. Ed. 1027, rev'g judgment 71 Fla. 89, 71 So. 374, 63 Fla. 64, 58 So. 231.

See also § 4236, *infra*.

¹⁴ *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 59 L. Ed. 1027, rev'g judgment 71 Fla. 89, 71 So. 374, 63 Fla. 64, 58 So. 231.

¹⁵ See § 4099, *supra*.

¹⁶ **United States.** *National Tube Works Co. v. Ballou*, 146 U. S. 517, 36 L. Ed. 1070.

California. *Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204.

Kentucky. *Williams v. Chamberlain*, 29 Ky. L. Rep. 606, 94 S. W. 29.

Minnesota. *Randall Printing Co.*

A receiver is an officer of the court which appoints him, and possesses no right or authority beyond the jurisdictional limits of that court. Hence, in the absence of a conveyance or a statute vesting the property of the corporation in him, he has no absolute right to institute suit to enforce the liability of stockholders on their subscriptions in any other state,¹⁷ nor can the court appointing him give him the right to do so.¹⁸ A receiver, or other person having similar duties

v. *Sanitas Mineral Water Co.*, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606; *Rule v. Omega Stove & Grate Co.*, 64 Minn. 326, 67 N. W. 60.

New Jersey. *McDermott v. Woodhouse*, 87 N. J. Eq. 124, 99 Atl. 103.

New York. *Stoddard v. Lum*, 159 N. Y. 265, 45 L. R. A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108, rev'g 32 App. Div. 565, 53 N. Y. Supp. 607; *McNelus v. Stillman*, 172 App. Div. 307, 158 N. Y. Supp. 428.

Tennessee. *Sullivan v. Farnsworth*, 132 Tenn. 691, 179 S. W. 317.

Utah. *Crofoot v. Thatcher*, 19 Utah 212, 75 Am. St. Rep. 725, 57 Pac. 171.

Virginia. *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 So. 751.

A receiver will not be appointed for an insolvent foreign corporation at the instance of a judgment creditor for the purpose of collecting unpaid subscriptions of stockholders residing at the corporation's domicile, in the absence of a showing in the pleadings that the creditor could not himself maintain an action there for that purpose. *Forsell v. Pittsburg & M. Copper Co.*, 42 Mont. 412, 113 Pac. 479.

An Illinois court has jurisdiction of a suit in equity by the trustee in bankruptcy of a foreign corporation against resident stockholders to set aside a fraudulent dividend applied in payment of their subscriptions and to recover the amount unpaid on such subscriptions, where the bill alleges a specific promise on the part of the defendants to pay the unpaid balance, and the stockholders residing in the

state of the corporation's domicile are insolvent. *Edwards v. Schillinger*, 245 Ill. 231, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048, aff'g 148 Ill. App. 227.

Of course the action must be brought against the stockholder in the state where he resides, since a judgment in personam can only be had upon personal service. *McDermott v. Woodhouse*, 87 N. J. Eq. 124, 99 Atl. 103.

That an assessment against delinquent stockholders can only be made by a court of the state of the corporation's domicile, see § 4119, *supra*.

As to the right to enforce a statutory liability in other states, see § 4247 et seq., *infra*.

17 United States. *Covell v. Fowler*, 144 Fed. 535; *Great Western Min. & Mfg. Co. v. Harris*, 128 Fed. 321, rev'g judgment 111 Fed. 38.

Maryland. *Castleman v. Templeman*, 87 Md. 546, 41 L. R. A. 367, 67 Am. St. Rep. 363, 40 Atl. 275.

Ohio. *Leman v. MacLennan*, 28 Ohio Cir. Ct. 137, aff'd 75 Ohio St. 643, 80 N. E. 1129.

Texas. *Nesom v. City Nat. Bank*, — Tex. Civ. App. —, 174 S. W. 715.

Wisconsin. *Parker v. Stoughton Mill Co.*, 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751.

That he has no right to sue in other states to enforce a statutory liability, see § 4252, *infra*.

18 Leman v. MacLennan, 28 Ohio Cir. Ct. 137, aff'd 75 Ohio St. 643, 80 N. E. 1129.

under any other name, may, however, become vested with title by statute, and in such case he may institute action in a foreign state.¹⁹ So an assignee or trustee for the benefit of creditors having title to the unpaid subscriptions under a deed of assignment or trust may sue wherever the subscribers may be found.²⁰ And generally a receiver²¹ or assignee for the benefit of creditors²² will be permitted, upon principles of comity, to maintain action in his own name against a stockholder to carry out the purposes of the appointment of such receiver, where the local policy and the rights of resident creditors are not interfered with or improperly prejudiced.

¹⁹ *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711, where it was held that under the statute the subscriber in effect promised to pay to the receiver in case one was appointed, so that he had a right to sue as substituted promisee. *Metropolitan Coach Co. v. Freund*, 42 App. Cas. (D. C.) 283. See also *Great Western Min. & Mfg. Co. v. Harris*, 128 Fed. 321, rev'g judgment 111 Fed. 38; *Parker v. Stoughton Mill Co.*, 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751.

See also § 4252, *infra*.

²⁰ *Glenn v. Soule*, 22 Fed. 417; *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46; *Glenn v. Williams*, 60 Md. 93; *Stoddard v. Lum*, 159 N. Y. 265, 45 L. R. A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108, rev'g 32 N. Y. App. Div. 565, 53 N. Y. Supp. 607. See also *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Foote v. Glenn*, 52 Fed. 529; *Liggett v. Glenn*, 51 Fed. 381, rev'g judgment 47 Fed. 472; *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 So. 44.

This is true of a substituted trustee appointed by a court of equity, although he is also given the powers of a receiver and is required to give bond and to account to the court. *Glenn v. Soule*, 22 Fed. 417.

See also § 4252, *infra*.

²¹ *United States*. *Chandler v. Sidde*, 3 Dill. 477, Fed. Cas. No. 2,594.

Illinois. *Patterson v. Lynde*, 112 Ill. 196.

Maryland. *Castleman v. Templeman*, 87 Md. 546, 41 L. R. A. 367, 67 Am. St. Rep. 363, 40 Atl. 275.

Michigan. See *Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 34 L. R. A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095.

New Jersey. See *Swing v. Consolidated Fruit Jar Co.*, 74 N. J. L. 145, 63 Atl. 899.

New York. *Stoddard v. Lum*, 159 N. Y. 265, 45 L. R. A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108; *Dayton v. Borst*, 31 N. Y. 435.

Tennessee. See *Sullivan v. Farnsworth*, 132 Tenn. 691, 179 S. W. 317.

Utah. See *Crofoot v. Thatcher*, 19 Utah 212, 75 Am. St. Rep. 725, 57 Pac. 171.

Wisconsin. See *Parker v. Stoughton Mill Co.*, 97 Wis. 74, 51 Am. St. Rep. 881, 64 N. W. 751.

See *Philadelphia & Gulf S. S. Co. v. Soeffing*, 59 Pa. Super. Ct. 429, and *Philadelphia & Gulf S. S. Co. v. Clark*, 59 Pa. Super. Ct. 415, where a receiver of a Delaware corporation, appointed by a federal court in Pennsylvania, which directed him to institute suits to collect unpaid subscriptions, maintained suits for that purpose in the courts of Pennsylvania.

See also § 4252, *infra*.

²² *Stoddard v. Lum*, 159 N. Y. 265, 45 L. R. A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108.

§ 4132. Set-off of debts due to stockholders. When a stockholder is indebted to a corporation for a balance on his stock, and also has a valid claim against the corporation, he may set off his claim against his liability, provided the corporation is not insolvent, and payment for the stock is not necessary to satisfy the claims of other creditors.²³ If the corporation allows such a set-off when it is solvent, and afterwards becomes insolvent, creditors cannot hold the stockholder liable.²⁴ It is well settled, however, in most jurisdictions, that when a corporation is known to be insolvent, stockholders who are also creditors cannot set off the debts due them from the corporation against their liability for their stock, and thus obtain a preference over the other creditors; but they must pay the full amount due on their stock, and then come in and share pro rata with the other creditors.²⁵

²³ See § 661, *supra*.

²⁴ See § 3515, *supra*.

²⁵ **United States.** *Seovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Scammon v. Kimball*, 92 U. S. 362, 23 L. Ed. 483; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Fidelity Trust Co. v. Washington-Oregon Corporation*, 217 Fed. 588; *In re Howe Mfg. Co.*, 193 Fed. 524; *Babbitt v. Read*, 173 Fed. 712; *Bausman v. Kinnear*, 79 Fed. 172, *rev'g* 73 Fed. 69.

California. See *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319.

Colorado. *Colorado Fuel & Iron Co. v. Sedalia Smelting Co.*, 13 Colo. App. 474, 59 Pac. 222.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Georgia. *Bailey v. Anderson*, 142 Ga. 11, 82 S. E. 290; *Wilkinson v. Berstock*, 111 Ga. 187, 36 S. E. 623.

Illinois. *Calder v. Calder Packing Co.*, 160 Ill. App. 620.

Indiana. *Indiana Novelty Mfg. Co. v. McGill*, 15 Ind. App. 1, 43 N. E. 464.

Iowa. *Merrill v. Timbrell*, 123 Iowa 375, 98 N. W. 879; *Boulton Carbon Co. v. Mills*, 78 Iowa 460, 5 L. R. A. 649, 43 N. W. 290; *Singer v. Given*, 61 Iowa 93, 15 N. W. 858.

Massachusetts. *Everett v. Foster*, 223 Mass. 553, 112 N. E. 239.

Michigan. *Utica Fire Alarm Tel. Co. v. Waggoner Watchman Clock Co.*, 166 Mich. 618, 132 N. W. 502.

Minnesota. *Richardson v. Merritt*, 74 Minn. 354, 77 N. W. 234, 407, 968.

Nebraska. *Wyman v. Williams*, 53 Neb. 670, 74 N. W. 48.

Nevada. *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

New Jersey. *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, *aff'd* 82 N. J. Eq. 364, 91 Atl. 1069; See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843; *Hebberd v. Southwestern Land & Cattle Co.*, 55 N. J. Eq. 18, 36 Atl. 122; *Williams v. Traphagan*, 38 N. J. Eq. 57.

New York. *Lawrence v. Nelson*, 21 N. Y. 158.

North Carolina. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538.

Pennsylvania. *Long v. Penn. Ins. Co.*, 6 Pa. St. 421.

South Carolina. *Efrd v. Piedmont Land Improvement & Investment Co.*, 55 S. C. 78, 32 S. E. 758, 897.

Texas. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Washington. *Murphy v. Pantan*, 96 Wash. 637, 165 Pac. 1074.

This rule has been based on the ground that "the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation";²⁶ and also on the ground that when persons deal with a corporation, they have a right to assume that the capital stock has been or will be paid in, so that it will be available for the payment of their claims, and it would operate as a fraud upon them to allow stockholders, instead of paying this fund into the treasury of the corporation, to wait until the corporation becomes insolvent, and then appropriate what they owe to their own claims against the corporation, to the exclusion of the other creditors.²⁷ "To apply such an unpaid subscription as a set-off to an ordinary claim held by the subscriber against the corporation, would be to appropriate the rights of the other creditors in the subscription debt to the exclusive benefit of the person owing it; or, on the other hand, it might, as respects his co-stockholders, subject him to the payment of more than his ratable share of the bankrupt's debts."²⁸ Another reason sometimes given is that the debts are not mutual or in the same right.²⁹

England. *Black & Co.'s Case*, 8 Ch. App. 254; *Grissell's Case*, 1 Ch. App. 528; *Mudford's Case*, 14 Ch. Div. 634; *Gill's Case*, 12 Ch. Div. 755; *Barnett's Case*, L. R. 19 Eq. 449; *Calisher's Case*, L. R. 5 Eq. 214.

The allowance of a claim in bankruptcy proceedings will not be reconsidered so as to permit the liability of the claimant as a stockholder to be set off against it. *In re Howe Mfg. Co.*, 193 Fed. 524.

As against creditors of an insolvent corporation, an agreement by the directors to allow debts due by it to certain of the directors to be applied on the unpaid portion of their stock is void. *Wyman v. Williams*, 53 Neb. 670, 74 N. W. 48.

As to the right of set-off in actions to enforce the statutory liability of stockholders, see § 4245, *infra*.

²⁶ *Sawyer v. Hoag*, 17 Wall. (U. S.) 610, 21 L. Ed. 731; *Kiskadden v. Steinle*, 203 Fed. 375; *Bausman v. Kinnear*, 79 Fed. 172, rev'g 73 Fed. 69. See also *Indiana Novelty Mfg. Co. v. McGill*, 15 Ind. App. 1, 43 N.

E. 464. And see cases cited in the preceding note.

²⁷ *Indiana Novelty Mfg. Co. v. McGill*, 15 Ind. App. 1, 43 N. E. 464.

²⁸ *Kiskadden v. Steinle*, 203 Fed. 375.

²⁹ "The reason usually assigned for this rule is that the debt owing by the stockholder to the corporation after insolvency and that owing from the corporation to him are not in the same right, the former being a debt payable to a trust fund." *Bausman v. Kinnear*, 79 Fed. 172, rev'g 73 Fed. 69.

There is no right of set-off where the liability is enforced by a receiver, since the receiver represents the creditors and hence the debtor and creditor do not claim in the same right. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538.

A stockholder who is also a creditor is not entitled to a set-off as against the corporation's trustee in bankruptcy, since there is no mutual debt or credit between the stockholder and the estate. *Babbitt v. Read*, 173

Some courts have held that this rule does not apply when a single creditor sues a stockholder at law, as authorized by a statute, and that in such a case he may plead as a counterclaim a debt due to him from the corporation.³⁰ And the right of set-off has also been held to exist in a suit in equity brought by one or more creditors against several stockholders, where it is not sought to obtain an accounting in behalf of all the creditors against all the stockholders nor to have the assets of the corporation collected and distributed pro rata under a decree of the court.³¹ The right has also been held

Fed. 712. In such case the debts are not mutual nor in same right. In re Howe Mfg. Co., 193 Fed. 524.

See also § 4245, *infra*.

³⁰ *Indiana Novelty Mfg. Co. v. McGill*, 15 Ind. App. 1, 43 N. E. 464. See also *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70; *Wilkinson v. Bertock*, 111 Ga. 187, 36 S. E. 623.

This is true in a statutory proceeding for an execution against a shareholder. *Rood v. Crocus Hill Min. Co.*, 157 Mo. App. 405, 139 S. W. 222; *Austin Powder Co. v. Commercial Lead Co.*, 134 Mo. App. 183, 114 S. W. 67; *Stinebaker v. National Restaurant Co.*, 133 Mo. App. 250, 113 S. W. 237.

In an action on a non-negotiable note, given for a stock subscription, by a corporate creditor to whom it has been assigned by the corporation as collateral security for an existing past due indebtedness, the maker may set off a debt due him from the corporation. *Indiana Novelty Mfg. Co. v. McGill*, 15 Ind. App. 1, 43 N. E. 464.

In *Stinebaker v. National Restaurant Co.*, 133 Mo. App. 250, 113 S. W. 237, the evidence was held to sustain a finding that money to pay certain corporate debts was advanced by a stockholder with the knowledge and consent of the managing officers of the company, and that such advances were treated by them as creating an indebtedness of the company to him.

See also § 4245, *infra*.

³¹ *Shields v. Hobart*, 172 Mo. 491, 95 Am. St. Rep. 529, 72 S. W. 669; *Austin Powder Co. v. Commercial Lead Co.*, 134 Mo. App. 183, 114 S. W. 67.

"If a defunct corporation is indebted to a holder of unpaid shares, the latter should enjoy the same facilities for obtaining satisfaction of his debt any other creditor has, and not be discriminated against by permitting a judgment creditor to collect his demand in full out of the shareholder's liability on his shares. The two kinds of creditors are put on an equal footing as regards obtaining priority of satisfaction out of the assets of the company, and their success made to depend on their comparative diligence. As the holder of unpaid shares cannot proceed against himself for satisfaction of his claim, his liability is an asset of the company which is not accessible to him by the statutory remedy; and hence his equality with other creditors ought to be protected, as regards said asset, by allowing him to set off any debt the company owes him, if another creditor seeks satisfaction from him." *Austin Powder Co. v. Commercial Lead Co.*, 134 Mo. App. 183, 114 S. W. 67.

That there is no right of set off in an equity suit instituted by all the creditors, or for the benefit of all of them, against the corporation and all its shareholders to have an accounting taken of its total assets and liabilities and to have the former dis-

to exist as against an assignee of the corporation for the benefit of creditors, in the absence of fraud and where there is no pretense that the stock has been paid for in full.³² It has been held that where in receivership proceedings it is found that the corporation is indebted to a director, the said amount may be deducted from the amount of the unpaid subscription under order and decree of the court,³³ and also that advances made by a stockholder to the corporation may be applied to the payment of his indebtedness for the difference between the par value of his stock and the amount he paid for it, in an action by the corporation's trustee in bankruptcy.³⁴ But on the other hand it has been held that the trustee in bankruptcy of an insolvent corporation cannot enforce the liability of a stockholder for the difference between the par value of stock issued to him as fully paid and the amount which he actually paid for it, by setting such liability off against a debt owed to such stockholder by the corporation.³⁵

It has been held that in an action against a receiver on a claim against the corporation, he may counterclaim for the amount of the creditor's unpaid subscription.³⁶ But there is also authority to the effect that amounts due from bondholders on account of unpaid subscriptions for stock will not be set off against the bonds held by them in a suit to foreclose a mortgage securing the bonds.³⁷

tributed pro rata among all its creditors, see *Austin Powder Co. v. Commercial Lead Co.*, 134 Mo. App. 183, 114 S. W. 67.

In *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274, which was a suit in the nature of a creditor's bill by a creditor of a foreign corporation, who had exhausted his remedy at law against it, to subject the amount due on the defendant's subscription to the payment of his claim, it was held that the defendant could not set off a debt due him from the corporation.

³² Under such circumstances a stockholder in a savings bank may set off, as against its assignee for the benefit of creditors, a claim for money which he has on deposit with the bank against his liability for the unpaid part of his subscription. *Niles v. Olszak*, 87 Ohio St. 229, Ann. Cas. 1913 E 1020, 100 N. E. 820.

Compare *Kiskadden v. Steinle*, 203 Fed. 375.

³³ *Kroegher v. Calivada Colonization Co.*, 119 Fed. 641.

³⁴ *Witt v. Nelson*, — Tex. Civ. App. —, 169 S. W. 381.

³⁵ *Kiskadden v. Steinle*, 203 Fed. 375. The court in this case distinguishes *Niles v. Olszak*, 87 Ohio St. 229, Ann. Cas. 1913 E 1020, 100 N. E. 820, on the ground that in that case the stock was not issued under the pretense of being fully paid. In the *Niles* case the court also expressly bases its decision on this ground.

³⁶ *Van Schaick v. Mackin*, 129 N. Y. App. Div. 335, 113 N. Y. Supp. 408.

³⁷ *Fidelity Trust Co. v. Washington-Oregon Corporation*, 217 Fed. 588.

Dividends ordered to be paid creditors out of the assets of an insolvent corporation may be applied on their liability as stockholders.³⁸ And even where no right of set-off exists, dividends on the claim of a stockholder against a bankrupt corporation may be withheld and applied on his liability on his subscription in case he fails to pay it.³⁹

The right of set-off may be given to stockholders by an express provision of the statute.⁴⁰

§ 4133. Application of the statute of limitations—General principles. There are some early decisions and some dicta to the effect that subscribers for stock in a corporation cannot oppose the statute of limitations to a claim in equity by creditors to have the stock paid up, on the ground that, before payment, the stockholders are chargeable with a trust in favor of creditors, and this trust "is a continuing subsisting trust and confidence to which the statute of limitations has no application."⁴¹ According to the decided weight of authority, however, unpaid subscriptions simply create, as to the amount due thereon, the relation of debtor and creditor between the subscribers and the corporation, and if the statute of limitations runs against an action by the corporation to collect a subscription, as it may,⁴² it also runs, in the absence of fraud, against a suit in equity by creditors to compel payment, or an action by a receiver or assignee.⁴³

³⁸ *Hynes v. Illinois Trust & Savings Bank*, 226 Ill. 95, 10 L. R. A. (N. S.) 472, 80 N. E. 753.

The stockholder is entitled to an offset to the extent of the dividend declared. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538.

See also § 4245, *infra*.

³⁹ *Kiskadden v. Steinle*, 203 Fed. 375.

But where the liability of a creditor stockholder for the difference between the par value of stock issued to him as fully paid and the amount actually paid therefor is to the creditors and not to the corporation, so that the trustee in bankruptcy of the corporation has no right to enforce it, and there is no suggestion that the stockholder is not financially responsible, his share of the money distributable to creditors will not be impounded nor payment of his claim against the

corporation postponed until his liability is satisfied. *Courtney v. Croxton*, 239 Fed. 247.

⁴⁰ *Appleton v. Turnbull*, 84 Me. 72, 24 Atl. 592.

⁴¹ *Georgia*. *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

Louisiana. *Succession of Shropshire*, 12 La. Ann. 527; *Stark v. Burke*, 9 La. Ann. 341; *Brown v. Union Ins. Co.*, 3 La. Ann. 177.

Mississippi. *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74.

Missouri. *McGinnis v. Barnes*, 23 Mo. App. 413.

Pennsylvania. *Appeal of Mack*, 7 Atl. 481; *Allibone v. Hager*, 46 Pa. St. 48.

Utah. *Crofoot v. Thatcher*, 19 Utah 212, 75 Am. St. Rep. 725, 57 Pac. 171.

⁴² See § 656, *supra*.

⁴³ *Alabama*. *Curry v. Woodward*, 53 Ala. 371.

So, too, liability on a subscription of a deceased stockholder may be

Illinois. *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725, aff'g 105 Ill. App. 271; *Great Western Tel. Co. v. Gray*, 122 Ill. 630, 14 N. E. 214, rev'g 23 Ill. App. 72.

Nevada. *Thompson v. Reno Sav. Bank*, 19 Nev. 171, 3 Am. St. Rep. 881, 7 Pac. 870.

New York. *Williams v. Taylor*, 120 N. Y. 244, 24 N. E. 288, rev'g *Williams v. Meyer*, 41 Hun 545.

Oregon. *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691, 908.

Pennsylvania. *Hamilton v. Clarion, M. & P. R. Co.*, 144 Pa. St. 34, 13 L. R. A. 779, 23 Atl. 53.

South Carolina. *South Carolina Mfg. Co. v. Bank of South Carolina*, 6 Rich. Eq. 227.

Utah. *Crofoot v. Thatcher*, 19 Utah 212, 75 Am. St. Rep. 725, 57 Pac. 171.

Vermont. *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313.

Virginia. *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920.

Canada. *In re Haggert Bros. Mfg. Co.*, 19 Can. App. Cas. 582.

A creditor has no better right than the corporation itself, and if the cause of action is barred as against the corporation, it is also barred as against a creditor. *Leighton v. Leighton Lea Ass'n*, 146 N. Y. App. Div. 255, 130 N. Y. Supp. 935, 74 N. Y. Misc. 229, 131 N. Y. Supp. 561.

"The relation of the stockholder who has not paid for his stock, to the corporation or the creditor, is the ordinary one of debtor." There is nothing in such relation upon which to base an argument that the unpaid subscription is, in the subscriber's hands, a trust fund for the benefit of creditors, and hence that the statute does not apply. *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725, aff'g 105 Ill. App. 271.

"It appears to the court a misap-

prehension to suppose that, as between the creditors of a corporation and a defaulting subscriber, any trust exists. The fiduciary relation may be between the creditors and the corporation, but the contract of the subscriber to the stock is direct and single. No privity exists between him, as an individual, and any creditor of the corporation. He can only be reached by the creditor through the corporation; and this is the only equity of the creditor, to wit, to be subrogated, *pro hac vice*, to the rights of the corporation. If the rights of the corporation are lost, or their remedy barred, the creditor has no equity to revive them. The statute of limitations is not an act of amnesty. It probably proceeds on the presumption that the debt has been paid, but that, from lapse of time, the evidence of payment has been lost or destroyed." *South Carolina Mfg. Co. v. Bank of State*, 6 Rich. Eq. (S. C.) 227, quoted with approval in *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691, 908.

The statute governing actions on contracts applies. *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920.

Where the subscription is not in writing, the statute prescribing a limitation of three years in the case of verbal contracts applies. *Liberty Sav. Bank v. Otter View Land Co.*, 96 Va. 352, 31 S. E. 511.

In Arkansas the period of limitation in an action based on a written contract of subscription is five years. *Davis v. Scott*, 129 Ark. 226, 195 S. W. 383; *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518.

In New York the six-year statute applies. *Leighton v. Leighton Lea Ass'n*, 146 App. Div. 255, 130 N. Y. Supp. 935; *Id.* 122 N. Y. Supp. 139; *Leighton v. Leighton Lea Ass'n*, 74 N. Y. Misc. 229, 131 N. Y. Supp. 561.

In Oregon the period of limitation

barred by failure to present a claim against his estate within the time fixed by the statute of nonclaim.⁴⁴

The law of the forum determines the time within which the action must be commenced.⁴⁵ But the time when the cause of action arose, and therefore the time when the statute commenced to run, is governed by the law of the state where the corporation was organized.⁴⁶ It is sometimes provided by statute that no action shall be brought to enforce a cause of action arising in another state after the expiration of the time limited by the laws of the latter state for bringing an action upon it.⁴⁷

is six years. *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691, 908.

⁴⁴ *Garesche v. Lewis*, 15 Mo. App. 565, aff'd 93 Mo. 197, 6 S. W. 54; *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736; *Rea v. Eslick*, 87 Wash. 125, 151 Pac. 256.

If a claim is not presented within the time prescribed, it can only be paid out of subsequently discovered estate not inventoried or accounted for. *Snydacker v. Swan Land & Cattle Co.*, 154 Ill. 220, 40 N. E. 466, rev'g 51 Ill. App. 211.

Under the Ohio statute, where the cause of action accrues after the expiration of the time limited for suing the personal representative and after the estate has been closed, a recovery against the residuary legatee is not prevented by the fact that the claim was not presented to and suit brought against said representative. *Thomas v. Kalbfus*, — Ohio St. —, 119 N. E. 412.

⁴⁵ *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, aff'g 83 Iowa 430, 50 N. W. 45; *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790; *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Brown v. Allebach*, 166 Fed. 488; *Glenn v. Williams*, 60 Md. 93; *Crofoot v. Thatcher*, 19 Utah 212, 75 Am. St. Rep. 725, 57 Pac. 171.

See also § 4238 et seq., *infra*.

⁴⁶ *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262; *Crofoot v. Thatcher*, 19 Utah 212, 75 Am. St. Rep. 725, 57 Pac. 171.

The question at what time a cause of action against a stockholder of an Illinois corporation accrued within the meaning of the Iowa statute of limitations is not a federal question, but a local question, upon which the judgment of the highest Iowa court cannot be reviewed by the Federal Supreme Court. *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, aff'g judgment 83 Iowa 430, 50 N. W. 45. In this case the Iowa court applied the law of Iowa instead of the law of Illinois in determining when the cause of action arose.

See also § 4238 et seq., *infra*.

⁴⁷ *Otter View Land Co.'s Receiver v. Bolling's Ex'x*, 24 Ky. L. Rep. 1157, 70 S. W. 834; *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17.

A holding by the court of the corporation's domicile that an action by a receiver against stockholders residing in that state is barred is not res adjudicata as against stockholders residing in another state, and who were not parties to the suit, and cannot be taken advantage of by them to bar an action against them under such a statute. *Otter View Land Co.'s Receiver v. Bolling's Ex'x*, 24 Ky. L. Rep. 1157, 70 S. W. 834.

See also § 4238 et seq., *infra*.

As in other cases, the defense of limitations is a personal one, available alone to the party in whose behalf it may exist.⁴⁸ It must be pleaded if relied on.⁴⁹

§ 4134. — Accrual of right of action. By the weight of authority, when subscriptions are payable upon call only, the statute of limitations does not begin to run, either as against the corporation or as against creditors, until a call is made, either by the directors or by a court of competent jurisdiction, although the corporation has ceased to do business and has made an assignment of all its property, including unpaid subscriptions, for the benefit of creditors; and it does begin to run from the time of such a call,⁵⁰ or, in some juris-

⁴⁸ *Otter View Land Co.'s Receiver v. Bolling's Ex'x*, 24 Ky. L. Rep. 1157, 70 S. W. 834.

⁴⁹ *Otter View Land Co.'s Receiver v. Bolling's Ex'x*, 24 Ky. L. Rep. 1157, 70 S. W. 834.

⁵⁰ **United States.** *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790; *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262, rev'g 28 Fed. 907, 24 Fed. 536, 23 Fed. 695; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *In re Phoenix Hardware Co.*, 249 Fed. 410; *Brown v. Allebach*, 166 Fed. 488; *Glenn v. Foote*, 36 Fed. 824; *Glenn v. Macon*, 32 Fed. 7; *Glenn v. Soule*, 22 Fed. 417.

Alabama. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46; *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 So. 44; *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92; *Curry v. Woodward*, 53 Ala. 371. See *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 So. 611.

California. *Union Sav. Bank of San Jose v. Leiter*, 145 Cal. 696, 79 Pac. 441; *Vermont Marble Co. v. Deelee Granite Co.*, 135 Cal. 579, 56 L. R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057; *Glenn v. Saxton*, 68 Cal. 353.

District of Columbia. *Glenn v. Sothoron*, 4 App. Cas. 125.

Georgia. *Glenn v. Howard*, 81 Ga.

383, 12 Am. St. Rep. 318, 8 S. E. 636.

Illinois. *Great Western Tel. Co. v. Gray*, 122 Ill. 630, 14 N. E. 214.

Kentucky. *Otter View Land Co.'s Receiver v. Bolling's Ex'x*, 24 Ky. L. Rep. 1157, 70 S. W. 834.

Louisiana. *Brown v. Union Ins. Co.*, 3 La. Ann. 177.

Maryland. *Glenn v. Williams*, 60 Md. 93.

Missouri. *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644; *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17.

Nevada. *Thompson v. Reno Sav. Bank*, 19 Nev. 171, 3 Am. St. Rep. 881, 7 Pac. 870.

New Jersey. *McCarter v. Ketcham*, 72 N. J. L. 247, 62 Atl. 693.

New York. *Williams v. Taylor*, 120 N. Y. 244, 24 N. E. 288, rev'g 41 Hun 545. See *Leighton v. Leighton Lea Ass'n*, 122 N. Y. Supp. 139.

North Carolina. *Cooper v. Adel Security Co.*, 127 N. C. 219, 37 S. E. 216.

Ohio. *Thomas v. Kalbfus*, 119 N. E. 412; *Warner v. Callender*, 20 Ohio St. 190.

Oregon. See *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691, 908.

Pennsylvania. *Cook v. Carpenter*, 212 Pa. 165, 1 L. R. A. (N. S.) 900, 108 Am. St. Rep. 854, 4 Ann. Cas. 723, 61 Atl. 799.

dictions, from the time when such a call or assessment becomes due and payable.⁵¹ And it has been held that where the court adopts a call previously made by the corporation, the statute commences to run at the time fixed by the company for its payment rather than at the time fixed by the court.⁵² It is generally held that the call need not be made within any particular time from the date of the subscription,⁵³ although there are some cases which apparently hold that the call must be made within a reasonable time after the subscription contract is entered into, and that the action is barred if the call is not made until after the statute has run.⁵⁴

In states where the liability upon unpaid subscriptions is deemed to become fixed and immediately due upon the declared or notorious insolvency of the company, without any call,⁵⁵ the statute of limitations commences to run from that time, although no call has been made.⁵⁶ And it has also been held that the statute commences to run

South Carolina. *Grice v. Anderson*, 96 S. E. 222.

Tennessee. *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736; *Marr v. Bank of West Tennessee*, 4 Lea 578; *Moses v. Ocoee Bank*, 1 Lea 398.

Virginia. *Liberty Sav. Bank v. Otter View Land Co.*, 96 Va. 352, 31 S. E. 511; *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806; *Lewis' Adm'r v. Glenn*, 84 Va. 947, 6 S. E. 866.

If a call by directors in liquidation for the full amount remaining due on the stock is rescinded and no part of the same is paid, their power to levy assessments is not thereby exhausted, and the statute does not commence to run against a subsequent assessment for the same amount until the same is made. *Union Sav. Bank of San Jose v. Leiter*, 145 Cal. 696, 79 Pac. 441.

This is true of demand stock notes given by the stockholders of an insurance company. *Kilbreath v. Gaylord*, 34 Ohio St. 305; *Crofoot v. Thatcher*, 19 Utah 212, 75 Am. St. Rep. 725, 57 Pac. 171.

See also § 656, *supra*.

⁵¹ *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920.

⁵² *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920.

⁵³ *Brown v. Allebach*, 166 Fed. 488; *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17; *Cooper v. Adel Security Co.*, 127 N. C. 219, 37 S. E. 216; *Cook v. Carpenter*, 212 Pa. 165, 1 L. R. A. (N. S.) 900, 108 Am. St. Rep. 854, 4 Ann. Cas. 723, 61 Atl. 799.

See also § 656, *supra*.

⁵⁴ See § 656, *supra*.

⁵⁵ See § 4118, *supra*.

⁵⁶ *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644. See also *Thompson v. Reno Sav. Bank*, 19 Nev. 171, 3 Am. St. Rep. 881, 7 Pac. 870.

The statute begins to run when the insolvency of the corporation is ascertained by a judicial decree or an assignment for the benefit of creditors. *Swearingen v. Sewickley Dairy Co.*, 198 Pa. 68, 53 L. R. A. 471, 47 Atl. 941; *Franklin Sav. Bank v. Bridges (Pa.)*, 8 Atl. 611.

The statute runs from the time when the insolvency of the corporation is established, either by a general assignment or by a judgment and

when the corporation closes its doors and ceases all its usual and ordinary business, with debts remaining unpaid,⁵⁷ or, when it has been dissolved, from the date of the dissolution.⁵⁸ If a receiver is required by statute to collect unpaid subscriptions at once, and no order of court is necessary to entitle him to sue, the statute runs from the date of his appointment.⁵⁹

return of nulla bona. *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736.

The creditor's right of action accrues at least as soon as the corporation disposes of all of its property and assets, ceases to be a going concern, and becomes notoriously insolvent. *Chilberg v. Siebenbaum*, 41 Wash. 663, 84 Pac. 598.

Where a corporation is adjudged insolvent or makes an assignment for the benefit of its creditors, the right to enforce liability against its members on account of unpaid subscriptions accrues immediately, and the statute runs from that time. *Boyd v. Mutual Fire Ass'n of Eau Claire*, 116 Wis. 155, 61 L. R. A. 918, 96 Am. St. Rep. 948, 94 N. W. 171, 90 N. W. 1086.

"So long as the corporation is solvent, the whole subscription is due in accordance with its terms and is payable when and as called for by the corporation. But when the corporation becomes insolvent, the contract between it and the subscriber is terminated and his debt to it then is only for such part of his subscription as is required to pay the corporate debts. It is a debt not to it in its own right but in the right of its creditors. But it would seem that the status of the stockholder as holder of a fund liable at least contingently to the creditors, must be fixed at the time and by the fact of the ascertainment of insolvency. It is the general rule that insolvency fixes the relative rights of all the parties concerned. From that moment the unpaid subscriptions become part of the assets

for the payment of the creditors. It is true they are special or as they may be called reserved assets not to be put in distribution until the insufficiency of the other assets is shown, but this is no reason why the creditors may not proceed at once to show that fact." *Swearingen v. Sewickley Dairy Co.*, 198 Pa. 68, 53 L. R. A. 471, 47 Atl. 941, quoted in part with approval in *West v. Topeka Sav. Bank*, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

See generally, as to calls, §§ 669-687, *supra*.

⁵⁷ *West v. Topeka Sav. Bank*, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

In *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74, it was held that if the statute could be interposed as a defense at all, it did not begin to run until the corporation had ceased to elect a directory, or to carry on its business.

⁵⁸ *Garesche v. Lewis*, 93 Mo. 197, 6 S. W. 54, 15 Mo. App. 565.

Where an insolvent corporation makes an assignment and surrenders its charter, the statute commences to run as soon as the surrender is accepted by the legislature. *Branch, Sons & Co. v. Knapp*, 61 Ga. 614.

⁵⁹ Under a statute requiring the receiver, in the case of a voluntary dissolution of a corporation to "immediately proceed and recover" any sum remaining due on stock subscriptions, the statute commences to run immediately upon the appointment of the receiver. *Webber v. Hovey*, 108 Mich. 49, 65 N. W. 619.

If the subscription is payable in instalments at specified times, so that no call is necessary,⁶⁰ the statute commences to run as to each instalment from the time when it becomes due.⁶¹

In some jurisdictions it is held that the right of action does not accrue, and hence that the statute does not commence to run against it, until the corporation is shown to be insolvent by the recovery of a judgment and a return of *nulla bona*, and that it does begin to run from that time.⁶² In a jurisdiction where the creditor is not required to exhaust his legal remedies against the corporation if it is insolvent,⁶³ it has been held that the statute commences to run when the creditor has notice of such insolvency, and that notice to the creditor will be presumed as soon as the insolvency of the corporation

⁶⁰ See § 669, *supra*.

⁶¹ *Alabama*. *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 So. 611.

Kansas. *West v. Topeka Sav. Bank*, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

Louisiana. *Consolidated Ass'n of Planters of Louisiana v. Lord*, 35 La. Ann. 425; *Brown v. Union Ins. Co.*, 3 La. Ann. 177.

Maryland. *Williams v. Taylor*, 99 Md. 306, 57 Atl. 641; *Williams v. Watters*, 97 Md. 113, 54 Atl. 767.

New York. *Leighton v. Leighton Lea Ass'n*, 122 N. Y. Supp. 139.

Ohio. *Thomas v. Kalbfus*, 119 N. E. 412.

Oregon. *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691, 908.

South Carolina. *South Carolina Mfg. Co. v. Bank of State*, 6 Rich. Eq. 227.

Virginia. *Williams v. Matthews*, 103 Va. 180, 48 S. E. 861.

Where ten per cent of the amount subscribed is due when the subscription is made, the statute begins to run as to it at that time. *Thomas v. Kalbfus*, — *Ohio St.* —, 119 N. E. 412.

See also § 656, *supra*.

⁶² *Alabama*. *Montgomery Iron Works v. Roman*, 147 Ala. 434, 41 So. 811; *Vaughn v. Alabama Nat. Bank*, 143 Ala. 572, 5 Ann. Cas. 665, 42 So.

64; *Montgomery Iron Works v. Capital City Ins. Co.*, 137 Ala. 134, 34 So. 210.

Arkansas. *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518; *Wilkins v. Worthen*, 62 Ark. 401, 36 S. W. 21.

Georgia. *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

Missouri. *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644.

Montana. *King v. Pony Gold Min. Co.*, 28 Mont. 74, 72 Pac. 309.

New York. *Christensen v. Colby*, 43 Hun 362; *Christensen v. Quintard*, 36 Hun 334.

Tennessee. *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736.

This is true of a statutory remedy by execution, where the recovery of a judgment against the corporation and the return of an execution *nulla bona* is necessary to entitle the creditor to such relief. *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644.

As to the necessity for the recovery of a judgment against the corporation and the return of an execution thereon unsatisfied, see § 4129, *supra*.

⁶³ See § 4180, *infra*.

becomes a matter of general notoriety.⁶⁴ And it has also been held that, under such circumstances, the accrual of the cause of action is not postponed until the creditor exhausts his legal remedies, even though he does in fact subsequently do so.⁶⁵ It has also been held that the right of action accrues whenever it is clear that the corporation has no property from which the claim may be collected rather than from the time judgment is recovered against the corporation, even though the recovery of judgment is necessary before the stockholder can be sued.⁶⁶

If the statute permits the creditor to sue the corporation and garnish the stockholder at the same time, his cause of action against the stockholder accrues as soon as the debt against the corporation falls due, and the statute runs from that time.⁶⁷

If the statute provides two methods whereby a creditor may enforce the stockholder's liability, the statute of limitations begins to run whenever a right accrues to the creditor to proceed directly against the stockholder by either method, and when the statutory period, counting from that time, has elapsed, the right to proceed by either method is barred.⁶⁸

The liability of the stockholders does not necessarily continue for as long a time as the creditors may be able to keep their obligations alive against the corporation.⁶⁹

§ 4135. — Bonus or watered stock. The statute of limitations does not begin to run against a suit by creditors of a corporation to

⁶⁴ Davis v. Scott, 129 Ark. 226, 195 S. W. 383.

If the issuance of an execution and a return of nulla bona is rendered unnecessary because of the insolvency of the company, the statute commences to run when the creditor has notice of such insolvency. Lester v. Bemis Lumber Co., 71 Ark. 379, 74 S. W. 518.

"Notice to the creditor of this fact would probably be presumed as soon as the insolvency of the company became a matter of general notoriety." Lester v. Bemis Lumber Co., 71 Ark. 379, 74 S. W. 518.

⁶⁵ Chilberg v. Siebenbaum, 41 Wash. 663, 84 Pac. 598.

⁶⁶ The creditor cannot prolong the operation of the statute by refusing

to take the steps which the law requires in order to authorize the maintenance of the action. Tama Water-Power Co. v. Hopkins, 79 Iowa 653, 44 N. W. 797; First Nat. Bank v. Greene, 64 Iowa 445, 20 N. W. 754, 17 N. W. 86.

⁶⁷ The stockholder's remedy by garnishment under J. & A. Ann. St. ¶ 2425; Hurd's Rev. St. 1917, c. 32, § 8, accrues as soon as the debt against the corporation falls due, and the statute runs in favor of the stockholder from that time. Parmelee v. Price, 208 Ill. 544, 70 N. E. 725, aff'g 105 Ill. App. 271.

⁶⁸ Parmelee v. Price, 208 Ill. 544, 70 N. E. 725, aff'g 105 Ill. App. 271.

⁶⁹ Chilberg v. Siebenbaum, 41 Wash. 663, 84 Pac. 598.

compel payment by holders of bonus or watered stock before the insolvency of the corporation,⁷⁰ and it may not commence to run even then. It has been held that the right of action does not accrue until the creditors have a right to proceed in equity to set aside the fraudulent arrangement,⁷¹ and that the statute does not run against the right of a trustee in bankruptcy until after an order of the court assessing the stockholders and directing the trustee to collect a sufficient amount to satisfy the claims of creditors.⁷² And it has also been held that the statute does not commence to run against the right

⁷⁰ *Vaughn v. Alabama Nat. Bank*, 143 Ala. 572, 5 Ann. Cas. 665, 42 So. 64; *Hospes v. Northwestern Manufacturing & Car Co.*, 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117; *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736.

Compare *Wilson v. St. Louis & W. R. Co.*, 120 Mo. 45, 25 S. W. 527, 759, where a creditor was held to be barred by laches in a case in which stock was issued for services at an overvaluation.

Hence the statute does not commence to run until the recovery of judgment and a return of no property fund. *Vaughn v. Alabama Nat. Bank*, 143 Ala. 572, 5 Ann. Cas. 665, 42 So. 64.

The statute commences to run as soon as an execution is issued on a judgment against the corporation and returned unsatisfied, or where no execution has been issued and returned unsatisfied, at the time the creditor receives notice that the corporation is insolvent, such notice would probably be presumed where the fact of the insolvency has become a matter of general notoriety. *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518.

In Illinois the creditor's right of action under J. & A. Ann. St. ¶ 2442; *Hurd's Rev. St.* 1917, c. 32, § 25, against stockholders of a corporation which has dissolved or ceased doing business, leaving debts unpaid, where they have paid for their stock with

property at a fraudulent overvaluation, accrues whenever the corporation ceases doing business leaving debts unpaid. *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725, aff'g 105 Ill. App. 271.

This was held to be true where the corporation accepted the stockholder's share of a fictitious dividend in discharge of his liability for the balance due on his stock under a contract which was binding on the corporation. *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875.

⁷¹ *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725, aff'g 105 Ill. App. 271.

⁷² Where the corporation issues stock at less than par, under an agreement, binding on it, not to require further payment, the statute does not commence to run against the right of creditors to compel full payment by the stockholders until such right accrues, and the right does not accrue until it becomes necessary to enforce payment for the satisfaction of their debts, and therefore that the statute does not run against an action by an assignee in bankruptcy of the corporation until he is authorized to bring such an action,—which is only after an order of the court making a call upon the stockholders to pay, and directing the assignee to collect, a sufficient amount to satisfy the claims of creditors. *Seovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968. And see *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

of a trustee in bankruptcy until a demand by him.⁷³ The mere fact that the creditor has no knowledge of the fraudulent overvaluation of the property received in payment for stock does not amount to a fraudulent concealment of the cause of action which will prevent the running of the statute.⁷⁴

A suit by a creditor of an insolvent corporation to compel payment for bonus stock issued to a person since deceased is based upon a contingent claim, within the meaning of a statute permitting claims to be prosecuted against a decedent's estate after the usual time for the presentation of claims, when such claims are contingent.⁷⁵ And it has been held that where the creditors have no right of action at law but can only compel payment by a suit in equity to which the corporation must be made a party, and hence the matter could not be adjudicated in the probate court, the failure to file a claim in the probate proceedings is no bar to a suit against the residuary legatee of the deceased stockholder.⁷⁶

§ 4136. — Interruption or tolling of statute. A voluntary appearance by a stockholder in a creditor's suit is equivalent to service upon him and stops the running of the statute in his favor.⁷⁷

The filing of a creditor's suit against the corporation will not stop the running of the statute, where it does not amount to the institution of a suit against the stockholders, and no relief against them is asked for.⁷⁸ Nor will the appointment of a receiver for the corporation, without more, have that effect,⁷⁹ even though he is given authority to sue delinquent stockholders.⁸⁰ But the statute is tolled both as to the corporation and its members by the commencement of an action by a creditor to sequester the corporate property and the

⁷³ Southworth v. Morgan, 143 N. Y. App. Div. 648, 128 N. Y. Supp. 196, aff'g 71 N. Y. Misc. 214, 128 N. Y. Supp. 598, judgment rev'd on other grounds 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490.

⁷⁴ Parmelee v. Price, 208 Ill. 544, 70 N. E. 725, aff'g 105 Ill. App. 271.

⁷⁵ Hospes v. Northwestern Manufacturing & Car Co., 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117.

⁷⁶ Gager v. Paul, 111 Wis. 638, 87 N. W. 875.

⁷⁷ Hawkins v. Donnerberg, 40 Ore. 97, 66 Pac. 691, 908.

⁷⁸ Williams v. Taylor, 99 Md. 306, 57 Atl. 641; Williams v. Watters, 97 Md. 113, 54 Atl. 767.

⁷⁹ Davis v. Scott, 129 Ark. 226, 195 S. W. 383; Williams v. Taylor, 99 Md. 306, 57 Atl. 641.

Notwithstanding his appointment, a creditor may ask the court to assess the stockholders and to compel the receiver to sue those who are delinquent. Davis v. Scott, 129 Ark. 226, 195 S. W. 383.

⁸⁰ Williams v. Taylor, 99 Md. 306, 57 Atl. 641.

exhibition of the claim of such creditor.⁸¹ Mere ignorance on the part of the creditor that there are unpaid subscriptions will not stop the running of the statute, where there is no fraud or concealment.⁸²

Where a suit is instituted by a creditor for the benefit of himself and all other creditors who may come in, each creditor who comes in and proves his claim has a right to be considered as a party from the beginning, and hence the time elapsing from the commencement of the original suit to his becoming a party will not be considered as a part of the time limited by the statute for enforcing his claim. And it follows that if the original suit was commenced in time, a creditor's claim is not barred although the period fixed by the statute had expired when he came in.⁸³ But where the liability is enforced in a suit to wind up the affairs of the corporation, the statute continues to run in favor of stockholders until they are made parties and summons is issued against them.⁸⁴

An injunction restraining a receiver from prosecuting actions against certain stockholders does not stop the running of limitations in favor of other stockholders.⁸⁵ It has been held that a provision in an order allowing the claim of a creditor that dividends thereon are to be withheld pending a settlement with the creditor as a stockholder in the corporation will not stop the running of the statute as against him, where an assessment by the court is a necessary prerequisite to the collection of the unpaid subscriptions.⁸⁶

The mere filing of a petition to rehear the decree in a creditor's suit directing actions at law to be brought against the stockholders does not prevent the running of the statute in their favor.⁸⁷

⁸¹ Potts v. St. Paul Athletic Park Ass'n, 84 Minn. 217, 87 N. W. 604; London & Northwestern American Mortg. Co. v. St. Paul Park Improvement Co., 84 Minn. 144, 86 N. W. 872.

⁸² Where creditors are clothed with the power to ascertain who the stockholders are by examination of the corporate books, in an action for the enforcement of stock subscriptions, the running of the statute of limitations will not be stopped by lack of knowledge that there are unpaid subscriptions. Chilberg v. Siebenbaum, 41 Wash. 663, 84 Pac. 598.

⁸³ Fox v. Produce Cold Storage Exchange, 192 Ill. App. 301; Dunne v.

Portland St. R. Co., 40 Ore. 295, 65 Pac. 1052.

A bondholder is a creditor within the meaning of this rule. Fox v. Produce Cold Storage Exchange, 192 Ill. App. 301.

⁸⁴ Boyd v. Mutual Fire Ass'n of Eau Claire, 116 Wis. 155, 61 L. R. A. 918, 96 Am. St. Rep. 948, 94 N. W. 171, 90 N. W. 1086.

⁸⁵ Gold v. Paynter, 101 Va. 714, 44 S. E. 920.

⁸⁶ Davis v. Scott, 129 Ark. 226, 195 S. W. 383.

⁸⁷ Gold v. Paynter, 101 Va. 714, 44 S. E. 920.

Under some statutes limitations do not run while the defendant is out of the state.⁸⁸

XXXIV. PERSONAL LIABILITY OF STOCKHOLDERS FOR DEBTS OF THE CORPORATION

§ 4137. Liability in the absence of charter, statutory or constitutional provisions—General principles. A court of equity, as we have seen, may compel the stockholders of a corporation, at the suit of creditors, to pay in any balance that may be due on their shares, when such payment is necessary in order to provide funds for paying the debts of the corporation.⁸⁹ This, however, is not holding the stockholders of the corporation personally liable for its debts, but is simply reaching assets of the corporation, and applying them to the payment of its debts. It is well settled that stockholders are not personally liable for debts of the corporation, either at law or in equity, unless such liability is expressly imposed⁹⁰ by the charter, or

⁸⁸ *Tama Water-Power Co. v. Hopkins*, 79 Iowa 653, 44 N. W. 797; *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17.

⁸⁹ See § 4095, *supra*.

As to the liability in equity of holders of watered or fictitiously paid up stock, see § 3589 et seq., *supra*.

⁹⁰ **United States.** *United States v. Stanford*, 161 U. S. 412, 40 L. Ed. 751, aff'g 70 Fed. 346, 69 Fed. 25; *Fourth Nat. Bank of New York v. Franklyn*, 120 U. S. 747, 30 L. Ed. 825; *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376; *Central Wisconsin Trust Co. v. Barter*, 194 Fed. 835, aff'g *Harris v. Northern Blue Grass Land Co.*, 185 Fed. 192; *Harrill v. Davis*, 168 Fed. 187, 22 L. R. A. (N. S.) 1153, rev'g judgment 7 Indian T. 152, 15 Ann. Cas. 1134, 104 S. W. 573; *Leyner Engineering Works v. Kempner*, 163 Fed. 605; *Hudson v. Limestone Natural Gas Co.*, 132 Fed. 410.

Alabama. *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 11 L. R. A. 515, 24 Am. St. Rep. 887, 8 So. 658; *Smith v. Huckabee*, 53 Ala. 191; *Magnolia*

Shingle Co. v. J. Zimmermann's Co., 3 Ala. App. 578, 58 So. 90.

Arkansas. *Davis v. Moore*, 130 Ark. 128, 197 S. W. 295; *Jones v. Jarman*, 34 Ark. 323.

California. *Green v. Beckman*, 59 Cal. 545; *French v. Teschemaker*, 24 Cal. 518, 540.

Colorado. *Liebhards v. Wilson*, 38 Colo. 1, 120 Am. St. Rep. 97, 88 Pac. 173; *Adams v. Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642.

Connecticut. *Betts v. Connecticut Life Ins. Co.*, 78 Conn. 442, 62 Atl. 345; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593.

Georgia. *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98, 2 Am. Rep. 563.

Indiana. *Gainey v. Gilson*, 149 Ind. 58, 48 N. E. 633; *Shaw v. Boylan*, 16 Ind. 384.

Iowa. *Warfield v. Marshall County Canning Co.*, 72 Iowa 666, 2 Am. St. Rep. 263, 34 N. W. 467; *Hampson v. Wear*, 4 Iowa 13, 66 Am. Dec. 116.

Kansas. *Bicknell v. Altman*, 81 Kan. 436, 105 Pac. 694.

Kentucky. *Gravel Switch & L. S.*

by some statutory or constitutional provision. And this is equally

Tel. Co. v. Lebanon, L. & L. Tel. Co., 139 Ky. 151, 129 S. W. 559; Wheeler v. Preston, 107 S. W. 274; Covington Stone & Sand Co. v. Rosedale Elec. Light Jockey Club, 25 Ky. L. Rep. 963, 76 S. W. 506.

Louisiana. Bond & Braswell v. Scott Lumber Co., 128 La. 818, 55 So. 468.

Maine. Abbott v. Goodall, 100 Me. 231, 60 Atl. 1030; Libby v. Tobey, 82 Me. 397, 19 Atl. 904; Coffin v. Rich, 45 Me. 507, 71 Am. Dec. 559; Adams v. Wicasset Bank, 1 Greenl. 361, 10 Am. Dec. 88.

Massachusetts. Auld v. Caunt, 216 Mass. 381, 103 N. E. 933; Whitney v. Malden & M. R. Co., 202 Mass. 298, 132 Am. St. Rep. 493, 88 N. E. 907; Inhabitants of Norton v. Hodges, 100 Mass. 241; Spear v. Grant, 16 Mass. 9; Vose v. Grant, 15 Mass. 505; Trustees of Free Schools in Andover v. Flint, 13 Metc. 539.

Mississippi. State v. Marshall, 69 Miss. 486, 13 So. 668.

Missouri. Johnson v. United Rys. Co., 247 Mo. 326, 152 S. W. 362, 374.

Nebraska. Rawson v. Taylor, 69 Neb. 473, 95 N. W. 1033; Farmers' Loan & Trust Co. v. Funk, 49 Neb. 353, 68 N. W. 520.

New Jersey. Salt Lake City Nat. Bank v. Hendrickson, 40 N. J. L. 52.

New Mexico. Jones v. Rankin, 19 N. M. 56, 140 Pac. 1120.

New York. Chase v. Lord, 77 N. Y. 1; Lowry v. Inman, 46 N. Y. 119; Seymour v. Sturgess, 26 N. Y. 134; Winne v. Mehrbach, 130 App. Div. 329, 114 N. Y. Supp. 618; Coulter Dry Goods Co. v. Rosenbaum, 74 Misc. 579, 134 N. Y. Supp. 487; New York Air Brake Co. v. International Steam Pump Co., 64 Misc. 347, 120 N. Y. Supp. 683, aff'd 136 App. Div. 931, 120 N. Y. Supp. 1137; Freeland v. McCullough, 1 Den. 414, 43 Am. Dec. 685.

North Carolina. Pocahontas Fuel

Co. v. Tarboro Cotton Factory, 174 N. C. 245, 93 S. E. 790.

Ohio. Ireland v. Palestine, B., N. P. & N. W. Turnpike Co., 19 Ohio St. 369; Carr v. Iglehart, 3 Ohio St. 457.

Oregon. Falls City Lumber Co. v. Watkins, 53 Ore. 212, 99 Pac. 884.

Pennsylvania. De Haven v. Pratt, 223 Pa. 633, 72 Atl. 1068; Brinham v. Wellersberg Coal Co., 47 Pa. St. 43.

Rhode Island. Atwood v. Rhode Island Agr. Bank, 1 R. I. 376.

South Carolina. Parker v. Carolina Sav. Bank, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673; Hall v. Klinck, 25 S. C. 348, 60 Am. Rep. 505; South Carolina Mfg. Co. v. Bank of South Carolina, 6 Rich. Eq. 227.

Tennessee. Woods v. Wicks, 7 Lea 40.

Vermont. Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176; Dauchy v. Brown, 24 Vt. 197.

Washington. Badere v. Goodrich, 63 Wash. 650, 116 Pac. 274.

West Virginia. Nimick v. Mingo Iron Works Co., 25 W. Va. 184, 199.

Exemption from individual liability is an element of a contract made with a corporation. Snider's Sons' Co. v. Troy, 91 Ala. 224, 11 L. R. A. 515, 24 Am. St. Rep. 887, 8 So. 658; Magnolia Shingle Co. v. J. Zimmern's Co., 3 Ala. App. 578, 58 So. 90.

A stockholder who does not participate in making a corporate contract is not liable thereon. Falls City Lumber Co. v. Watkins, 53 Ore. 212, 99 Pac. 884.

A petition seeking to hold certain stockholders liable on a contract of the corporation on the ground that they were its principal stockholders and as such received the benefit of the services rendered under the contract, but which fails to allege that they owed anything on their stock, or facts bringing them within the statute imposing liability on stockholders and of-

true of a stockholder who owns all,⁹¹ or a majority,⁹² of the capital stock. The reason is that a corporation is a legal entity or artificial person, distinct from the members who compose it, in their individual capacity; and when it contracts a debt, it is the debt of this legal entity or artificial person,—the corporation,—and not the debt of the individual members.⁹³ “Personal responsibility of stockholders is inconsistent with a body corporate at common law, and can arise only out of some positive prescription by legislative act.”⁹⁴ This is one of the features which distinguishes a corporation at common law from an ordinary partnership, partners being individually liable for all the debts of the firm, however little they may have invested in the business, and it is one of the chief advantages of incorporation.

It of course follows that an execution⁹⁵ or attachment⁹⁶ against a corporation cannot be levied upon the individual property of its stockholders or members unless there is a valid charter, statutory or constitutional provision therefor.

ficers in certain cases on insolvency and dissolution of the corporation, does not state a cause of action. *Seaton v. Majors*, — Tex. Civ. App. —, 182 S. W. 712.

Compare *Jackson v. Meek*, 87 Tenn. 69, 10 Am. St. Rep. 620, 9 S. W. 225, where it is said: “The general rule of the common law holds the shareholder of a corporation liable for the debts of the association only so far as he may have agreed to contribute to the capital stock of the company; his liability is in his corporate capacity, and is deemed the primary source for the payment of the company’s debts.”

⁹¹ *Gravel Switch & L. S. Tel. Co. v. Lebanon, L. & L. Tel. Co.*, 139 Ky. 151, 129 S. W. 559.

A corporation which owns all of the stock of another corporation is not liable for a breach of contract by the latter. *New York Air Brake Co. v. International Steam Pump Co.*, 64 N. Y. Misc. 347, 120 N. Y. Supp. 683, aff’d 136 N. Y. App. Div. 931, 120 N. Y. Supp. 1137.

“In the absence of a statutory provision on the subject, the acquisition of all the stock, property and assets

of a corporation, by an individual or by another corporation, does not make the new holder liable to pay the debts of the corporation.” *Whiting v. Malden & M. R. Co.*, 202 Mass. 298, 132 Am. St. Rep. 493, 88 N. E. 907.

See also § 22 et seq., supra.

⁹² *Stone v. Cleveland, C., C. & St. L. R. Co.*, 202 N. Y. 352, 35 L. R. A. (N. S.) 770, 95 N. E. 416, rev’g 136 N. Y. App. Div. 907, 120 N. Y. Supp. 1147; *Quaid v. Ratkowsky*, — N. Y. App. Div. —, 170 N. Y. Supp. 812; *Badere v. Goodrich*, 63 Wash. 650, 116 Pac. 274.

See also § 22 et seq., supra.

⁹³ See § 22 et seq., supra.

⁹⁴ *Depue, J.*, in *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52.

⁹⁵ *Adams v. Wicasset Bank*, 1 Me. 361, 10 Am. Dec. 88.

As to the remedy by execution to enforce a statutory liability of stockholders for corporate debts, see § 4221, infra.

⁹⁶ *State v. Marshall*, 69 Miss 486, 13 So. 668.

As to attachment in proceedings to enforce a statutory liability for corporate debts, see § 4222, infra.

Persons who undertake to do business as a corporation, and contract debts, after an ineffectual attempt to incorporate, or without any attempt at all, may be personally liable as partners for the debts so contracted; but this is on the ground that there is no corporation, at all, and that the debts are their individual debts.⁹⁷

When there is a corporation, and it contracts debts, stockholders do not become personally liable therefor because the corporation exceeds its powers.⁹⁸ Nor do stockholders become personally liable as such for debts of the corporation by falsely representing that they are liable. In such a case, the remedy, if any, is against them as individuals merely to recover damages for the deceit.⁹⁹ Nor do they become personally liable for corporate debts, in the absence of a statute, because assets of the corporation have been illegally distributed among or withdrawn by them, either before or after dissolution of the corporation. The remedy of creditors in such a case is in equity to compel restitution of the assets or their value, and their application to payment of the debts.¹

§ 4138. — Liability for torts. The stockholders of a corporation are not individually liable for its torts, whether they consist in mis-

⁹⁷New York Nat. Exch. Bank v. Crowell, 177 Pa. St. 313, 35 Atl. 613.

Where there is no such compliance with the statute as to make even a de facto corporation, the members are liable to creditors as individuals. Meyer v. Brunson, 104 S. C. 84, 88 S. E. 359.

Many courts have held that where a corporation is organized for an unlawful purpose, the incorporators may be held as partners. But it has been held that the stockholders of an illegal investment company cannot be held liable on its prior lawful contract for printing and supplies, where it was organized and they became stockholders in good faith, and upon discovering that its investment contracts were illegal, they were called in and the money paid under them was refunded, and the company did not engage in any further unlawful business, especially where such printing contract was made by the plaintiff with full knowledge of the nature of the corpo-

ration, and he later acquired stock for the purpose of taking corporate action on his claim against other stockholders, and thereby became a partner with them, and in *pari delicto* in the fraud, if any there was. Ivy Press v. McKechnie, 88 Wash. 643, 153 Pac. 1067.

See § 281, *supra*, and see subd. xxxvi "Individual Liability and Rights on Failure to Incorporate," *infra*, this chapter.

⁹⁸Second Nat. Bank of Cincinnati v. Hall, 35 Ohio St. 166; Medill v. Collier, 16 Ohio St. 599; Ohio Life Insurance & Trust Co. v. Merchants' Insurance & Trust Co., 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; Searight v. Payne, 2 Tenn. Ch. 175.

⁹⁹Reid v. Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563. See Searight v. Payne, 2 Tenn. Ch. 175.

¹See the chapter on Insolvency.

As to the right to recover dividends unlawfully paid, see § 3733 *et seq.*, *supra*.

feasance, malfeasance or nonfeasance, if they have not in any way participated therein,² unless they are made liable by some express charter, statutory or constitutional provision.³

* § 4139. — **Power of corporation to make stockholders liable; by-laws.** It is not within the power of a corporation, unless it is authorized by the charter or by some other statute, to bind the stockholders to personal liability for its debts, without their consent, by agreement with its creditors, by resolution or otherwise.⁴ A bank, for example, cannot make its stockholders liable on its notes or bills by printing thereon a notice that they are so liable;⁵ and, in the absence of charter or statutory authority therefor, a corporation cannot make a valid by-law imposing upon stockholders personal liability for its debts,⁶ unless they consent.⁷ Nor, in the absence of plain

² **United States.** Johns-Pratt Co. v. Sachs Co., 175 Fed. 70, aff'g judgment 168 Fed. 311, as to this point; Hudson v. Limestone Natural Gas Co., 132 Fed. 410.

Illinois. Peck v. Cooper, 8 Ill. App. 403, aff'd 112 Ill. 192, 54 Am. Rep. 231.

Indiana. Hartzler v. Goshen Churn & Ladder Co., 55 Ind. App. 455, 104 N. E. 34.

Kansas. Atchison, T. & S. F. R. Co. v. Cochran, 43 Kan. 225, 7 L. R. A. 414, 19 Am. St. Rep. 129, 23 Pac. 151.

Massachusetts. Inhabitants of Norton v. Hodges, 100 Mass. 241.

Michigan. Bohn v. Brown, 33 Mich. 257.

Missouri. Cable v. McCune, 26 Mo. 271, 72 Am. Dec. 214; Flood v. Busch, 165 Mo. App. 142, 146 S. W. 73.

Nebraska. Doolittle v. Marsh, 11 Neb. 243, 9 N. W. 54.

New York. Merriek v. Van Santvoord, 34 N. Y. 208; Heacock v. Sherman, 14 Wend. 58.

Oregon. Poley v. Lacert, 35 Ore. 166, 58 Pac. 37.

Texas. Belo v. Fuller, 84 Tex. 450, 31 Am. St. Rep. 75, 19 S. W. 616; Kirby v. Hayden (Tex. Civ. App.), 125 S. W. 993.

They are not responsible for the fraudulent representations of an agent of the corporation made to induce the sale of stock, where they did not take any part in or sanction such representations, and did not know of them. Flood v. Busch, 165 Mo. App. 142, 146 S. W. 73.

But a stockholder may be held jointly liable with the corporation where he directed and was behind its acts. Chicago Ry. Equipment Co. v. Perry Side Bearing Co., 170 Fed. 968, judgment rev'd 178 Fed. 449.

See also § 31, supra.

³ See § 4164, infra.

⁴ **Georgia.** Reid v. Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563.

Maryland. Vincent v. Chapman, 10 Gill & J. 279.

Massachusetts. Trustees of Free Schools in Andover v. Flint, 13 Mete. 539.

New York. Lowry v. Inman, 46 N. Y. 119.

Ohio. Ireland v. Palestine, B., N. P. & N. W. Turnpike Co., 19 Ohio St. 369.

⁵ Lowry v. Inman, 46 N. Y. 119. And see Reid v. Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563.

⁶ See § 512, supra.

⁷ See § 4140, infra.

statutory authority, can such liability be imposed by a provision in the articles of incorporation.⁸

§ 4140. — Agreement or consent of stockholders. Stockholders, of course, may render themselves personally liable for debts of the corporation by express agreement or consent, provided their promise has a consideration to support it, and is in writing, when this is necessary under the statute of frauds, but their liability in such case is not as stockholders, but as individuals.⁹

⁸ An amendment of the articles so as to impose an additional liability on stockholders who had paid for their stock in full was held not to be warranted by a statutory provision permitting the articles to contain "such other provisions or articles, * * * not inconsistent with law," as the incorporators might deem proper to be inserted for the interests of the corporation, etc., and also to be a departure from the uniformity of corporate powers and privileges intended by the statute. *Central Wisconsin Trust Co. v. Barter*, 194 Fed. 835, aff'g 185 Fed. 192.

As to the effect generally of provisions in the articles not required to be inserted, see § 207, *supra*.

⁹ *United States. R. R. Thompson Estate Co. v. Weinhard*, 247 Fed. 951, aff'g 242 Fed. 315; *Wilson v. Knowles*, 213 Fed. 782.

California. London & S. F. Bank v. Parrott, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164.

Georgia. Reid v. Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563.

Iowa. Watt v. German Sav. Bank, 165 N. W. 897; *Minden Canning Co. v. Hensley*, 149 Iowa 168, 126 N. W. 1115 (construing a bond given by stockholders to secure certain corporate debts).

Louisiana. Citizens' Bank of Louisiana v. Folse, 123 La. 918, 49 So. 641; *Green, Harding & Co. v. J. M. Relf & Co.*, 14 La. Ann. 828.

Massachusetts. Trustees of Free

Schools in Andover v. Flint, 13 Metc. 539.

Michigan. People's Bank v. McMahon, 160 Mich. 46, 125 N. W. 62.

Minnesota. Smith v. Armstrong, 125 Minn. 59, 145 N. W. 617.

Texas. Zachry & Gerhart v. Peterson & Avant, — Tex. Civ. App. —, 171 S. W. 494.

Utah. Dotson v. Hoggan, 44 Utah 295, 140 Pac. 128.

Wisconsin. Hannah v. Knuth, 161 Wis. 467, Ann. Cas. 1917 C 681, 154 N. W. 985.

See, as to agreements of stockholders imposing individual liability, *Wheat v. Frankfort Cotton Mill Co.*, 4 Ky. L. Rep. 620.

Guaranty by stockholders of payment of corporate debt. *London & S. F. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164; *Citizens' Bank of Louisiana v. Folse*, 123 La. 918, 49 So. 641.

Guaranty to save harmless a person indorsing a corporate note. *Wilson v. Knowles*, 213 Fed. 782.

Minutes of a corporate meeting showing that a motion that the corporate debts be paid by the stockholders was made and seconded do not show an agreement by the stockholders to pay them, where they do not show that such motion was voted upon or adopted, especially where it is shown by other evidence that it was not. *Asbury v. Mauney*, 173 N. C. 454, 92 S. E. 267.

The adoption of a resolution at a

A promise by a stockholder to pay a debt of the corporation, being a promise to answer for the debt of another, is within the statute of frauds, and must be in writing, unless there are circumstances taking it out of the statute.¹⁰

A by-law making stockholders personally liable for corporate debts, consented to by all the stockholders, and relied upon by a creditor in dealing with the corporation and extending it credit, would no doubt operate as an agreement between the stockholders, as individuals, and the creditor, so as to render them liable to him, but they would be liable, in the absence of a charter or statutory provision authorizing such a by-law, as individuals merely, and not as stock-

holders' meeting that the stockholders pay the corporate debts, is not the action of the corporation, but at most amounts to no more than a personal agreement between the stockholders. *Asbury v. Mauney*, 173 N. C. 454, 92 S. E. 267.

A resolution adopted at a stockholders' meeting that the debts of the corporation be paid by "the stockholders" means all of the stockholders, and is in the nature of a proposal which does not become effective where stockholders who were not present at the meeting refuse to give their consent. *Asbury v. Mauney*, 173 N. C. 454, 92 S. E. 267.

A resolution of record of a corporation, that each stockholder of a corporation shall indorse the company's paper to the extent of his stock, does not impose upon the stockholders individual liability on paper of the company indorsed by them without recourse. *Martin v. Fitch*, 65 Ind. 216.

To warrant a recovery by a creditor under an agreement by stockholders to pay certain indebtedness of the corporation, it must appear that his claim is a part of the indebtedness so agreed to be paid. *Robinson v. Nashville Center Co-operative Creamery Ass'n*, 115 Minn. 43, 131 N. W. 856.

Where, by the terms of the agreement, the liability of the stockholders to pay corporate debts is joint and

several, each is liable for the entire indebtedness, and any creditor in the class referred to in the agreement may maintain an action at law on his own behalf against any or all the stockholders. Hence there is no ground for a suit in equity on behalf of all the creditors against all the stockholders to fix the liability of each and to compel each to contribute to a fund to pay such debts. *Robinson v. Nashville Center Co-operative Creamery Ass'n*, 115 Minn. 43, 131 N. W. 856.

¹⁰ *Trustees of Free Schools in Andover v. Flint*, 13 Metc. (Mass.) 539; *Winne v. Mehrbach*, 130 N. Y. App. Div. 329, 114 N. Y. Supp. 618.

An agreement by a stockholder to "indemnify and hold harmless" a corporate creditor on account of the extension of credit or the sale of goods to the corporation, is a promise to answer for the debt or default of another. *Goldie-Klenert Distributing Co. v. Bothwell*, 67 Wash. 264, Ann. Cas. 1913 D 849, 121 Pac. 60.

The minutes of a stockholders' meeting, signed only by the secretary as such, showing the adoption of a motion that certain debts be paid by the stockholders, are not a sufficient memorandum to satisfy the statute, since such a signature does not purport to be that of the signer as agent of the stockholders, and since, in any event, one of the contracting parties cannot

holders.¹¹ It has been held that a stockholder does not become liable to a creditor of the corporation, even individually, under a by-law imposing personal liability upon stockholders for corporate debts, merely because he signed the by-laws, if it does not appear that he did so for any other purpose than to become a member of the corporation, or that the creditor contracted on the faith of the by-law, or with knowledge of its existence.¹²

Where a loan is made to a corporation on its bond and mortgage, and the stockholders become, by contract, sureties for repayment of the loan, other creditors of the company have no equity to compel the lender to exhaust his remedy against the stockholders as sureties before resorting to the corporation and the property for payment.¹³

An agreement among stockholders to pay corporate debts, to which the creditors are not parties, could not be enforced by the creditors at common law, but would be binding as between the stockholders.¹⁴

§ 4141. Statutory liability in general. The legislature clearly has the power to impose upon the stockholders of a corporation individual liability for its debts to any extent it may see fit, unless controlled by special constitutional provisions, if it imposes the liability at the time the corporation is created.¹⁵ But it has no right to increase the liability of the existing stockholders of a corporation after its creation, or to impose a liability upon them where none existed before, unless they consent, or unless it has reserved the power to

be the agent of the other for the purpose of binding him by his signature under the statute of frauds. *Asbury v. Mauney*, 173 N. C. 454, 92 S. E. 267.

¹¹ See *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98, 2 Am. Rep. 563; *Flint v. Pierce*, 99 Mass. 68, 96 Am. Dec. 691; *Trustees of Free Schools in Andover v. Flint*, 13 Metc. (Mass.) 539.

See also §§ 498, 512, *supra*.

¹² *Flint v. Pierce*, 99 Mass. 68, 96 Am. Dec. 691.

¹³ *South Carolina Mfg. Co. v. Bank of South Carolina*, 6 Rich. Eq. (S. C.) 227.

¹⁴ See *Ripley v. Sampson*, 10 Pick. (Mass.) 371.

¹⁵ *United States Trust Co. v. United States Fire Ins. Co.*, 18 N. Y. 199.

A provision imposing personal liability may be contained in a special

charter under which a corporation is organized or in the general statutory law. *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

The Colorado statute imposing double liability on stockholders in banks was passed in conformity to the constitutional requirements. *Adams v. Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642.

Prior to the Act of 1893 (2 Park's Ann. Code 1914, § 2270) there was no general statute in Georgia regulating the individual liability of stockholders in banks, and such liability was in each instance dependent on the provisions of the special charter of each particular bank. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626; *Reid v. De Jarnette*, 123 Ga. 787, 3 Ann. Cas. 1117, 51 S. E. 770.

alter, amend or repeal the charter of the corporation or the general law under which it was formed.¹⁶ Nor can it take away or impair a right of existing creditors of a corporation to resort to the liability of its stockholders for the payment of their claims.¹⁷ And of course, where the liability is imposed by the constitution, the legislature has no right to relieve the stockholders from liability, or to impose a different liability.¹⁸

The liability is to be determined by the statutes in force when the indebtedness of the corporation was contracted.¹⁹

It is sometimes expressly provided by statute that corporations shall have power to exempt the private property of members from liability for corporate debts.²⁰

A provision that "the individual property of the stockholders" shall be liable for the ultimate payment of debts, does not mean that the liability can be enforced only in a suit which seeks to subject specific property of the stockholder, but imposes a liability which may result in a personal judgment against him which will bind all of his property at the date of the judgment and any that he may thereafter acquire.²¹

¹⁶ See § 4146, *infra*.

¹⁷ See § 4147, *infra*.

¹⁸ See § 4142, *infra*.

¹⁹ *Seymour v. Bank of Minnesota*, 79 Minn. 211, 81 N. W. 1059; *Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601; *Leighton v. Leighton Lea Ass'n*, 146 N. Y. App. Div. 255, 130 N. Y. Supp. 935.

The liability is determined by the law in force when it is alleged to have been created. *Heinze v. South Green Bay Land & Dock Co.*, 109 Wis. 99, 85 N. W. 145.

The liability of the stockholders of a bank to depositors accrues with the making of the deposit, and not at the date of the bank's charter. *Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601.

Where certificates of deposit issued by a bank before the passage of an act changing the statutory liability of stockholders are renewed after passage of the act, the old certificates being surrendered, and new ones taken

in their stead, and a part of the principal being paid in some cases, and interest in others, the new certificates are to be treated as new contracts for the purpose of determining the liability of stockholders. *Seymour v. Bank of Minnesota*, 79 Minn. 211, 81 N. W. 1059. And see § 4197, *infra*.

²⁰ *Johnson v. Tennessee Oil, etc., Co.*, 74 N. J. Eq. 32, 69 Atl. 788, construing the Arizona statute to this effect.

Under Comp. Laws 1907, § 315, subd. 11, the private property of stockholders may be exempted from liability for corporate debts by a provision to that effect in the articles of incorporation. *Dotson v. Hoggan*, 44 Utah 295, 140 Pac. 128.

²¹ Hence it is not necessary, in a suit to enforce such liability, to allege that the stockholder has any property, or of what his property consists. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

§ 4142. **Effect of constitutional provisions.** Where the constitution of a state makes the stockholders of a corporation liable for its debts, the legislature, of course, has no power to exempt them from liability or to impose a different liability from that fixed by the constitution,²² or to restrict the rights thereby given to the corporate creditors.²³ Nor can provisions in the articles of incorporation have that effect.²⁴ And if the constitution exempts stockholders from liability other than for unpaid stock, no other liability can be imposed by legislation or by the judgment of a court.²⁵ So it has been

²² **United States.** *Whitman v. National Bank of Oxford*, 176 U. S. 559, 44 L. Ed. 587.

Alabama. *Central Agricultural & Mechanical Ass'n v. Alabama Gold Life Ins. Co.*, 70 Ala. 120.

California. *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; *French v. Teschemaker*, 24 Cal. 518.

Maryland. *Mister v. Thomas*, 122 Md. 445, 89 Atl. 844.

Michigan. *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696; *Milroy v. Spurr Mountain Iron Min. Co.*, 43 Mich. 231, 5 N. W. 287.

Minnesota. *Way v. Barney*, 116 Minn. 285, 38 L. R. A. (N. S.) 648, Ann. Cas. 1913 A 719, 133 N. W. 801; *Anderson v. Anderson Iron Co.*, 65 Minn. 281, 33 L. R. A. 510, 68 N. W. 49.

Nebraska. *Van Pelt v. Gardner*, 54 Neb. 701, 75 N. W. 874.

New York. *Barnes v. Arnold*, 23 Misc. 197, 51 N. Y. Supp. 1109, aff'd 45 App. Div. 314, 61 N. Y. Supp. 85, aff'd 169 N. Y. 611, 62 N. E. 1093.

Ohio. *State v. Sherman*, 22 Ohio St. 411.

South Carolina. *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

The legislature cannot limit the effect of the constitutional provision. *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915 B 825, 136 Pac. 284.

If the constitution imposes liability upon the stockholders of all corpora-

tions, the legislature cannot exempt the stockholders of any corporation from liability, whether created by special act or under a general law. *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; *Anderson v. Anderson Iron Co.*, 65 Minn. 281, 33 L. R. A. 510, 68 N. W. 49.

The South Carolina constitutional provision (art. 12, § 6) that the general assembly shall grant no banking charter, except on condition that the stockholders shall be liable to the amount of their stock, is not self-executing, and does not prevent the legislature from imposing upon stockholders of banks a greater liability than to the extent of their stock, in pursuance of the further constitutional provision (§ 4) that dues from corporations shall be secured by such individual liability and other means as may be prescribed by law, and the provision (§ 5) that all laws passed pursuant to it shall provide for fixing the personal liability of stockholders under proper limitations, etc. *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

²³ *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273; *Union Nat. Bank of Omaha v. Halley*, 19 S. D. 474, 104 N. W. 213.

²⁴ *Security Trust Co. v. Ford*, 75 Ohio St. 322, 8 L. R. A. (N. S.) 263, 79 N. E. 474.

²⁵ *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 11 L. R. A. 515, 24 Am. St. Rep. 887, 8 So. 658.

held that where the constitution imposes a liability to each individual creditor on each individual stockholder, a statute permitting a receiver to enforce the liability is invalid as being "an unauthorized interference with the rights of the creditors to authorize the collection of the indebtedness due to them individually by a stranger, and with the rights of the stockholders to compel them to pay to a stranger when the legislature has no authority to make the receipt of the stranger a discharge of the debt."²⁶

If the constitution, however, merely provides that stockholders shall be individually liable for corporate debts, without fixing the extent of their liability, the legislature has power to fix its extent.²⁷ And if no mode of enforcing the liability is prescribed by the constitution, the legislature may prescribe a mode of enforcing it.²⁸

²⁶ *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

See also *Williams v. Carver*, 171 Cal. 658, 154 Pac. 472, where it was said that to construe a statute giving the superintendent of banks the right to enforce the individual liability of stockholders of banks so as to give him the right to enforce their constitutional liability to creditors would deprive the creditor of his constitutional right to enforce such liability, and impose additional burdens upon the stockholders.

²⁷ A constitutional provision that the stockholders shall be subject to such liabilities and restrictions as shall be provided by law, is intended to render them liable in such degree and manner as the legislature may see proper. *Hampson v. Weare*, 4 Iowa 13, 66 Am. Dec. 116.

Where the constitution provides that each stockholder shall be individually and personally liable for his proportion of all the corporate debts and liabilities, the legislature has power to regulate the liability and to prescribe the rule by which each stockholder's proportion shall be ascertained. *Larrabee v. Baldwin*, 35 Cal. 155; *French v. Teschemaker*, 24 Cal. 518.

Under such a provision it is within the power of the legislature to make

each stockholder liable for his proportion of all the debts of the corporation contracted while he is a stockholder. *Larrabee v. Baldwin*, 35 Cal. 155.

²⁸ *United States*. *Borland v. Haven*, 37 Fed. 394.

California. *Gardner v. Bank of Napa*, 160 Cal. 577, 117 Pac. 667.

Iowa. *Hampson v. Weare*, 4 Iowa 13, 66 Am. Dec. 116.

Michigan. *Milroy v. Spurr Mountain Iron Min. Co.*, 43 Mich. 231, 5 N. W. 287.

South Dakota. *Union Nat. Bank of Omaha v. Halley*, 19 S. D. 474, 104 N. W. 213.

The mode and means of enforcing the double liability imposed by the Minnesota Constitution are subject to legislative regulation. *Selig v. Hamilton*, 234 U. S. 652, 56 L. Ed. 749, Ann. Cas. 1917 A 104; *Converse v. Hamilton*, 224 U. S. 243, 56 L. Ed. 749, Ann. Cas. 1913 D 1292, rev'g judgment 136 Wis. 589, 118 N. W. 190; *Bernheimer v. Converse*, 206 U. S. 516, 51 L. Ed. 516; *Way v. Barney*, 116 Minn. 285, 38 L. R. A. (N. S.) 648, Ann. Cas. 1913 A 719, 133 N. W. 801; *Willis v. Mabon*, 48 Minn. 140, 16 L. R. A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110.

When the constitution provides that

A constitutional provision imposing liability upon the stockholders of banks of issue does not prevent the legislature from extending the liability to the stockholders of other banks.²⁹ And a statutory provision making the recovery of a judgment against the corporation and the return of an execution unsatisfied a condition precedent to the right of creditors to enforce the liability, does not violate a constitutional provision making the stockholders of every corporation individually responsible to the amount of their shares for all its debts and liabilities of every kind.³⁰

Under a provision that dues from corporations "shall be secured by such individual liability of the corporators, or other means, as may be prescribed by law," it has been held that the matter of imposing individual liability on the stockholders is entirely discretionary with the legislature, and that it may repeal an act creating individual liability whether a new act is provided or not.³¹

§ 4143. Whether constitutional provisions are self-executing. A constitutional provision in relation to individual liability of stockholders for corporate debts may be self-executing, so as to impose such liability itself, or it may require action by the legislature to carry it into effect. Whether such a provision is self-executing or not depends, of course, upon the intention, to be ascertained by construing its language.³² "The question in every case is whether the language

"stockholders shall be subject to such liabilities and restrictions as shall be provided by law," a statute may provide that, when no corporate property can be found on which to levy an execution against the corporation, the execution may, on motion and an order of court, be levied on the individual property of the stockholders. *Hampson v. Weare*, 4 Iowa 13.

That a constitutional or statutory liability is not defeated because no method is provided for enforcing it either by the constitution or by the statute, see § 4216, *infra*.

²⁹ *Allen v. Clayton*, 63 Iowa 11, 50 Am. Rep. 716, 18 N. W. 663; *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696; *Seymour v. Bank of Minnesota*, 79 Minn. 211, 81 N. W. 1059; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Allen v. Walsh*,

25 Minn. 543; *Hagmayer v. Alten*, 36 N. Y. Misc. 59, 72 N. Y. Supp. 623; *Barnes v. Arnold*, 23 N. Y. Misc. 197, 51 N. Y. Supp. 1109, *aff'd* 45 N. Y. App. Div. 314, 61 N. Y. Supp. 85, 169 N. Y. 611, 62 N. E. 1093. See also *Anderson v. Seymour*, 70 Minn. 358, 73 N. W. 171.

³⁰ *Gause v. Boldt*, 49 N. Y. Misc. 340, 99 N. Y. Supp. 442, *aff'd* 115 N. Y. App. Div. 987, 100 N. Y. Supp. 1117, 188 N. Y. 546, 80 N. E. 566.

³¹ *Wood v. Harrison*, 50 Ind. 480.

³² *Jones v. Jarman*, 34 Ark. 323; *Tuttle v. National Bank of Republic of St. Louis*, 161 Ill. 497, 34 L. R. A. 750, 44 N. E. 984, *rev'g* judgment 48 Ill. App. 481; *Fowler v. Lamson*, 146 Ill. 472, 37 Am. St. Rep. 163, 34 N. E. 932; *Willis v. Mabon*, 48 Minn. 140, 16 L. R. A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110.

of a constitutional provision is addressed to the courts or the legislature,—does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed are fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts.”³³ But if the provision is in express terms addressed to the legislature, or if it does not fix the extent of the liability and the conditions upon which it must rest, it is not self-executing, and legislation is necessary to carry it into effect.³⁴

Provisions to the effect that every stockholder in any corporation shall be liable for corporate debts or contracts to the amount of the stock held or owned by him, or in such proportion as his stock bears to the whole of the subscribed capital, have generally been held to be self-executing.³⁵ On the other hand, a provision that “dues from corporations shall be secured by individual liability of the stock-

See generally standard works on constitutional law.

“Where it is apparent that a particular provision of the organic law shall go into immediate effect without ancillary legislation, and this can be determined by giving full force and effect to all its clauses relating to the same subject, and the language is free from ambiguity, then it becomes the imperative duty of judicial tribunals to declare it self-executing; and where the provision is unambiguous, and the purpose of the provision would be frustrated unless given immediate effect, it will be held self-executing.” *Tuttle v. National Bank of Republic of St. Louis*, 161 Ill. 497, 34 L. R. A. 750, 44 N. E. 984, rev’g judgment 48 Ill. App. 481.

³³ *Mitchell, J.*, in *Willis v. Mabon*, 48 Minn. 140, 16 L. R. A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110. See also *Jones v. Jarman*, 34 Ark. 323.

³⁴ *French v. Teschemaker*, 24 Cal. 518.

³⁵ *Arkansas*. The provision of Const. 1868, art. 5, § 48, that “each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock,” is self-executing. *Jones v. Jarman*, 34 Ark. 323.

Illinois. The provision relative to banks, that “Every stockholder * * * shall be individually responsible and liable * * * over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all liabilities accruing while he or she remains such stockholder,” is self-executing. *Dupee v. Swigart*, 127 Ill. 494, 21 N. E. 622. See also *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

Minnesota. The provision of the constitution that “each stockholder

holders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law," has been held not to be self-executing.³⁶ And the same has also been held

in any corporation [excepting specified corporations] shall be liable to the amount of stock held or owned by him" is self-executing. *Way v. Barney*, 116 Minn. 285, 38 L. R. A. (N. S.) 648, Ann. Cas. 1913 A 719, 133 N. W. 801; *McKusick v. Seymour, Sabin & Co.*, 48 Minn. 158, 50 N. W. 1114; *Willis v. Mabon*, 48 Minn. 140, 16 L. R. A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; *Selig v. Hamilton*, 234 U. S. 652, 58 L. Ed. 1518, Ann. Cas. 1917 A 104; *Converse v. Hamilton*, 224 U. S. 243, 56 L. Ed. 749, Ann. Cas. 1913 D 1292, rev'g judgment 136 Wis. 589, 118 N. W. 190. In *Bernheimer v. Converse*, 206 U. S. 516, 51 L. Ed. 516, it is said in respect to the provision of the Minnesota Constitution: "It is evident from the general language used in this constitutional provision that while a remedy might have been worked out in the courts of equity in the state, it was proper if not necessary that a statute should be passed to make more effectual the liability thus secured by the constitution."

Nebraska. The provision relative to banks that "every stockholder * * * shall be individually responsible and liable," etc., is self-executing. *Goss v. Carter*, 156 Fed. 746.

South Dakota. The provision relative to banks that the stockholders "shall be held individually responsible and liable for all contracts, debts and engagements of such corporation to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares of stock," is self-executing. *Union Nat. Bank of Omaha v. Halley*, 19 S. D. 474, 104 N. W. 213.

³⁶**Indiana.** The provision of art. 11, § 14, of the Constitution that "Dues from corporations * * * shall be

secured by such individual liability of the corporators, or other means, as may be prescribed by law," is not self-executing. *Williams v. Citizen's Enterprise Co.*, 153 Ind. 496, 55 N. E. 425; *Wood v. Harrison*, 50 Ind. 480.

Kansas. A former provision of the Constitution of Kansas to this effect was held not to be self-executing. *Bicknell v. Altman*, 81 Kan. 436, 105 Pac. 694; *Rowland & Moyer v. Forest Park Creamery Co.*, 79 Kan. 134, 99 Pac. 212; *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, 173; *Henley v. Stevenson*, 67 Kan. 4, 72 Pac. 518; *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331; *Morley v. Thayer*, 3 Fed. 737; *Bell v. Farwell*, 176 Ill. 489, 42 L. R. A. 804, 68 Am. St. Rep. 194, 52 N. E. 346; *Tuttle v. National Bank of Republic of St. Louis*, 161 Ill. 497, 34 L. R. A. 750, 44 N. E. 984, rev'g 48 Ill. App. 481; *Western Nat. Bank of New York v. Lawrence*, 117 Mich. 669, 76 N. E. 105; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 51 Am. St. Rep. 654, 42 N. E. 419; *Kulp v. Fleming*, 65 Ohio St. 321, 87 Am. St. Rep. 611, 62 N. E. 334; *Hancock Nat. Bank v. Farnum*, 20 R. I. 466, 40 Atl. 341. Compare *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 44 L. Ed. 587, aff'g 83 Fed. 288, where it is said with respect to the Constitution of Kansas: "The words, 'shall be secured,' are not merely directory to the legislature to make provision for such liability, but of themselves declare it. To this extent the constitution is self-executing. The discretion of the legislature extends beyond this, as indicated by the clause 'and such other means as shall be provided by law.' A failure of the legislature to create courts or prescribe modes of procedure may, it

to be true of a provision that the legislature shall grant no charter except on condition that the stockholders shall be liable to the amount of their stock.³⁷ And where a constitution provided in one section that "dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law," and, in a subsequent section, that "each stockholder of a corporation * * * shall be individually and personally liable for his proportion of all its debts and liabilities," it was held that the section last quoted was not self-executing, because, in the first place, while it provided that each stockholder should be liable for his proportion of corporate debts, it did not determine what that proportion should be, or prescribe any rule by which it should be ascertained, and because, in the second place, that section should be read in connection

is true, make ineffective this constitutional provision, but does not destroy the liability; nor is it created by the act of the legislature prescribing the mode of its enforcement."

In *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec), the court held, following *Whitman v. Oxford Nat. Bank*, supra, that the provision of the Kansas Constitution was self-executing, on the ground that the contract in question was made before the highest court of Kansas had passed on the question, and hence that the decision of the Federal Supreme Court was conclusive. See also *Whitman v. Citizens' Bank of Reading*, 110 Fed. 503; *Fowler v. Lamson*, 146 Ill. 472, 37 Am. St. Rep. 163, 34 N. E. 932.

Missouri. The provision of Const. 1865, art. 8, § 6, that "dues from private corporations shall be secured by such means as may be prescribed by law; but in all cases each stockholder shall be individually liable over and above the stock by him or her owned, and any amount unpaid thereon, in a further sum at least equal in amount to such stock," needed legislation to carry it into effect. *Jerman's Adm'r*

v. Benton, 79 Mo. 148; *Blakeman v. Benton*, 9 Mo. App. 107.

Ohio. The provision of Const. 1851, art. 13, § 3, that "dues from stockholders shall be secured, by such individual liability of the stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock," was held not so far self-executing that it could be enforced outside of the state without complying with the statutory provisions governing the manner of ascertaining and enforcing the liability thereby imposed. *Middletown Nat. Bank v. Toledo, A. A. & N. M. R. Co.*, 197 U. S. 394, 49 L. Ed. 803, aff'g 113 Fed. 587. The questions involved in this case were certified to the Supreme Court by the Court of Appeals without deciding them. See 127 Fed. 85. In *Irvine v. Elliott*, 203 Fed. 82, it was held that this provision contemplated legislative action to effect its purpose.

³⁷ Const. 1868, art. 12, § 6, relating to banks. *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

with the former section, which was clearly addressed to the legislature.³⁸

The mere fact that a constitutional provision which, in positive terms, imposes upon stockholders an individual liability for corporate debts, does not prescribe any remedy for enforcing the liability, does not render it any the less self-executing. If it in fact creates a liability in favor of creditors, they may maintain an action in accordance with the principle that when a statute gives a right, without in express terms prescribing any remedy for enforcing the same, the remedy which by law is properly applicable to that right follows as an incident.³⁹

§ 4144. Construction of statutory or constitutional provisions in general. Some of the courts have held that statutory or constitutional provisions imposing upon the stockholders of a corporation personal liability for its debts, although the liability so imposed is contractual, and not penal, in its nature,⁴⁰ are to be strictly construed, since they are in derogation of the common law,⁴¹ and hence

³⁸ *French v. Teschemaker*, 24 Cal. 518. This holding was followed in *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418, and in *United States v. Stanford*, 69 Fed. 25, judgment aff'd 161 U. S. 412, 40 L. Ed. 751. See also *Larrabee v. Baldwin*, 35 Cal. 155.

The second of these provisions is referred to as self-executing in *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915 B 825, 136 Pac. 254.

³⁹ *Willis v. Mabon*, 48 Minn. 140, 16 L. R. A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110. See also § 4216, *infra*.

⁴⁰ See § 4176, *infra*.

⁴¹ *United States*. *Harris v. Northern Blue Grass Land Co.*, 185 Fed. 192, judgment aff'd *Central Wisconsin Trust Co. v. Barter*, 194 Fed. 835.

Illinois. *Steel v. Dunne*, 65 Ill. 298.

Maine. *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904; *Coffin v. Rich*, 45 Me. 511, 71 Am. Dec. 559; *Grose v. Hilt*, 36 Me. 22; *Auld v. Caunt*, 216 Mass. 381, 103 N. E. 933, construing the Maine statute.

Massachusetts. *Gray v. Coffin*, 9 Cush. 192; *Dane v. Dane Mfg. Co.*, 14 Gray 488.

New Jersey. *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52.

New Mexico. *Jones v. Rankin*, 19 N. M. 56, 140 Pac. 1120.

New York. *Chase v. Lord*, 77 N. Y. 1; *Lowry v. Inman*, 46 N. Y. 119; *Diven v. Lee*, 36 N. Y. 302; *Barnes v. Arnold*, 23 Misc. 197, 51 N. Y. Supp. 1109, aff'd 45 App. Div. 314, 61 N. Y. Supp. 85, 169 N. Y. 611, 62 N. E. 1093. *Contra*, *Freeland v. McCullough*, 1 Den. 414, 43 Am. Dec. 685, rev'd 1 N. Y. 47, 49 Am. Dec. 287.

North Carolina. *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893.

Pennsylvania. *De Haven v. Pratt*, 223 Pa. 633, 72 Atl. 1068; *O'Reilly v. Bard*, 105 Pa. St. 569; *Appeal of Means*, 85 Pa. St. 75; *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293.

Rhode Island. See *Wing v. Slater*, 19 R. I. 597, 33 L. R. A. 566, 35 Atl. 302.

Tennessee. See *Tradesman Pub. Co.*

that they are not to be extended beyond the words used;⁴² and that, if susceptible of more than one construction, they should receive that imposing the lightest burden on the stockholders.⁴³ Other courts have held that, since such provisions are remedial, they should be liberally construed in favor of creditors.⁴⁴ According to the better opinion, however, no arbitrary rule of construction should be applied, at least when the liability imposed is contractual in its nature; but the court should simply ascertain and give effect to the intention of the legislature or the people, and with this view the statute or constitutional provision should be construed neither strictly nor liberally, but naturally and reasonably.⁴⁵ It has been said that the liability "should be governed by fair rules and should not be extended or imposed in

v. Knoxville Car Wheel Co., 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

West Virginia. *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184.

⁴² **United States.** *Brunswick Terminal Co. v. National Bank of Baltimore*, 192 U. S. 386, 48 L. Ed. 491, aff'g 112 Fed. 812; *Harris v. Northern Blue Grass Land Co.*, 185 Fed. 192, judgment aff'd *Central Wisconsin Trust Co. v. Barter*, 194 Fed. 835.

Florida. *Saussey v. Liggett*, 78 So. 334.

Georgia. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

Maine. *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904.

New Mexico. *Jones v. Rankin*, 19 N. M. 56, 140 Pac. 1120.

⁴³ *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378, 69 Atl. 771.

⁴⁴ *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63; *Gauch v. Harrison*, 12 Ill. App. 457; *Marion Tp. Union Draining Co. v. Norris*, 37 Ind. 424; *Rider v. Fritchey*, 49 Ohio St. 285, 15 L. R. A. 513, 30 N. E. 692.

Where the liability extends only to the amount remaining unpaid on the stock, the statute will be regarded as remedial. *Rogers v. Stag Min. Co.*, 185 Mo. App. 659, 171 S. W. 676.

The provisions of the National Banking Act as to the manner of enforcing the liability of the stockholders of national banks will not be given a narrow or technical construction, which will restrict the powers of the comptroller and so impede the settlement of the affairs of the bank, but will be liberally interpreted so as to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of the institution. *Korbly v. Springfield Inst. for Savings*, 245 U. S. 330, 62 L. Ed. 326, aff'g judgment 218 Fed. 814.

⁴⁵ **United States.** *Carver v. Braintree Mfg. Co.*, 2 Story 432, Fed. Cas. No. 2,485.

California. *Davidson v. Rankin*, 34 Cal. 503.

Georgia. *Lane v. Morris*, 8 Ga. 475.

Maine. *Ingalls v. Cole*, 47 Me. 540.

Massachusetts. *Priest v. Essex Hat Mfg. Co.*, 115 Mass. 380; *Knowlton v. Ackley*, 8 Cush. 93.

Michigan. *Bohn v. Brown*, 33 Mich. 257.

New Hampshire. *Hicks v. Burns*, 38 N. H. 141.

Vermont. *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313.

"They should be construed neither liberally nor strictly, but reasonably so as to carry out the clear purpose and policy for which they are

violation of the plain dictates of ordinary justice.”⁴⁶ And also that if the statute is susceptible of two constructions, one consistent with natural equity and justice and the other not, the former should be adopted.⁴⁷

If the liability imposed is not contractual in its nature, but penal,⁴⁸ then, of course, the statute is to be strictly construed.⁴⁹

§ 4145. Alteration or repeal of constitutional or statutory provisions—General principles. The presumption is that all legislation is intended to act prospectively, and not retrospectively, and this applies to statutes imposing a liability upon stockholders, or altering or abrogating a liability previously imposed.⁵⁰ But a statute will be given a retroactive effect when it is clear from its terms that the legislature so intended.⁵¹ Retroactive statutes of a purely remedial

enacted.” *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401, 5 So. 120; *Crawford v. Swicord*, — Ga. —, 94 S. E. 1025, rev’g 20 Ga. App. 35, 92 S. E. 394.

⁴⁶ *Assets Realization Co. v. Howard*, 211 N. Y. 430, 105 N. E. 680, aff’g 152 N. Y. App. Div. 900, 136 N. Y. Supp. 1130, 70 N. Y. Misc. 651, 127 N. Y. Supp. 798.

⁴⁷ *Crawford v. Swicord*, — Ga. —, 94 S. E. 1025, rev’g judgment 20 Ga. App. 35, 92 S. E. 394.

⁴⁸ See § 4176, *infra*.

⁴⁹ *Georgia*. *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13.

Iowa. *Seaton v. Grimm*, 110 Iowa 145, 81 N. E. 225.

Missouri. *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214.

Nebraska. *Cady v. Smith*, 12 Neb. 628, 12 N. W. 95.

New York. *Garrison v. Howe*, 17 N. Y. 458; *Farnum v. Harrison*, 167 App. Div. 704, 152 N. Y. Supp. 835, aff’d 218 N. Y. 672, 113 N. E. 1055; *Esmond v. Bullard*, 16 Hun 65.

Rhode Island. *Wing v. Slater*, 19 R. I. 597, 33 L. R. A. 566, 35 Atl. 302.

⁵⁰ *Davis v. Moore*, 130 Ark. 128, 197 S. W. 295; *Black v. Special School*

Dist. No. 2, 116 Ark. 472, 173 S. W. 846, 1104; *Barnes v. Arnold*, 23 N. Y. Misc. 197, 51 N. Y. Supp. 1109, aff’d 45 N. Y. App. Div. 314, 61 N. Y. Supp. 85, 169 N. Y. 611, 62 N. E. 1093.

A statute imposing a new liability will be construed to operate prospectively only, and not to render stockholders liable for debts of the corporation contracted prior to its passage. *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893.

The provisions of the Constitution of 1895 imposing liability on stockholders were not intended to be retroactive, and in terms do not apply to corporations chartered before they went into effect, and which have not reincorporated under such Constitution. *Man v. Boykin*, 79 S. C. 1, 128 Am. St. Rep. 830, 60 S. E. 17.

⁵¹ Acts 1913, p. 462, approved March 3, 1913, imposing liability on stockholders in banks which continue in business after it takes effect was intended to have a retroactive effect so as to make stockholders of such a bank liable for debts incurred prior to the time when the act went into effect. *Davis v. Moore*, 130 Ark. 128, 197 S. W. 295, followed in *Davis v. Branch*, — Ark. —, 202 S. W. 705.

nature do not impair vested rights,⁵² and have been held not to be repugnant to a constitutional provision prohibiting the passage of retroactive laws.⁵³ A constitutional amendment abolishing an existing liability does not affect pending suits.⁵⁴ Of course general provisions that the repeal of a statute shall not affect any right which accrues under it are applicable, and it has been held that such a provision will preserve rights accrued although no action or proceeding has been commenced for their enforcement prior to the repeal of the statute.⁵⁵

A statute imposing liability upon stockholders may be repealed by a subsequent statute, either in express terms or by implication. In the latter case, the question is one of intention. There is an implied repeal if the later statute is inconsistent with the former, or if it appears that the legislature intended that it should cover the whole subject;⁵⁶

In *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626, and *Moore v. Ripley*, 106 Ga. 556, 32 S. E. 647, a statute providing for the enforcement of the liability was held to be remedial in its nature, and to apply to cases where the liability arose prior to its passage.

In *Persons v. Gardner*, 42 N. Y. App. Div. 490, 59 N. Y. Supp. 463, aff'g 26 N. Y. Misc. 663, 56 N. Y. Supp. 822, a statute providing for the enforcement of the liability by a receiver, where one had been appointed, instead of by creditors, was held to be retroactive, so that an action for that purpose could be maintained by a receiver appointed before it took effect.

⁵² *Moore v. Ripley*, 106 Ga. 556, 32 S. E. 647. See also §§ 4146, 4147, *infra*.

⁵³ *Irvine v. Elliott*, 203 Fed. 82.

⁵⁴ An amendment abrogating an existing double liability of stockholders does not affect controversies arising before its enactment. *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11.

⁵⁵ *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915 B 797, Ann. Cas. 1913 A 378, 119 Pac. 74; *Walterscheid v. Bowdish*, 77 Kan. 665, 96 Pac. 56; *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, on re-

hearing 76 Kan. 736, 93 Pac. 173; *Schwartz v. Loftus*, 216 Fed. 320; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.), under the Kansas statute.

⁵⁶ *Indiana*. See *Wood v. Harrison*, 50 Ind. 480.

Maine. *Poor v. Willoughby*, 64 Me. 379; *Milliken v. Whitehouse*, 49 Me. 527.

Maryland. *Strauss v. Heiss*, 48 Md. 292.

Missouri. *Fairchild v. Masonic Hall Ass'n*, 71 Mo. 526.

New York. *Rochester v. Barnes*, 26 Barb. 657.

South Dakota. *Busby v. Riley*, 6 S. D. 401, 61 N. W. 164.

Vermont. *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

Where the later act is a revision of the whole subject-matter covered by the former one and clearly was intended as a substitute therefor, the former one is repealed. *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

It has been held that a constitutional provision, making stockholders of corporations liable for corporate debts to the extent of their unpaid subscriptions only, repeals a statute

but there is no implied repeal if the two statutes are entirely consistent, and can stand together.⁵⁷

§ 4146. — Effect as against stockholders. It is very generally held that any attempt to increase the liability of the existing stockholders of a corporation after its creation, or to impose a liability upon them where none existed before, impairs the obligation of their contracts and is void as to them, unless they consent, or unless the legislature has reserved the power to alter, amend or repeal the charter of the corporation or the general law under which it was formed.⁵⁸ There are, however, some early cases to the effect that the legislature may

making stockholders of a particular class of corporations liable for corporate debts to an amount equal to their stock. *Van Pelt v. Gardner*, 54 Neb. 701, 75 N. W. 874.

⁵⁷ *Whitney v. Hammond*, 44 Me. 305; *Musselman v. Wright*, 107 Mich. 639, 65 N. W. 569; *Close v. Potter*, 2 N. Y. Misc. 1, 21 N. Y. Supp. 1086. And see *Gilbert v. Southern Indiana Coal & Iron Co.*, 62 Ind. 522.

Under the New York Statutory Construction Law (sections 31, 32), providing that rights and liabilities accruing under former statutes shall be continued notwithstanding the repeal of the acts, and that new enactments substantially similar to the provisions of repealed acts shall be construed as continuations of the latter, the liability of stockholders in a corporation for debts incurred before the passage of the amended Stock Corporation Law of 1892 (Laws 1892, c. 688), upon the ground that the whole stock of the corporation had not been paid in, continued under the Act of 1892, which went into force simultaneously with the Statutory Construction Law, although as to debts subsequently incurred a different rule of liability was provided. *Close v. Potter*, 155 N. Y. 145, 49 N. E. 686, rev'g 11 N. Y. Misc. 729, 34 N. Y. Supp. 1136. And see *Thompson v. Nicolai*, 21 N. Y. Misc. 700, 49 N. Y. Supp. 422.

⁵⁸ *United States v. Bernheimer*, 41

Converse, 206 U. S. 516, 51 L. Ed. 1163; *Irvine v. Elliott*, 203 Fed. 82; *Evans v. Nellis*, 101 Fed. 920.

Idaho. *Sparks v. Lower Payette Ditch Co.*, 3 Idaho 306, 29 Pac. 134.

Illinois. *Wincock v. Turpin*, 96 Ill. 135.

Minnesota. *Yonealla State Bank v. Gemmill*, 134 Minn. 334, L. R. A. 1917 A 1223, 159 N. W. 798.

Missouri. *Fairechild v. Masonic Hall Ass'n*, 71 Mo. 526.

Ohio. *Ireland v. Palestine, B., N. P. & N. W. Turnpike Co.*, 19 Ohio St. 369.

This is equally true of a constitutional amendment increasing the liability of stockholders. *Norris Safe & Lock Co. v. Weaver*, 81 Ore. 670, 160 Pac. 807.

Where, at the time an Oregon bank was organized and defendant purchased stock therein, the Constitution of that state provided that stockholders should be liable for the debts of the corporation to the amount of their stock subscribed and unpaid and no more, a subsequent constitutional amendment imposing a double liability on stockholders of banks cannot be held to apply to him. *Yonealla State Bank v. Gemmill*, 134 Minn. 334, L. R. A. 1917 A 1223, 159 N. W. 798.

“The right to regulate and control the banking business under the police power of the state cannot go to the

impose upon the stockholders a liability for debts subsequently contracted without impairing contract obligations, even where no right of amendment or repeal has been reserved.⁵⁹

If the legislature has reserved the power of alteration, amendment or repeal, then it may impose liability upon the stockholders of existing corporations,⁶⁰ at least as to those obligations incurred in the future extent of imposing a personal liability upon the stockholders in a bank contrary to the express constitutional provision in force at the time of the organization of the bank and the purchase of the stock by the stockholder." *Yoncalla State Bank v. Gemmill*, 134 Minn. 334, L. R. A. 1917 A 1223, 159 N. W. 798.

Section 19 of the Banking Law of 1909, providing for the seizure of the business and property of banking corporations by the superintendent of banks under certain circumstances, and § 196 of the same act providing that if default is made in the payment of any debt or liability contracted by any such corporation, the stockholders shall be individually responsible, equally and ratably for the then existing debts of the corporation, but no stockholder shall be liable for the debts of the corporation to an amount exceeding the par value of the respective shares of stock by him held in such corporation at the time of such default, are not unconstitutional as to the stockholders of existing corporations as depriving them of their property without due process of law by impairing the obligations of their contracts with the corporation, or the contract between the corporation and the state created by the law authorizing its incorporation, in view of Const. art. 8, § 7, making stockholders of every banking corporation individually responsible for all its debts and liabilities to the amount of their stock. *Richards v. Schwab*, 101 N. Y. Misc. 128, 167 N. Y. Supp. 535.

⁵⁹ *Coffin v. Rich*, 45 Me. 507, 71 Am.

Dec. 559; *Stanley v. Stanley*, 26 Me. 191; *Child v. Coffin*, 17 Mass. 64; *Gray v. Coffin*, 9 Cush. (Mass.) 192.

⁶⁰ *United States. Sherman v. Smith*, 1 Black 587, 17 L. Ed. 163.

Arkansas. Davis v. Moore, 130 Ark. 128, 197 S. W. 295.

California. McGowan v. McDonald, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

Connecticut. Perkins v. Coffin, 84 Conn. 275, Ann. Cas. 1912 C 1188, 79 Atl. 1070.

Illinois. Weidenger v. Spruance, 101 Ill. 278; *Gulliver v. Roelle*, 100 Ill. 141.

Kentucky. Williams v. Nall, 108 Ky. 21, 55 S. W. 706.

Maine. South Bay Meadow Dam Co. v. Gray, 30 Me. 547.

Minnesota. See Yoncalla State Bank v. Gemmill, 134 Minn. 334, L. R. A. 1917 A 1223, 159 N. W. 798.

Mississippi. Pate v. Bank of Newton, 116 Miss. 666, 77 So. 601.

Montana. Barth v. Poek, 51 Mont. 418, 155 Pac. 282.

New York. Bailey v. Hollister, 26 N. Y. 112; *In re Reciprocity Bank*, 22 N. Y. 9; *In re Gibson*, 21 N. Y. 9; *United States Trust Co. v. United States Fire Ins. Co.*, 18 N. Y. 199; *Hirshfeld v. Bopp*, 27 App. Div. 180, 50 N. Y. Supp. 676; *Hagmayer v. Alten*, 36 Misc. 59, 72 N. Y. Supp. 623; *Barnes v. Arnold*, 23 Misc. 197, 51 N. Y. Supp. 1109, aff'd 45 App. Div. 314, 61 N. Y. Supp. 85, 169 N. Y. 611, 62 N. E. 1093.

North Carolina. Smathers v. Western Carolina Bank, 135 N. C. 410, 47 S. E. 893.

ure.⁶¹ Some courts hold that such liability may be imposed as to debts existing when the statute was enacted,⁶² although other courts hold to the contrary.⁶³ A limitation on the reserved power that no injustice

Rhode Island. See *Kilton v. Providence Tool Co.*, 22 R. I. 605, 48 Atl. 1039.

Wisconsin. *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335.

Under such a reservation the legislature may increase the burden of liability imposed upon stockholders, or may impose a personal liability for the debts of the company thereafter to be contracted, where none was imposed at the date of the company's organization. *Barth v. Pock*, 51 Mont. 418, 155 Pac. 282.

A prospective purchaser of stock is chargeable with knowledge of the provisions of the constitution. Such provisions enter into his contract when he becomes a stockholder, "and he agrees not only to be bound to the liability then imposed, but as well to such additional liability as the legislature under its reserved power may properly prescribe, and therefore he cannot be heard to say that a statute which does not unreasonably affect his liability impairs the obligation of his contract." *Barth v. Pock*, 51 Mont. 418, 155 Pac. 282.

"The statute was intended only to prescribe terms upon which banking corporations might thereafter continue in business, and it imposed no additional liability upon the stockholders unless those terms were accepted by a continuance of the corporation in that business. So the statute falls within the principle announced so often by this court that the Constitution reserves the power of the lawmakers to amend charters of corporations by prescribing new terms upon which they may do business." *Davis v. Moore*, 130 Ark. 128, 197 S. W. 295.

⁶¹ **United States.** *Sherman v. Smith*, 1 Black 587, 17 L. Ed. 163.

Kentucky. *Williams v. Nall*, 108 Ky. 21, 55 S. W. 706.

Michigan. *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585.

Mississippi. *Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601.

Montana. *Barth v. Pock*, 51 Mont. 418, 155 Pac. 282.

New York. In re *Reciprocity Bank*, 22 N. Y. 9; In re *Gibson*, 21 N. Y. 9, aff'd 1 Black (U. S.) 587, 17 L. Ed. 163; *Hagmayer v. Alten*, 36 Misc. 59, 72 N. Y. Supp. 623; *Barnes v. Arnold*, 23 Misc. 197, 51 N. Y. Supp. 1109, aff'd 45 App. Div. 314, 61 N. Y. Supp. 85, 169 N. Y. 611, 62 N. E. 1093.

North Carolina. *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893.

Wisconsin. *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335.

Such an amendment does not give a stockholder a right to have the corporation dissolved. *Williams v. Nall*, 108 Ky. 21, 55 S. W. 706.

⁶² Where the constitution gives the legislature power to alter, revoke or annul any corporate charter, it may impose a liability on stockholders in banks which continue in business after the act takes effect, and may make the same operate retroactively so as to make stockholders liable for debts of the bank incurred prior to the time when the statute takes effect. *Davis v. Moore*, 130 Ark. 128, 197 S. W. 295, followed in *Davis v. Branch*, — Ark. —, 202 S. W. 705.

⁶³ *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893. See also *Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601; *Barnes v. Arnold*, 23 N. Y. Misc. 197, 51 N. Y. Supp. 1109, aff'd 45 N. Y. App. Div. 314, 61 N. Y. Supp. 85, 169 N. Y. 611, 62 N. E. 1093.

shall be done to the stockholder by its exercise must, of course, be observed.⁶⁴

If a constitutional provision directs or authorizes legislation imposing individual liability upon stockholders, every person who becomes a stockholder takes his stock subject thereto, and the legislature may at any time impose such liability as to future debts, without impairing the obligation of contracts.⁶⁵ And where the charter of a corporation provides that no stockholder shall be liable in his individual capacity for any debt or liability of the company "beyond the amount of stock held by him," the obligation of a stockholder's contract is not impaired by a subsequent statute fixing the individual liability of stockholders at that amount, and prescribing a mode of enforcing it.⁶⁶

Statutes imposing a penal liability for corporate debts, as for debts contracted before the full amount of the capital has been paid in, do not impair contract obligations even when applied to existing stockholders, and although power to amend the charter has not been reserved.⁶⁷ Nor is the obligation of a stockholder's contract impaired by a provision imposing a penalty for neglecting to pay assessments when due.⁶⁸

A statute which merely changes the remedy available to creditors applies to stockholders who became such prior to its enactment, and the new remedy is available against them. Its application to them does not constitute an impairment of the contract arising out of their membership, even though the new remedy may be more efficacious

⁶⁴ A provision imposing a double liability on stockholders in banks which continue in business after the act takes effect, and giving it a retroactive effect so as to make stockholders liable for debts of the bank incurred before that time, does not come within a limitation on the right to alter, revoke or annul corporate charters, that no injustice shall thereby be done to the corporators. *Davis v. Moore*, 130 Ark. 128, 197 S. W. 295.

No injustice is done the stockholders by an amendment, where under it the corporation can do business under more favorable terms than a partnership or an individual could. *Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601.

⁶⁵ *Weidenger v. Spruance*, 101 Ill. 278; *Shufeldt v. Carver*, 8 Ill. App. 545.

⁶⁶ *Gridley v. Barnes*, 103 Ill. 211; *Arenz v. Weir*, 89 Ill. 25.

⁶⁷ *Weidenger v. Spruance*, 101 Ill. 278; *Fogg v. Sidwell*, 8 Ill. App. 551; *Shufeldt v. Carver*, 8 Ill. App. 545. See also *Gulliver v. Roelle*, 100 Ill. 141, where the right to amend the charter was expressly reserved.

As to whether the liability is contractual or penal, see § 4176, *infra*.

⁶⁸ He is only obliged to pay his proportionate amount, and is discharged from liability by doing so, and it is his own fault if he incurs the penalty. *Com. v. Cochituate Bank*, 3 Allen (Mass.) 42.

than the old, and may incidentally and under some circumstances prove more burdensome to the stockholders, so long as it involves no actual increase in their liability.⁶⁹ So a statute substituting for individual actions against the stockholders a suit in equity by a receiver

⁶⁹ **United States.** *Converse v. Hamilton*, 224 U. S. 243, 56 L. Ed. 749, Ann. Cas. 1913 D 1292; *Henley v. Myers*, 215 U. S. 373, 54 L. Ed. 240, aff'g 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, on rehearing 76 Kan. 736, 93 Pac. 173; *Converse v. Aetna Nat. Bank*, 212 U. S. 567, 53 L. Ed. 654 (mem. dec.), rev'g 79 Conn. 163, 7 Ann. Cas. 75, 64 Atl. 341; *Bernheimer v. Converse*, 206 U. S. 516, 51 L. Ed. 516; *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 30 L. Ed. 994, aff'g 86 Mo. 466; *Irvine v. Elliott*, 203 Fed. 82.

Georgia. *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085.

Idaho. *Sparks v. Lower Payette Ditch Co.*, 3 Idaho 306, 29 Pac. 134.

Illinois. *Smith v. Bryan*, 34 Ill. 364.

Kansas. *Henley v. Myers*, 215 U. S. 373, 54 L. Ed. 240, aff'g 76 Kan. 723, 736, 17 L. R. A. (N. S.) 779, 93 Pac. 168, 173. See also *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915 B 797, Ann. Cas. 1913 A 378, 119 Pac. 74.

Maine. *Johnson v. Libby*, 111 Me. 204, Ann. Cas. 1916 C 681, 88 Atl. 667; *Hathorn v. Calef*, 53 Me. 471.

Massachusetts. *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98; *Com. v. Cochituate Bank*, 3 Allen 42.

Minnesota. *London & Northwestern American Mortg. Co. v. St. Paul Park Improvement Co.*, 84 Minn. 144, 86 N. W. 872; *Straw & Ellsworth Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.*, 80 Minn. 125, 83 N. W. 36.

New York. *Hirshfeld v. Bopp*, 145 N. Y. 84, 39 N. E. 817, aff'g 81 Hun 555, 30 N. Y. Supp. 1023.

Where the statute under which a corporation was organized imposed a liability upon each stockholder for his proportion of all debts and liabilities

contracted or incurred during the time that he was a stockholder, for the recovery of which joint or several actions might be instituted, it was held that a subsequent statute permitting the directors to assess paid up stock for the purpose of paying legally incurred debts and obligations of the corporation did not increase the liability of the stockholders, but merely enlarged the remedy or method of procedure to collect the amounts due from each stockholder. *Sparks v. Lower Payette Ditch Co.*, 3 Idaho 306, 29 Pac. 134.

In *Bernheimer v. Converse*, 206 U. S. 516, 51 L. Ed. 1163, in determining the validity of a statute of Minnesota enlarging the remedy for enforcing the constitutional liability of stockholders, the court says: "The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each stockholder. That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad

appointed after judgment against the corporation does not impair the contract rights of existing stockholders;⁷⁰ nor does a statute giving a receiver power to enforce the liability of stockholders by suits brought against them in other states, although it takes the place of a statute under which receivers had no power to sue in other jurisdictions;⁷¹ nor does a statute providing that when a judgment is obtained against a corporation a stockholder may be made a party to it, for the purpose of enforcing his liability, before execution issues against the corporation,⁷² nor a statute substituting a remedy by an action on the case for one by *scire facias*,⁷³ nor a statute giving creditors of the corporation a special remedy to reach any balance due from him on his stock, as by allowing an execution against him to the extent of the unpaid balance due on his stock, where there is no corporate property to be levied upon.⁷⁴ The right of the legislature to extend or reduce the time fixed by the statute of limitations for enforcing the liability will be considered in a subsequent section.⁷⁵

A stockholder may waive his right to complain of a statute imposing individual liability for corporate debts on the ground that it impairs the obligation of his contract of membership, and he does so if he makes no objection, and participates in the benefits conferred by the

distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made.''

⁷⁰ *Henley v. Myers*, 215 U. S. 373, 54 L. Ed. 240, aff'g 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, 76 Kan. 736, 93 Pac. 173; *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085; *Johnson v. Libby*, 111 Me. 204, Ann. Cas. 1916 C 681, 88 Atl. 667; *Com. v. Cochi-tuate Bank*, 3 Allen (Mass.) 42.

⁷¹ *Minnesota Gen. Laws* 1899, c. 272, is valid. *Converse v. Hamilton*, 224 U. S. 243, 56 L. Ed. 749, Ann. Cas. 1913 D 1292; *Bernheimer v. Converse*, 206 U. S. 516, 51 L. Ed. 516, followed in *Converse v. Ætna Nat. Bank*, 212 U. S. 567, 53 L. Ed. 654 (mem. dec.), rev'g 79 Conn. 163, 603, 7 Ann. Cas. 75, 64 Atl. 341; *Robinson v. Brown*, 126 Fed. 429; *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98; *London & Northwestern American*

Mortg. Co. v. St. Paul Park Improvement Co., 84 Minn. 144, 86 N. W. 872; *Straw & Ellsworth Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.*, 80 Minn. 125, 83 N. W. 36.

As to the Ohio statute, see *Irvine v. Elliott*, 203 Fed. 82.

The fact that the additional expenses of enforcing the liability of stockholders in other states is to be included in estimating the amount necessary to be raised by assessment does not invalidate the statute, where the expense is kept within the amount of the original liability. *Bernheimer v. Converse*, 206 U. S. 516, 51 L. Ed. 516.

⁷² *Smith v. Bryan*, 34 Ill. 364.

⁷³ *Hathorn v. Calef*, 53 Me. 471; *Cummings v. Maxwell*, 45 Me. 190.

⁷⁴ *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 33 L. Ed. 994, aff'g 86 Mo. 466; *Steam Stone-Cutter Co. v. Scott*, 157 Mo. 520, 57 S. W. 1076.

⁷⁵ See § 4243, *infra*.

statute.⁷⁶ A corporation formed under a special charter or general statute imposing no liability upon stockholders for corporate debts is subject to a general law afterwards passed imposing such liability, where it has accepted an amendment of its charter subjecting it to general laws.⁷⁷ And where the statute imposing the liability provides that after a specified date its provisions shall apply to all corporations, the stockholders of a corporation organized before its enactment are liable thereunder if the corporation continues to do business after the date specified.⁷⁸

§ 4147. — Effect as against creditors. When the liability imposed upon stockholders is contractual in its nature,⁷⁹ the legislature cannot take away or impair the right of existing creditors to resort to such liability, since to do so would impair the obligation of their contracts.⁸⁰ But a statute imposing upon stockholders a penal liability

⁷⁶ *Dows v. Naper*, 91 Ill. 44.

The fact that, after the enactment of an amendment to a special charter imposing liability on stockholders, and granting the corporation additional powers, the stockholders, without objection, allowed the corporation to continue in business and to exercise the new powers granted by the amendment and to make contracts, debts and engagements therein authorized, is sufficient evidence of their acceptance of the liability imposed upon them thereby. *Johnson v. Libby*, 111 Me. 204, Ann. Cas. 1916 C 681, 88 Atl. 667; *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378, 69 Atl. 771.

Where the stockholders of a bank expressly authorize and direct the directors to take the necessary steps to come under and secure the benefits of the act imposing the liability, and such steps are taken, they cannot contend that they are not liable under its provisions to subsequent depositors. *Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601.

In *Senn v. Levy*, 111 Ky. 318, 63 S. W. 776, it was held that, by amend-

ing its articles of incorporation under a statute passed after its incorporation, a corporation was, in effect, reorganized under its provisions and that its stockholders thereby became subject to the double liability imposed by it.

⁷⁷ *Arenz v. Weir*, 89 Ill. 25.

⁷⁸ *Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co.*, 116 Ky. 759, 76 S. W. 862.

The Banking Law of 1892, § 52, imposing a liability upon the stockholders of all banks continuing in business after its enactment, applies to stockholders in an existing bank who became such before the passage of the act, and renders them liable for debts thereafter incurred by the bank. *Hagmayer v. Alten*, 36 N. Y. Misc. 59, 72 N. Y. Supp. 623.

See also § 4148, *infra*.

⁷⁹ See § 4176, *infra*.

⁸⁰ *United States*. *Hawthorn v. Catef*, 2 Wall. 10, 17 L. Ed. 776; *Schwartz v. Loftus*, 216 Fed. 320; *Blackburn v. Irvine*, 205 Fed. 217, aff'g 198 Fed. 360; *Irvine v. Elliott*, 203 Fed. 82; *Republic Iron & Steel Co. v. Carlton*, 189 Fed. 126; *Ramsden v. Knowles*, 151 Fed. 718; *Harri-*

for corporate debts, as distinguished from a contractual liability,⁸¹ is not within the protection of the contract clause of the constitution,

son v. Remington Paper Co., 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.); **Webster v. Bowers**, 104 Fed. 627; **Evans v. Nellis**, 101 Fed. 920; **Western Nat. Bank v. Reckless**, 96 Fed. 70.

Alabama. **National Commercial Bank v. McDonnell**, 92 Ala. 387, 9 So. 149; **McDonnell v. Alabama Gold Life Ins. Co.**, 85 Ala. 401, 5 So. 120.

Delaware. **Pusey & Jones Co. v. Love**, 16 Pennw. 80, 11 L. R. A. (N. S.) 953, 130 Am. St. Rep. 144, 66 Atl. 1013.

Iowa. **Donworth v. Coolbaugh**, 5 Iowa 300.

Kansas. **Douglass v. Loftus**, 85 Kan. 720, L. R. A. 1915 B 797, Ann. Cas. 1913 A 378, 119 Pac. 74; **Rowland & Moyer v. Forest Park Creamery Co.**, 79 Kan. 134, 99 Pac. 212; **Walterscheid v. Bowdish**, 77 Kan. 665, 96 Pac. 56; **Stocker v. Davidson**, 74 Kan. 214, 118 Am. St. Rep. 315, 86 Pac. 136; **Woodworth v. Bowles**, 61 Kan. 569, 60 Pac. 331.

Maine. **Hathorn v. Calef**, 53 Me. 471. A holding to the contrary on a prior appeal in this case was reversed by the Supreme Court of the United States in **Hawthorn v. Calef**, 2 Wall. (U. S.) 10, 17 L. Ed. 776; which also, in effect, overruled. **Hathorn v. Towle**, 46 Me. 302; **Carroll v. Hinkley**, 46 Me. 81; **Coffin v. Rich**, 45 Me. 507, 71 Am. Dec. 559; **Cummings v. Maxwell**, 45 Me. 190.

Michigan. **In re Warren's Estate**, 52 Mich. 557, 18 N. W. 356.

Missouri. **Jerman's Adm'r v. Benton**, 79 Mo. 148; **Provident Sav. Institution v. Jackson Place Skating & Bathing Rink**, 52 Mo. 552; **Blakeman v. Benton**, 9 Mo. App. 107; **St. Louis Railway Supplies Mfg. Co. v. Harbine**, 2 Mo. App. 134.

New York. **Story v. Furman**, 25 N. Y. 214; **Van Tuyl v. Sullivan**, 173 App. Div. 391, 156 N. Y. Supp. 309, aff'd 217 N. Y. 691, 112 N. E. 1078; **Barnes v. Arnold**, 23 Misc. 197, 51 N. Y. Supp. 1109, aff'd 45 App. Div. 314, 61 N. Y. Supp. 85, 169 N. Y. 611, 62 N. E. 1093; **Van Hook v. Whitlock**, 26 Wend. 43, 37 Am. Dec. 246.

Vermont. **Barton Nat. Bank v. Atkins**, 72 Vt. 33, 47 Atl. 176.

The legislature has no right, as to existing creditors, to change the law so as to exempt from liability a person who has transferred his stock although there has been no transfer or tender for transfer on the corporate books, where such a transfer or tender was previously necessary. **Blackburn v. Irvine**, 205 Fed. 217, aff'g 198 Fed. 360.

Where the constitution makes stockholders liable to the amount of their shares "for all its debts and liabilities of every kind," a statute limiting their liability to corporate debts payable within two years from the time they were contracted is unconstitutional. **Van Tuyl v. Sullivan**, 173 N. Y. App. Div. 391, 156 N. Y. Supp. 309, aff'd 217 N. Y. 691, 112 N. E. 1078.

This is true of a change in the provisions of a state constitution so as to abrogate the double liability of stockholders and leave each stockholder liable only to the amount of stock owned by him. **Douglass v. Loftus**, 85 Kan. 720, L. R. A. 1915 B 797, Ann. Cas. 1913 A 378, 119 Pac. 74.

The constitutional prohibition prohibiting the impairment of contract obligations applies to contracts wherever made. **Western Nat. Bank of New York v. Reckless**, 96 Fed. 70.

⁸¹ See § 4176, *infra*.

and may be repealed at any time, even as against existing creditors.⁸² And if such a statute is unconditionally repealed after a creditor has commenced an action against a stockholder thereunder, but before any judgment has been rendered, the action abates.⁸³ It has also been held that "a judgment founded on a tort is not a contract, and for that reason is not protected by the provision of the federal constitution against the impairment of contract obligations by state legislation."⁸⁴

The constitutional prohibition against laws impairing the obligation of contracts does not prevent the legislature from changing, as to existing creditors, the remedy for enforcing the individual liability of stockholders, if the right is not impaired.⁸⁵ But the change in the

⁸² *First Nat. Bank of Omaha v. Cooper*, 89 Neb. 632, 131 N. W. 958; *Hogue v. Capital Nat. Bank of Lincoln*, 47 Neb. 929, 66 N. W. 1036; *Kleckner v. Turk*, 45 Neb. 176, 63 N. W. 469; *Globe Pub. Co. v. State Bank of Nebraska*, 41 Neb. 175, 27 L. R. A. 854, 59 N. W. 683; *Lawler v. Burt*, 7 Ohio St. 340. See also *Richardson v. Akin*, 87 Ill. 138.

⁸³ *Hogue v. Capital Nat. Bank of Lincoln*, 47 Neb. 929, 66 N. W. 1036; *Globe Pub. Co. v. State Bank of Nebraska*, 41 Neb. 175, 27 L. R. A. 854, 59 N. W. 683.

⁸⁴ *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915 B 797, Ann. Cas. 1913 A 378, 119 Pac. 74. In the above case it was held that a judgment for damages for trespass to real estate was not a judgment for tort pure and simple, where the tort benefited the tort-feasor's estate to the full extent of the damages recovered by the injured party, but was so far contractual as to bring it within the provisions of the Federal Constitution.

In *Henley v. Stevenson*, 67 Kan. 4, 72 Pac. 518, it was held that a judgment creditor who had not shown that his judgment was founded on a contract was not within the provision of the constitution, and that his only remedy was that given by the new law.

See also *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, on rehearing 76 Kan. 736, 93 Pac. 173, judgment aff'd 215 U. S. 373, 54 L. Ed. 240.

⁸⁵ *United States. Fourth Nat. Bank v. Franeklyn*, 120 U. S. 747, 30 L. Ed. 825; *Penniman's Case*, 103 U. S. 714, 26 L. Ed. 602, aff'g 11 R. I. 333; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.); *Myers v. Knickerbocker Trust Co.*, 139 Fed. 111, 1 L. R. A. (N. S.) 1171, aff'g 133 Fed. 764. See also *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 33 L. Ed. 994.

Delaware. Pusey & Jones Co. v. Love, 16 Pennew. 80, 11 L. R. A. (N. S.) 953, 130 Am. St. Rep. 144, 66 Atl. 1013.

Georgia. Lamar v. Taylor, 141 Ga. 227, 80 S. E. 1085; *Moore v. Ripley*, 106 Ga. 556, 32 S. E. 647.

Illinois. Richardson v. Akin, 87 Ill. 138.

Kansas. Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331.

Maine. Hathorn v. Calef, 53 Me. 471; *Cummings v. Maxwell*, 45 Me. 190.

Maryland. Bettendorf Axle Co. v. Field, 114 Md. 487, 79 Atl. 724; *Pittsburg Steel Co. v. Baltimore Equitable*

remedy may be so great as to affect and impair the creditor's right, and in such a case it will be within the constitutional provision.⁸⁶ Some courts have held that a change in the law so as to provide for the enforcement of the liability by a receiver instead of by the individual creditors violates the contract rights of existing creditors,⁸⁷

Society, 113 Md. 77, 77 Atl. 255, aff'd 226 U. S. 455, 57 L. Ed. 297; *Miners' & Merchants' Bank of Lonaconing v. Snyder*, 100 Md. 57, 68 L. R. A. 312, 108 Am. St. Rep. 390, 59 Atl. 707.

Missouri. See *Steam Stone-Cutter Co. v. Scott*, 157 Mo. 520, 57 S. W. 1076; *Merchants' Ins. Co. v. Hill*, 86 Mo. 466.

New York. *Persons v. Gardner*, 42 App. Div. 490, 59 N. Y. Supp. 463, aff'g 26 Misc. 663, 56 N. Y. Supp. 822.

Virginia. See *Shickell v. Berryville Land & Improvement Co.*, 99 Va. 88, 37 S. E. 813.

⁸⁶ *Republic Iron & Steel Co. v. Carlton*, 189 Fed. 126; *Myers v. Knickerbocker Trust Co.*, 139 Fed. 111, 1 L. R. A. (N. S.) 1171, aff'g 133 Fed. 764; *Western Nat. Bank of New York v. Reckless*, 96 Fed. 70; *Pusey & Jones Co. v. Love*, 16 Pennw. (Del.) 80, 11 L. R. A. (N. S.) 953, 130 Am. St. Rep. 144, 66 Atl. 1013; *Walterscheid v. Bowdish*, 77 Kan. 665, 96 Pac. 56; *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331; *Miners' & Merchants' Bank of Lonaconing v. Snyder*, 100 Md. 57, 68 L. R. A. 312, 108 Am. St. Rep. 390, 59 Atl. 707. See also *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, on rehearing 76 Kan. 736, 93 Pac. 173.

"The creditor must be allowed to retain in substance the same remedy as before, or in lieu thereof allowed one which will no more seriously embarrass or delay him in the prosecution of his claim and the collection of his debt than did the former one." *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331.

⁸⁷ Thus, it was held that the Kansas law of 1898, providing for the enforcement of the constitutional liability of stockholders by a receiver for the benefit of the corporation and all the creditors alike, did not supersede, as to existing creditors, the former statute, which gave each creditor the right to enforce the liability of any particular stockholder for his own individual benefit, since the right thereby given became a part of contracts entered into while the statute was in force, and the contract obligations would be materially impaired by substitution of the restricted remedy. *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.); *Webster v. Bowers*, 104 Fed. 627; *Evans v. Nellis*, 101 Fed. 920. This case was certified to the Supreme Court, which, however, did not pass on this particular question. See 187 U. S. 271, 47 L. Ed. 173. *Western Nat. Bank of New York v. Reckless*, 96 Fed. 70; *Pusey & Jones Co. v. Love*, 16 Pennw. (Del.) 80, 11 L. R. A. (N. S.) 953, 130 Am. St. Rep. 144, 66 Atl. 1013; *Stocker v. Davidson*, 74 Kan. 214, 118 Am. St. Rep. 315, 86 Pac. 136. In *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331, the same was held to be true of Laws 1897, c. 47, § 55, which made a similar change in the remedy for enforcing the individual liability of stockholders of insolvent banks.

In *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915 B 797, Ann. Cas. 1913 A 378, 119 Pac. 74, it was held that neither the Act of 1898 above re-

while others have taken a contrary view.⁸⁸ And there is a similar conflict of authority as to the validity of a change in the law so as to require the enforcement of the liability by a suit in equity for the benefit of all of the creditors and against all of the stockholders instead of permitting a single creditor to sue one or more stockholders at law for his own benefit, and applying the new remedy to pending actions.⁸⁹ It has been held that contract obligations are not violated

ferred to, nor the Act of 1903 repealing all provisions for enforcing the liability of stockholders, nor the Constitutional Amendment of 1906, which abolished the double liability of stockholders, could affect the right of a judgment creditor, whose cause of action against the corporation arose prior to the taking effect of any of these changes, of the right to maintain a suit against a stockholder under the statute as it existed at the time when such cause of action arose.

In *Walterscheid v. Bowdish*, 77 Kan. 665, 96 Pac. 56, it was held that the Act of 1903 did not affect the right of an existing creditor who was prosecuting an action to determine the liability of the corporation at the time when the act went into effect.

⁸⁸ *Moore v. Ripley*, 106 Ga. 556, 32 S. E. 647, followed in *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626; *Persons v. Gardner*, 42 N. Y. App. Div. 490, 59 N. Y. Supp. 463, aff'g 26 N. Y. Misc. 663, 56 N. Y. Supp. 822.

In *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085, the court refused to pass on the question because no creditor who became such before the change in the law was objecting.

⁸⁹ The right of a single creditor to sue one or more stockholders at law is a valuable one of which he cannot, constitutionally, be deprived. *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24, aff'g 83 N. Y. App. Div. 534, 82 N. Y. Supp. 319.

In *Myers v. Knickerbocker Trust Co.*, 139 Fed. 111, 1 L. R. A. (N. S.)

1171, aff'g 133 Fed. 764, Maryland Acts 1904, c. 337, p. 797, relating to the enforcement of the double liability of stockholders of banks and trust companies was held to impair the contract obligations of creditors who had instituted actions against individual stockholders prior to its passage.

In *Miners' & Merchants' Bank of Lonaconing v. Snyder*, 100 Md. 57, 68 L. R. A. 312, 108 Am. St. Rep. 390, 59 Atl. 707, the Maryland Court of Appeals held that said act did not impair the contract obligations of such creditors, and was valid. And this holding was followed in *Murphy v. Wheatley*, 100 Md. 358, 59 Atl. 704. See also *Republic Iron & Steel Co. v. Carlton*, 189 Fed. 126.

In *Pittsburg Forge & Iron Co. v. Safe Deposit & Trust Co.*, 116 Md. 697, 84 Atl. 335; *Bettendorf Axle Co. v. Field*, 114 Md. 487, 79 Atl. 724; and *Pittsburg Steel Co. v. Baltimore Equitable Society*, 113 Md. 77, 77 Atl. 255, Acts 1908, c. 305, containing a similar provision as to the manner of enforcing the liability of stockholders to creditors for the amount of their unpaid subscriptions, and providing for the abatement of pending actions, was held to be valid. The decision in the latter case was affirmed by the United States Supreme Court, 226 U. S. 455, 57 L. Ed. 297, which overruled 139 Fed. 111, 1 L. R. A. (N. S.) 1171.

New Jersey Act March 30, 1897 (Laws 1897, p. 124), providing that a liability created by or arising under

by substituting a remedy by an action on the case for one by *scire facias*,⁹⁰ or by the repeal of a statute providing a remedy by execution against the person of a stockholder.⁹¹ A provision of a state constitution prohibiting the legislature from depriving a party of any remedy for enforcing a contract which existed when the contract was made has been held to apply to contracts wherever made, and to preclude a change in the remedy for enforcing the liability of stockholders of foreign corporations.⁹² The right of the legislature to extend or reduce the time fixed by the statute of limitations for enforcing the liability will be considered in a subsequent section.⁹³

Repeal or alteration of a provision imposing individual liability upon stockholders, even when the liability is contractual, is effectual as to subsequent creditors, provided the new provision is otherwise constitutional,⁹⁴ and such creditors acquire no right against stockholders under the original provision.⁹⁵ But stockholders are liable under the original provision to creditors who become such after the passage of an act reducing the liability but before such act takes effect.⁹⁶

It has been held that, when the individual liability of stockholders of a corporation imposed by a statutory or constitutional provision is

the laws of any other state can only be enforced in a suit in the nature of an equitable accounting for the proportionate benefit of all parties interested, to which the corporation and all of its creditors and stockholders are necessary parties, violates the constitutional prohibition as against an existing creditor of a Kansas corporation who, prior to the passage of the act, could have sued a single stockholder at law in New Jersey. *Western Nat. Bank of New York v. Reckless*, 96 Fed. 70.

⁹⁰ *Hathorn v. Calef*, 53 Me. 471; *Cummings v. Maxwell*, 45 Me. 190.

⁹¹ *Penniman's Case*, 103 U. S. 714, 26 L. Ed. 602, aff'd 11 R. I. 333.

⁹² *Western Nat. Bank of New York v. Reckless*, 96 Fed. 70, construing art. 4, § 7, ¶ 3, of the New Jersey Constitution.

⁹³ See § 4243, *infra*.

⁹⁴ See § 4142, *supra*.

⁹⁵ *Indiana. Gilbert v. Southern In-*

diana Coal & Iron Co., 62 Ind. 522.

Kansas. *Rowland & Moyer v. Forest Park Creamery Co.*, 79 Kan. 134, 99 Pac. 212.

Maine. *Hathorn v. Calef*, 53 Me. 471.

Minnesota. *Seymour v. Bank of Minnesota*, 79 Minn. 211, 81 N. W. 1059.

Missouri. *Ochiltree v. Iowa Railroad Contracting Co.*, 54 Mo. 113, aff'd 21 Wall. (U. S.) 249, 22 L. Ed. 546.

Persons who deal with the corporation after the repeal of such a provision cannot complain, since they are chargeable with notice of the situation, and have no reason to suppose that they will be benefited by the provisions of a law which is no longer in existence. *Rowland & Moyer v. Forest Park Creamery Co.*, 79 Kan. 134, 99 Pac. 212.

⁹⁶ *Seymour v. Bank of Minnesota*, 79 Minn. 211, 81 N. W. 1059.

lessened by an amendment, a person who becomes a stockholder after the amendment is not liable, under the original provision, for the debts contracted prior to the amendment.⁹⁷ And the same rule has been applied to the holders of increased stock where the increase was made after the taking effect of such an amendment.⁹⁸ It has also been held that the contract of a creditor who became such before the passage of an act imposing liability on stockholders is not impaired by a repeal of the act before he has taken steps to enforce the liability, since his contract was not made on the faith of its provisions.⁹⁹

Of course, a creditor of a corporation may waive the right to object to an act removing or lessening the individual liability of stockholders, on the ground that it impairs the obligation of his contract, and he does waive the objection if he accepts the benefit of the act.¹

§ 4148. Effect of reorganization of corporation. As a rule, where a corporation having a special charter,² or formed under a general law,³ reorganizes under a general law, its stockholders become subject to the liabilities imposed by that law. But the contrary has been held to be true where the liability under a special charter is in terms limited to the amount unpaid on the stock, and the statute authorizing the reorganization does not provide, either expressly or by implication that the reorganization shall operate to increase it.⁴

Where a state bank is changed into a national bank, stockholders

⁹⁷ *Ochiltree v. Iowa Railroad Contracting Co.*, 54 Mo. 113, aff'd 21 Wall. (U. S.) 249, 22 L. Ed. 546.

Compare, however, *National Commercial Bank v. McDonnell*, 92 Ala. 387, 9 So. 149, wherein it was held that one who becomes a stockholder in a corporation after the passage of a law lessening the liability of stockholders to creditors is equally liable with the other stockholders, under the former law, to creditors whose claims existed prior to the change.

⁹⁸ *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

⁹⁹ *Jerman v. Benton*, 79 Mo. 148.

¹ *Van Hook v. Whitlock*, 26 Wend. (N. Y.) 43, 37 Am. Dec. 246.

² In *Tibballs v. Libby*, 87 Ill. 142, it was held that an increase of stock under the provisions of a general law

was, in effect, an incorporation under that law, and hence that the stockholders incurred the liabilities imposed by it.

³ In *Senn v. Levy*, 111 Ky. 318, 63 S. W. 776, it was held that, by amending its articles of incorporation under a statute passed after its incorporation, a corporation was, in effect, reorganized under its provisions and that its stockholders thereby became subject to the double liability imposed by it.

See also *Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601. And see § 4146, supra.

⁴ Under such circumstances the stockholders do not become subject to a double liability imposed by the general law. *Saussy v. Liggett*, — Fla. —, 78 So. 334.

who expressly or impliedly assent to the change thereby become stockholders in the national bank, with such responsibilities as the law imposes in such case,⁵ and hence are subject to the double liability imposed by the National Banking Act.⁶

In some jurisdictions it has been held that the stockholders of a reorganized corporation are primarily liable for the debts of the old corporation, and all remedies against them should be exhausted before resorting to stockholders of the old corporation who did not become members of the reorganized one.⁷

Of course stockholders of the original corporation who do not become members of the reorganized corporation are in no way liable for debts incurred or contracted by it.⁸

§ 4149. Effect of consolidation of corporations. When consolidating corporations are dissolved, and an entirely new corporation created,⁹ the liability of the stockholders in the new corporation is determined by the law in force at the time of the consolidation,¹⁰ subject, of course, to such future changes in the law as may be within the powers of the legislature.¹¹ Under such circumstances the new corporation is subject to a constitutional provision in force at the time of the consolidation, imposing individual liability upon stockholders of such corporations, although the original corporations may have been exempt; and the legislature cannot exempt the new corporation from the provision as to individual liability of stockholders without violating the constitution.¹² Nor will a grant to the consolidated corporation of the franchises, exemptions and immunities of the old companies include an exemption from individual liability for corporate debts which the stockholders of the old companies had by mere im-

⁵ See the chapter on Reorganization.

⁶ *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531; *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168; *Aldrich v. Bingham*, 131 Fed. 363.

⁷ *State v. Germania Bank of St. Paul*, 106 Minn. 446, 119 N. W. 61; *Willius v. Mann*, 91 Minn. 494, 98 N. W. 341, 867; *Marriott v. Columbus, S. & H. R. Co.*, 16 Ohio Dec. (N. P.) 135; *Security State Bank v. Gannon*, 39 S. D. 232, 163 N. W. 1046.

This rule is to be reasonably construed, and does not require the ex-

haustion of all remedies against stockholders primarily liable in favor of whom the statute of limitations has run. *State v. Germania Bank of St. Paul*, 106 Minn. 446, 119 N. W. 61.

⁸ *Willius v. Mann*, 91 Minn. 494, 98 N. W. 341, 867.

⁹ See the chapter on Consolidation.

¹⁰ *Gardner v. Minneapolis & St. L. Ry. Co.*, 73 Minn. 517, 76 N. W. 282, aff'd 177 U. S. 332, 44 L. Ed. 793.

¹¹ See § 4146, *supra*.

¹² *Minneapolis & St. L. Ry. Co. v. Gardner*, 177 U. S. 332, 44 L. Ed. 793, aff'g 73 Minn. 517, 76 N. W. 282.

plication, without any express provision therefor, even assuming it to be within the power of the legislature to grant such an exemption.¹³

The stockholders are estopped to question the constitutionality of the act under which a consolidation is effected where they have accepted its benefits by organizing, issuing stock and doing business as a corporation under it.¹⁴

§ 4150. Effect of dissolution of corporation. Generally the liability continues and may be enforced although the corporation has been dissolved.¹⁵ And in some jurisdictions this is the rule by express provision of the statute.¹⁶ So where the statute provides that corporations whose charters expire by limitation may continue to act for the purpose of winding up their affairs, the liability of the stockholders of such a corporation continues until its business is wound up, at least as respects valid indebtedness contracted while it had a legal existence, and they cannot insist that at the expiration of the charter they became liable only as partners.¹⁷ And, as we shall see in a subsequent section, the liability under some statutes attaches only when the corporation has been dissolved.¹⁸

The failure of the corporation to pay a franchise tax does not relieve its stockholders from their statutory liability, although it is ground for a forfeiture of the corporate charter, where it does not ipso facto

¹³ *Minneapolis & St. L. Ry. Co. v. Gardner*, 177 U. S. 332, 44 L. Ed. 793, aff'g 73 Minn. 517, 76 N. W. 282.

¹⁴ *Gardner v. Minneapolis & St. L. Ry. Co.*, 73 Minn. 517, 76 N. W. 282, aff'd 177 U. S. 332, 44 L. Ed. 793.

And see the chapter on Consolidation.

¹⁵ *Tarbell v. Page*, 24 Ill. 46; *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335.

A creditor may sue in behalf of himself and all other creditors to enforce the liability of stockholders to the extent of the amount unpaid on their stock imposed by Consol. Laws, c. 59, §§ 56, 59, although the corporation has been dissolved and a receiver has been appointed. *Lyell Ave. Lumber Co. v. Lighthouse*, 137 N. Y. App. Div. 422, 121 N. Y. Supp. 802.

See also *Ford v. Chase*, 118 N. Y.

App. Div. 605, 103 N. Y. Supp. 30, aff'd 189 N. Y. 504, 81 N. E. 1164.

Contra. Since the corporate debts become extinct by the expiration of its charter, the liability of the stockholders also becomes extinct if it is secondary. *Malloy v. Mallett*, 6 Jones Eq. (N. C.) 345.

¹⁶ *Kipp v. Miller*, 47 Colo. 598, 135 Am. St. Rep. 236, 108 Pac. 164; *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626; *Merrill v. Suffolk Bank*, 31 Me. 57, 50 Am. Dec. 649 (where an act revoking a corporate charter contained such a provision).

¹⁷ *Elson v. Wright*, 134 Iowa 634, 112 N. W. 105. See also *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335.

As to the effect of such provisions generally, see the chapter on Dissolution.

¹⁸ See § 4181, *infra*.

work such a forfeiture.¹⁹ Nor does the fact that the charter of the corporation could have been declared forfeited had the state chosen to institute proceedings for that purpose constitute a defense to an action to enforce the liability of a stockholder in another state.²⁰

§ 4151. Conflict of laws. Ordinarily the liability of a stockholder for corporate debts and its extent and character, are determined by the law of the state under the laws of which the corporation was created, and not by the laws of the state in which the stockholder may reside. And the decisions of the highest court of that state construing the statutory or constitutional provision by which the liability is imposed will be followed by the courts of other states in which it is sought to enforce the liability against nonresident stockholders.²¹ But

¹⁹ *Murphy v. Wheatley*, 102 Md. 501, 63 Atl. 62.

²⁰ *Bearse v. Mabie*, 198 Mass. 451, 84 N. E. 1015.

²¹ **United States.** *Converse v. Hamilton*, 224 U. S. 243, 56 L. Ed. 749, Ann. Cas. 1913 D 1292, rev'g judgment 136 Wis. 589, 118 N. W. 190; *Finney v. Guy*, 189 U. S. 335, 47 L. Ed. 839, aff'g 106 Wis. 256, 49 L. R. A. 486, 82 N. W. 595; *Hale v. Allinson*, 188 U. S. 56, 47 L. Ed. 380, aff'g judgment 106 Fed. 258, which aff'd 102 Fed. 790; *Evans v. Nellis*, 187 U. S. 271, 47 L. Ed. 173; *Pinney v. Nelson*, 183 U. S. 144, 46 L. Ed. 125; *Chase v. Curtis*, 113 U. S. 452, 28 L. Ed. 1038; *Second Nat. Bank of Erie v. Georger*, 246 Fed. 517; *Leyner Engineering Works v. Kempner*, 163 Fed. 605; *Fidelity Insurance, Trust & Safe-Deposit Co. v. Mechanics' Sav. Bank*, 97 Fed. 297; *Hale v. Hardon*, 95 Fed. 747, rev'g judgment 89 Fed. 283; *Brown v. Trail*, 89 Fed. 641; *Dexter v. Edmonds*, 89 Fed. 467.

California. *Provident Gold Min. Co. v. Haynes*, 173 Cal. 44, 159 Pac. 155; *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942.

Illinois. *Bell v. Farwell*, 176 Ill. 489, 42 L. R. A. 804, 68 Am. St. Rep. 194, 52 N. E. 346; *Tuttle v. National Bank of Republic*, 161 Ill. 497, 34 L. R. A.

750, 44 N. E. 984, rev'g 48 Ill. App. 481; *Fowler v. Lamson*, 146 Ill. 472, 37 Am. St. Rep. 163, 34 N. E. 932, aff'g 44 Ill. App. 186, writ of error dismissed 164 U. S. 252, 41 L. Ed. 424; *Patterson v. Lynde*, 112 Ill. 196; *Smith v. Kastor*, 195 Ill. App. 458; *Hayward v. Sencenbaugh*, 141 Ill. App. 395.

Iowa. *Johnson v. Morgan*, 178 Iowa 577, 160 N. W. 2.

Maine. *Abbott v. Goodall*, 100 Me. 231, 60 Atl. 1030.

Massachusetts. *Auld v. Caunt*, 216 Mass. 381, 103 N. E. 933; *American Spirits Mfg. Co. v. Eldridge*, 209 Mass. 590, 95 N. E. 942; *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98; *Clark v. Knowles*, 187 Mass. 35, 105 Am. St. Rep. 376, 2 Ann. Cas. 26, 72 N. E. 352; *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Howarth v. Lombard*, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 42 L. R. A. 396, 70 Am. St. Rep. 232, 51 N. E. 207; *Id.* 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349; *New Haven Horse Nail Co. v. Linden Springs Co.*, 142 Mass. 349, 7 N. E. 773.

Minnesota. *First Nat. Bank of Deadwood v. Gustin Minerva Consol. Min. Co.*, 42 Minn. 327, 6 L. R. A. 676, 18 Am. St. Rep. 510, 44 N. W. 198.

where a corporation is formed in one state for the purpose of doing business in another state, its stockholders will be held liable in accordance with the laws of the latter state in so far as concerns business transacted there. So the stockholders of a corporation formed to do business in another state whose laws impose a personal liability upon the stockholders of domestic corporations for corporate debts, and provide that the liability of each stockholder of a foreign corporation doing business in the state shall be the same as that of a stockholder of a domestic corporation, may be held liable in accordance with the laws of the latter state in so far as respects business transacted there, although the corporate charter, or the articles of incorporation, or the contract of subscription specifically exempts the stockholders from personal liability, or does not impose any such liability upon them.²²

Missouri. *Rogers v. Stag Min. Co.*, 185 Mo. App. 659, 171 S. W. 676.

New Jersey. *Johnson v. Tennessee Oil, etc., Co.*, 74 N. J. Eq. 32, 69 Atl. 738.

New York. *Southworth v. Morgan*, 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490, rev'g judgment 143 App. Div. 648, 128 N. Y. Supp. 196; *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643; *Savings Ass'n of St. Louis v. O'Brien*, 51 Hun 45, 3 N. Y. Supp. 764.

Ohio. *Blair v. Newbegin*, 65 Ohio St. 425, 58 L. R. A. 644, 62 N. E. 1040; *Kulp v. Fleming*, 65 Ohio St. 321, 87 Am. St. Rep. 611, 62 N. E. 334.

Oregon. *Garetson Lumber Co. v. Hinson*, 69 Ore. 605, 140 Pac. 633.

Pennsylvania. *Ball v. Anderson*, 196 Pa. St. 86, 79 Am. St. Rep. 693, 46 Atl. 366.

Rhode Island. *Miller v. Smith*, 26 R. I. 146, 66 L. R. A. 473, 106 Am. St. Rep. 699, 58 Atl. 634.

Tennessee. *Sullivan v. Farnsworth*, 132 Tenn. 691, 179 S. W. 317.

Texas. *Nesom v. City Nat. Bank*, — Tex. Civ. App. —, 174 S. W. 715.

Wisconsin. *Eau Claire Nat. Bank v. Benson*, 106 Wis. 624, 82 N. W. 604; *Finney v. Guy*, 106 Wis. 256, 49 L. R. A. 486, 82 N. W. 595, aff'd 189 U. S. 335, 47 L. Ed. 839.

"The nature and extent of the stockholders' liability is to be determined by the statute creating it." *Abbott v. Goodall*, 100 Me. 231, 60 Atl. 1030.

The liability is to be determined by the charter of the corporation or the law under which it is organized, and if liable at all the shareholder is generally liable only in accordance with the law of the corporation's domicile. *Nesom v. City Nat. Bank*, — Tex. Civ. App. —, 174 S. W. 715.

"The construction placed upon a statute by the highest courts of the state which enacted it is considered a part of the law itself, and justly entitled to great weight." *Pulsifer v. Greene*, 96 Me. 438, 52 Atl. 921.

A stockholder of a Texas corporation residing in that state cannot be held liable by a Colorado creditor under a Colorado statute imposing personal liability on the stockholders of foreign corporations doing business in that state without complying with its laws. *Leyner Engineering Works v. Kempner*, 163 Fed. 605.

²² *Thomas v. Matthiessen*, 232 U. S. 221, 58 L. Ed. 577, rev'g 192 Fed. 495; *Pinney v. Nelson*, 183 U. S. 144, 46 L. Ed. 125; *Provident Gold Min. Co. v. Haynes*, 173 Cal. 44, 159 Pac. 155; *Thomas v. Wentworth Hotel Co.*, 158

This has been held to be true where the charter or articles of incorporation show a purpose to transact business in the particular state under whose laws the stockholder is sought to be held liable,²³ and also where they confer a general authority upon the corporation to transact business in any other state or territory.²⁴ Nor is it material whether the articles show an intent to carry on all or only a part of the corporate business in such other state.²⁵ The basis of this rule is that, in forming a corporation for the purpose of doing business in a particular state, the stockholders must be deemed to have contracted with ref-

Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942; Peck v. Noee, 154 Cal. 351, 97 Pac. 865.

"A provision exempting the stockholder alongside of one authorizing the doing of business elsewhere cannot be taken to limit the latter authority to those states that grant a like exemption or be deemed an attempt to override the law of the place where the business is to be done." Thomas v. Matthiessen, 232 U. S. 221, 58 L. Ed. 577, rev'g 192 Fed. 495.

Civil Code, § 322, specifically provides that the liability of each stockholder formed outside of the state and doing business within the state is the same as the liability of a stockholder of a domestic corporation. Thomas v. Matthiessen, 232 U. S. 221, 58 L. Ed. 577, rev'g judgment 192 Fed. 495; Provident Gold Min. Co. v. Haynes, 173 Cal. 44, 159 Pac. 155; Thomas v. Wentworth Hotel Co., 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942.

"This statute carries out the constitutional mandate that foreign corporations shall not be 'allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state.'" Thomas v. Wentworth Hotel Co., 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942.

This provision does not impair the obligation of the contract of the stockholders of a corporation which was organized after its enactment. Pinney

v. Nelson, 183 U. S. 144, 46 L. Ed. 125.

²³ Thomas v. Matthiessen, 232 U. S. 221, 58 L. Ed. 577, rev'g 192 Fed. 495; Pinney v. Nelson, 183 U. S. 144, 46 L. Ed. 125; Provident Gold Min. Co. v. Haynes, 173 Cal. 44, 159 Pac. 155; Thomas v. Wentworth Hotel Co., 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942; Peck v. Noee, 154 Cal. 351, 97 Pac. 865.

²⁴ Provident Gold Min. Co. v. Haynes, 173 Cal. 44, 159 Pac. 155.

Where a person "becomes a stockholder in a corporation whose articles authorize it to do business in any state or country which its directors may select, he empowers the directors to engage in business anywhere, and impliedly consents that, when they select a place for the transaction of corporate business, they shall have power to bind him so far as the laws of that place may require. The test of liability is whether the stockholder has authorized the corporation and its managing officers to bind him by entering upon the transaction of business in a given state. Such authority is conferred as well by general language authorizing the transaction of business in any state which the directors may deem it expedient to enter as by words empowering them to transact business in a specific place." Provident Gold Min. Co. v. Haynes, 173 Cal. 44, 159 Pac. 155.

²⁵ Thomas v. Wentworth Hotel Co., 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942.

erence to its laws and to have consented to be bound by them so far as concerns business transacted there, and will therefore be held to the liabilities which those laws impose upon the transaction of such business.²⁶ And the test of whether a stockholder can be held liable under the laws of a given state is whether he has authorized the corporation and its managing officers to transact business there.²⁷

The extent to which provisions imposing liability for corporate debts will be enforced against nonresident stockholders in the courts of states other than that by which the corporation was created,²⁸ including questions as to the remedy to be adopted,²⁹ and the statute of limitations,³⁰ and the question how far a judgment rendered against the corporation,³¹ or an assessment levied on its stockholders³² in the state of its domicile is conclusive in actions brought against stockholders in other jurisdictions, will be considered in subsequent sections.

§ 4152. Extent of liability—General statement. The provisions imposing upon stockholders individual liability for corporate debts and liabilities vary greatly in the different states, and have varied from time to time in the same states. Sometimes the liability is unlimited, and extends to the full amount of the debts or liabilities incurred by the corporation during the time the stockholders respectively own their stock, thus in effect doing away with the common-law exemption of stockholders from liability for corporate debts and rendering them liable as partners.³³ Under other provisions the

²⁶ *Thomas v. Matthiessen*, 232 U. S. 221, 58 L. Ed. 577, rev'g 192 Fed. 495; *Pinney v. Nelson*, 183 U. S. 144, 46 L. Ed. 125; *Provident Gold Min. Co. v. Haynes*, 173 Cal. 44, 159 Pac. 155; *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942; *Peck v. Noe*, 154 Cal. 351, 97 Pac. 865.

²⁷ *Provident Gold Min. Co. v. Haynes*, 173 Cal. 44, 159 Pac. 155.

In *Risdon Iron & Locomotive Works v. Furness*, [1906] 1 K. B. 49, the English Court of Appeal held that a stockholder of an English corporation formed for the purpose of acquiring and working mines in various foreign countries including the United States, and which acquired and worked mines in the state of California, was not subject to the liability imposed on stock-

holders by the laws of that state. It was held that the memorandum and articles of association authorizing the company to trade in foreign countries could not be treated as an authority by every shareholder of the company to the company, or its directors or agents, to carry on business in a foreign country so as to make the shareholder liable beyond the limited liability under which he became a member of the company by virtue of the English law. The court distinguished the holding in *Pinney v. Nelson*, 183 U. S. 144, 46 L. Ed. 125.

²⁸ See § 4247 et seq., *infra*.

²⁹ See § 4249, *infra*.

³⁰ See § 4243, *infra*.

³¹ See § 4252, *infra*.

³² See § 4237, *infra*.

³³ See § 4178, *infra*.

stockholders are made liable only in proportion to the amount or value of their stock,³⁴ or for an amount equal to the par value of their shares in addition to what may have been paid or may be due therefor,³⁵ or merely for the amount due on the stock.³⁶

Sometimes the liability is for certain classes of debts only, as debts due laborers, servants, etc.,³⁷ or debts due for materials, supplies, etc.,³⁸ or, in the case of banking corporations, for money deposited in the bank,³⁹ in which case it may be unlimited, except as to the character of the indebtedness, or it may be limited, as explained above.

The extent of the liability is fixed by the statute creating it,⁴⁰ and its measure is in no way dependent upon the number of shares which a stockholder owns.⁴¹

§ 4153. — Liability to amount due on stock. Sometimes a constitutional or statutory provision declares that stockholders shall be individually liable to creditors of the corporation to the amount due on their stock.⁴² Such a provision imposes no greater liability than exists

³⁴ See § 4155, *infra*.

³⁵ See § 4154, *infra*.

³⁶ See § 4153, *infra*.

³⁷ See § 4168, *infra*.

³⁸ See § 4169, *infra*.

³⁹ See § 4171, *infra*.

⁴⁰ The liability of a stockholder is created by statute, and by statute alone, and the court has no power to add to or lessen such liability. *Liebhardt v. Wilson*, 38 Colo. 1, 120 Am. St. Rep. 97, 88 Pac. 173.

⁴¹ "There is not one measure of liability for a stockholder holding but a few shares and another measure for a stockholder holding many shares." *Liebhardt v. Wilson*, 38 Colo. 1, 120 Am. St. Rep. 97, 88 Pac. 173.

⁴² **Alabama.** *In re Huffman-Salvar Roofing Paint Co.*, 234 Fed. 798.

Arizona. *McConey v. Belton Oil & Gas Co.*, 97 Minn. 190, 106 N. W. 900, construing the Arizona statute.

Colorado. *Henry v. Semonian*, 27 Colo. App. 487, 150 Pac. 818; *Speer v. Bordeleau*, 20 Colo. App. 413, 79 Pac. 332.

Connecticut. *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972.

Delaware. Rev. Code 1915, ¶ 1934;

John W. Cooney Co. v. Arlington Hotel Co., — Del. Ch. —, 101 Atl. 879.

Florida. *Knight & Wall Co. v. Tampa Sand Lime Brick Co.*, 55 Fla. 728, 46 So. 285.

Georgia. *Crawford v. Swicord*, 94 S. E. 1025, rev'g judgment 20 Ga. App. 35, 92 S. E. 394; *Harrell v. Blount*, 112 Ga. 711, 38 S. E. 56.

Idaho. *McTamany v. Day*, 23 Idaho 95, 128 Pac. 563.

Illinois. *Moore v. United States One Stave Barrel Co.*, 238 Ill. 544, 87 N. E. 536, aff'g 141 Ill. App. 104; *Paramelee v. Price*, 208 Ill. 544, 70 N. E. 725, aff'g 105 Ill. App. 271; *Sprague v. National Bank of America*, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, aff'g 66 Ill. App. 320; *Patterson v. Lynde*, 112 Ill. 196, 106 U. S. 519, 27 L. Ed. 265; *Kelly v. Kilian*, 133 Ill. App. 102; *Taylor v. Cummings*, 127 Fed. 108; *American Spirits Mfg. Co. v. Eldridge*, 209 Mass. 590, 95 N. E. 942; *Stoddard v. Lum*, 159 N. Y. 265, 45 L. R. A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108, rev'g judgment 32 N. Y. App. Div. 565, 53 N. Y. Supp. 607.

Kansas. Art. 12, § 2 of the Kansas

in equity in the absence of any provision on the subject, and is merely

'Constitution was amended in 1906 so as to abrogate the double liability of stockholders, and to leave each stockholder liable only to the amount of the stock owned by him. (Gen. St. 1909, § 211.) *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915 B 797, Ann. Cas. 1913 A 378, 119 Pac. 74; *Bicknell v. Altman*, 81 Kan. 436, 105 Pac. 694.

Kentucky. Stockholders are not liable in excess of the amount unpaid on their stock, except stockholders in banks and in trust, guaranty, investment, and insurance companies, upon whom a double liability is imposed. *Ky. St.* 1915, § 547; *Fidelity & Columbia Trust Co. v. Edelen*, 176 Ky. 376, 195 S. W. 447; *Boulware-Allen Shoe Co.'s Trustee v. Morris*, 168 Ky. 426, 182 S. W. 225.

Maine. *Damon v. Webber*, 111 Me. 473, 89 Atl. 734; *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904; *Grindle v. Stone*, 78 Me. 176, 3 Atl. 183.

Maryland. *Hall v. Hughes*, 119 Md. 487, 87 Atl. 387; *Hughes v. Hall*, 117 Md. 547, 83 Atl. 1023.

Minnesota. *McConey v. Belton Oil & Gas Co.*, 97 Minn. 190, 106 N. W. 900.

Mississippi. *Allen v. Edwards*, 93 Miss. 719, 47 So. 382.

Missouri. *Steam Stone-Cutter Co. v. Scott*, 157 Mo. 520, 57 S. W. 1076; *Rogers v. Stag Min. Co.*, 185 Mo. App. 659, 171 S. W. 676.

Montana. *Kelly v. Clark*, 21 Mont. 291, 42 L. R. A. 621, 69 Am. St. Rep. 668, 53 Pac. 959; *Crowley v. Walton*, 23 R. I. 331, 50 Atl. 385, quoting the Montana statute.

Nebraska. *Wyman v. Bowman*, 127 Fed. 257.

New Jersey. *Easton Nat. Bank v. American Brick & Tile Co.*, 70 N. J. Eq. 732, 8 L. R. A. (N. S.) 271, 10 Ann. Cas. 84, 64 Atl. 917, rev'g judgment 69 N. J. Eq. 326, 60 Atl. 54; *In re Newfoundland Syndicate*, 196 Fed. 443; *In re Remington Automobile &*

Motor Co., 153 Fed. 345, modifying judgment 139 Fed. 766; *Kirkpatrick v. American Alkali Co.*, 140 Fed. 186, 135 Fed. 230.

New York. *Firestone Tire & Rubber Co. v. Agnew*, 194 N. Y. 165, 24 L. R. A. (N. S.) 628, 16 Ann. Cas. 1150, 86 N. E. 1116, rev'g judgment 128 App. Div. 518; 112 N. Y. Supp. 907; *Stephens v. Fox*, 83 N. Y. 313; *Mills v. Stewart*, 41 N. Y. 384; *Graeber v. Ehr Gott*, — App. Div. —, 169 N. Y. Supp. 32; *Warth v. Moore Blind Stitcher & Overseamer Co.*, 146 App. Div. 28, 130 N. Y. Supp. 748, aff'd 207 N. Y. 673, 100 N. E. 1135; *Ford v. Chase*, 118 App. Div. 605, 103 N. Y. Supp. 30, aff'd 189 N. Y. 504, 81 N. E. 1164; *Dyer v. Drucker*, 108 App. Div. 238, 95 N. Y. Supp. 749; *Dyer v. Drucker*, 104 N. Y. Supp. 166; *Alpha Portland Cement Co. v. Schratwieser*, 215 Fed. 982, aff'd 221 Fed. 258; *In re Jassoy Co.*, 178 Fed. 515.

North Dakota. *Johnson v. Morgan*, 178 Iowa 577, 160 N. W. 2.

Ohio. *Security Trust Co. v. Ford*, 75 Ohio St. 322, 8 L. R. A. (N. S.) 263, 79 N. E. 474.

Oklahoma. *Chilson v. McFarland*, 161 Pac. 199; *Chilson v. Cavanagh*, 160 Pac. 601; *Smith v. Kastor*, 195 Ill. App. 458.

Oregon. *Myers v. Indiana Min. Co.*, 86 Ore. 664, 168 Pac. 719; *Shipman v. Portland Const. Co.*, 64 Ore. 1, 128 Pac. 989; *McAllister v. American Hospital Ass'n*, 62 Ore. 530, 125 Pac. 286; *Macbeth v. Banfield*, 45 Ore. 553, 106 Am. St. Rep. 670, 78 Pac. 693; *Brunnage v. Monumental Gold & Silver Min. Co.*, 12 Ore. 322, 7 Pac. 314; *Ladd & Bush v. Cartwright*, 7 Ore. 329; *Patterson v. Lynde*, 106 U. S. 519, 27 L. Ed. 265; *Patterson v. Lynde*, 112 Ill. 196.

South Carolina. Const. art. 9, § 18; Civ. Code 1912, § 2784; *Grice v. Anderson*, 96 S. E. 222.

declaratory of the common law,⁴³ although it may render the stockholders liable directly to creditors.⁴⁴

A provision limiting the liability to the amount unpaid on the stock deals only with the contractual relations of the stockholders and does not exempt a stockholder from liability for a loss resulting from his actual misrepresentations as to the capital stock of the corporation, whereby a third person has been induced to extend credit to it.⁴⁵ Nor does it prevent the enforcement by or for the benefit of creditors of an agreement by a subscriber to pay a bonus for his stock in addition to its par value.⁴⁶

South Dakota. Clinton Mining & Mineral Co. v. Cochran, 247 Fed. 449; Bearse v. Mabie, 198 Mass. 451, 84 N. E. 1015.

Texas. Texas, G. & N. R. Co. v. Berlin, — Tex. Civ. App. —, 165 S. W. 62.

Washington. Montesano v. Carr, 80 Wash. 384, 141 Pac. 894; Johns v. Clothier, 78 Wash. 602, 139 Pac. 755; Davies v. Ball, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833; Burch v. Taylor, 1 Wash. 245, 24 Pac. 438.

West Virginia. Security Trust Co. v. Ford, 75 Ohio St. 322, 8 L. R. A. (N. S.) 263, 79 N. E. 474; McDowell v. Lindsay, 213 Pa. 591, 63 Atl. 130. The constitutional provision that the stockholders of all corporations "shall be liable for the indebtedness of such corporations to the amount of their stock subscribed and unpaid, and no more," creates a liability on the part of subscribers in the interest of creditors. The amount subscribed means the amount as ascertained by the par value of the stock as fixed in the articles of incorporation. Security Trust Co. v. Ford, 75 Ohio St. 322, 8 L. R. A. (N. S.) 263, 79 N. E. 474.

Wyoming. Tuttle v. Rohrer, 23 Wyo. 305, 149 Pac. 857, rehearing denied 23 Wyo. 305, 153 Pac. 27.

⁴³ **United States.** Patterson v. Lynde, 106 U. S. 519, 27 L. Ed. 265; Wyman v. Bowman, 127 Fed. 257;

Taylor v. Cummings, 127 Fed. 108.

Georgia. Crawford v. Swicord, 94 S. E. 1025, rev'g judgment 20 Ga. App. 35, 92 S. E. 394.

Illinois. Patterson v. Lynde, 112 Ill. 196.

Minnesota. First Nat. Bank of Deadwood v. Gustin Minerva Consol. Min. Co., 42 Minn. 327, 6 L. R. A. 676, 18 Am. St. Rep. 510, 44 N. W. 198.

Missouri. Steam Stone-Cutter Co. v. Scott, 157 Mo. 520, 57 S. W. 1076.

New York. Stoddard v. Lum, 159 N. Y. 265, 45 L. R. A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108, rev'g judgment 32 App. Div. 565, 53 N. Y. Supp. 607; Warth v. Moore Blind Stitcher & Overseamer Co., 146 App. Div. 28, 130 N. Y. Supp. 748, aff'd 207 N. Y. 673, 100 N. E. 1135.

Washington. Montesano v. Carr, 80 Wash. 384, 141 Pac. 894; Burch v. Taylor, 1 Wash. 245, 24 Pac. 438.

Such a provision creates no new right, but simply provides for the preservation of an old one. Patterson v. Lynde, 106 U. S. 519, 27 L. Ed. 265; Patterson v. Lynde, 112 Ill. 196.

As to the liability in the absence of statute, see § 4095, *supra*.

⁴⁴ See § 4218, *infra*.

⁴⁵ Steam Stone-Cutter Co. v. Scott, 157 Mo. 520, 57 S. W. 1076; Barnard Mfg. Co. v. Ralston Milling Co., 71 Wash. 659, 129 Pac. 389.

⁴⁶ Johns v. Clothier, 78 Wash. 602, 139 Pac. 755. See also National

Holders of watered or fictitiously paid up stock may be held liable under statutes of this character for the difference between the par value of their stock and the amount actually paid for it.⁴⁷

Persons who do not become creditors of a corporation until after its capital stock is reduced under statutory authority, and the certificate and notice filed and given as required by the statute, cannot collect their debts out of subscriptions to the capital stock canceled by the reduction.⁴⁸

Under some statutes stockholders in certain classes of corporations are made liable in double the amount that is unpaid upon the stock held by them.⁴⁹

§ 4154. — Liability to amount or extent of stock; double liability.

As a general rule, the individual liability imposed upon stockholders is neither limited to the amount that may be due on their stock, nor unlimited, but is for an amount equal to the nominal or par value of their stock, in addition to what may have been paid or may be due therefor. Such is the effect of a provision that each stockholder in any corporation shall be liable for its debts "to the amount" of his stock, or "to the extent" of his stock, etc. Such a provision renders stockholders liable to the extent of the face value of their stock, although they may have paid for it in full, and does not mean simply that they shall be bound to pay once for their stock its face value. In other words, it imposes what is called a "double liability."⁵⁰ It has been held in Missouri, however, that a provision that "in no case shall any

Realty Co. v. Neilson, 73 Wash. 89, 131 Pac. 446; *McConaughy v. Juvenal*, 73 Wash. 166, 131 Pac. 851.

The statutory limitation "is a limitation on the implied legal undertaking to pay for the capital stock at par regardless of the contract, not a limitation upon the power of the stockholder to contract with the corporation in reference to a surplus fund, or any other matter." *Johns v. Clothier*, 78 Wash. 602, 139 Pac. 755.

⁴⁷ See § 3589 et seq., *supra*.

⁴⁸ See §§ 3471, 3472, *supra*.

⁴⁹ *Lankford v. Menefee*, 45 Okla. 228, 145 Pac. 375.

⁵⁰ *Alabama*. *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401, 5 So. 120.

Colorado. *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565.

A former statute imposed such a liability on stockholders of banks. *Richardson v. Boot*, 18 Colo. App. 140, 70 Pac. 454.

The complaint in a suit to enforce such liability must allege the number of shares of stock issued by the corporation, the number of shares held by the stockholders respectively, and the amount of debts for which the stockholders are liable, with the dates when created, so that the amount for which judgment shall be rendered against each stockholder may be determined. *Richardson v. Boot*, 18 Colo. App. 140, 70 Pac. 454.

Georgia. *Alexander v. Dever*, —

stockholder be individually liable in any amount over and above the amount of the stock owned by him or her" does not make a stockholder liable for any amount after he has paid in the full amount of his stock.⁵¹

It is sometimes specifically provided that stockholders shall be liable in double the amount of the par value of their stock,⁵² or in double the

Ga. App. —, 95 S. E. 756; *Crawford v. Swicord*, 94 S. E. 1025, rev'g judgment 20 Ga. App. 35, 92 S. E. 394.

Illinois. *Root v. Sinnock*, 120 Ill. 350, 60 Am. Rep. 558, 11 N. E. 339.

Maryland. *Booth v. Campbell*, 37 Md. 522; *Norris v. Johnson*, 34 Md. 485; *Matthews v. Albert*, 24 Md. 527.

Michigan. *Pettibone v. McGraw*, 6 Mich. 441.

Minnesota. *Willis v. Mabon*, 48 Minn. 140, 16 L. R. A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; *Selig v. Hamilton*, 234 U. S. 652, 58 L. Ed. 1518, Ann. Cas. 1917 A 104; *Converse v. Hamilton*, 224 U. S. 243, 56 L. Ed. 749, Ann. Cas. 1913 D 1292, rev'g judgment 136 Wis. 589, 118 N. W. 190; *Bernheimer v. Converse*, 206 U. S. 516, 51 L. Ed. 1163.

Missouri. *Perry v. Turner*, 55 Mo. 418.

New York. *United States Trust Co. v. United States Fire Ins. Co.*, 18 N. Y. 199, 218; *Van Tuyl v. Schwab*, 172 App. Div. 670, 158 N. Y. Supp. 424, appeal dismissed 217 N. Y. 663, 112 N. E. 1078; *Richards v. Schwab*, 101 Misc. 128, 167 N. Y. Supp. 535; *Richards v. Scharmann*, 97 Misc. 143, 161 N. Y. Supp. 109; *Briggs v. Penniman*, 8 Cow. 387, 18 Am. Dec. 454.

South Carolina. *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. 225.

South Dakota. Const. art. 18, § 3; *Security State Bank v. Gannon*, 39 S. D. 232, 163 N. W. 1040. The constitution contemplates a total liability for each share of stock equal to the face value of such share. Hence shares cannot be twice assessed to their full face value merely because

they have changed ownership, even though the liability may be shared by the successive owners.

Tennessee. *Ohio Life Insurance & Trust Co. v. Merchants' Insurance & Trust Co.*, 11 Humph. 1, 53 Am. Dec. 742.

West Virginia. *Dunn v. Bank of Union*, 74 W. Va. 594, L. R. A. 1915 B 168, 82 S. E. 578; *Clark v. Bank of Union*, 72 W. Va. 491, 78 S. E. 785; *Benedum v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656. And see *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273, as to the extent of the liability under the West Virginia Constitution.

Wisconsin. *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797.

⁵¹ *Gausen v. Buck*, 68 Mo. 545; *Schrieker v. Ridings*, 65 Mo. 208; *Lewis v. St. Charles County*, 13 Mo. App. 48.

⁵² **Colorado.** *Adams v. Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642; *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565; *Miller v. Connor*, 177 Mo. App. 630, 160 S. W. 582; *Miller v. Willett*, 71 N. J. Eq. 741, 65 Atl. 681, aff'g 70 N. J. Eq. 396, 62 Atl. 178; *Miller v. Smith*, 26 R. I. 146, 66 L. R. A. 473, 106 Am. St. Rep. 699, 58 Atl. 634.

Maryland. *Murphy v. Wheatley*, 100 Md. 358, 59 Atl. 704.

Under such a provision a stockholder is liable for double the amount of the par value of his stock in addition to the amount of his subscription. *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565; *Murphy v. Wheatley*, 102 Md. 501, 63 Atl. 62.

amount that is unpaid upon the stock held by them,⁵³ or to the amount or extent of their stock at its par value in addition to the amount invested therein,⁵⁴ or in addition to the stock held by them,⁵⁵ or that their liability shall be over and above or in addition to the amount of stock which they respectively hold,⁵⁶ or that they shall be liable

⁵³ *Lankford v. Menefee*, 45 Okla. 228, 145 Pac. 375.

⁵⁴ *Arkansas*. Acts 1913, p. 462, imposes such a liability on the stockholders of banks. *Davis v. Branch*, 202 S. W. 705; *Davis v. Moore*, 130 Ark. 128, 197 S. W. 295; *Black v. Special School Dist. No. 2*, 116 Ark. 472, 173 S. W. 846, 1104; *Roberts v. State*, 116 Ark. 410, 172 S. W. 1039. By its terms the statute applies only to the stockholders of banks which continue in business after it takes effect, and requires existing banks to report to the bank department, within 30 days after it takes effect, a list of its stockholders, and to declare its intention to continue business under the act, as a condition of its being allowed to continue in business. The act went into effect January 1, 1914. It has been held that under these provisions an existing bank had 30 days from January 1, 1914, within which to determine whether it would continue in business, and hence that the stockholders of a bank which ceased to do business on January 12, and had not filed the report required by the statute, were not liable under its provisions. *Davis v. Branch*, 202 S. W. 705; *Davis v. Moore*, 130 Ark. 128, 197 S. W. 295.

Florida. *McNeil v. Pace*, 69 Fla. 349, 68 So. 177.

Maine. *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378, 69 Atl. 771, where the liability was imposed by a special charter granted to a bank.

Massachusetts. *Coyle v. Taunton Safe Deposit & Trust Co.*, 216 Mass. 156, 103 N. E. 288.

Montana. Rev. Codes, § 4012; *Barth v. Pock*, 51 Mont. 418, 155 Pac. 282.

Washington. *Bennett v. Thorne*, 36 Wash. 253, 68 L. R. A. 113, 78 Pac. 936.

⁵⁵ *Idaho*. *McTamany v. Day*, 23 Idaho 95, 128 Pac. 563.

Kentucky. Stockholders in banks, trust companies, guaranty companies, investment companies and insurance companies are liable equally and ratably for all contracts and liabilities of the corporation "to the extent of the amount of their stock at par value in addition to the amount of such stock." Ky. St. 1915, § 547; *Barnes v. Scott*, 171 Ky. 115, 186 S. W. 904, 168 Ky. 640, 181 S. W. 1199, 168 Ky. 121, 181 S. W. 984; *Robertson v. Conway*, 188 Fed. 579; *Alsop v. Conway*, 188 Fed. 568, certiorari denied 223 U. S. 720, 56 L. Ed. 629 (mem. dec.); *Conway v. Owensboro Sav. Bank & Trust Co.*, 185 Fed. 950; *Id.* 165 Fed. 822. Ky. St. 1899, § 547, imposed a similar liability upon stockholders of all corporations not organized for certain specified purposes. *Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co.*, 116 Ky. 759, 76 S. W. 862. The statute applies to corporations in existence when it went into effect, and makes their stockholders liable in respect to debts subsequently contracted. *Williams v. Nall*, 108 Ky. 21, 55 S. W. 706.

Mississippi. Laws 1914, c. 124, § 59, imposes such a liability on holders of bank stock. *Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601.

⁵⁶ *Illinois*. Under the provision of Const. art. 11, § 6, making every stockholder in a banking corporation liable "over and above the amount of

for a sum equal to the amount of their stock and a certain per cent in addition thereto.⁵⁷

§ 4155. — Liability in proportion to amount or value of stock. Sometimes stockholders are made individually liable for corporate debts, neither generally nor merely to the extent of the stock held by them, but in proportion to the amount or value of their stock. Under these statutes, each stockholder is liable for such a proportion of the corporate debts as the amount or value of the stock held by him bears to the whole amount or value of the capital stock of the corporation.⁵⁸

stock by him or her held, to an amount equal to his or her respective shares so held," each stockholder is liable, in addition to his investment in the stock, to a like amount, and not for twice the amount of the stock held by him in addition to the amount so invested. *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273. In the above case, in commenting upon the statement in *Dupee v. Swigert*, 127 Ill. 494, 21 N. E. 622, that under this provision "every stockholder is liable for the debts of the bank to an amount equal to twice the amount of stock held by him, and may be sued for such amount by any creditor, whose claim is large enough to cover it," the court, after calling attention to the fact that there was no question before the court in that case as to the amount of the liability, said: "The statement that the stockholder is liable for the debts of the bank to an amount equal to twice the amount of stock held by him is correct in the sense that his liability to have his property taken for the debts of the bank includes both the amount which he has invested in his stock and a like amount for which he is declared personally and individually liable by the constitution, but it is only for the latter amount that he may be sued by any creditor, and the statement that he may be sued for twice the amount is inaccurate."

Ohio. *Kirtley v. Holmes*, 107 Fed. 1, 52 L. R. A. 738.

Oklahoma. *Lankford v. Menefee*, 45 Okla. 228, 145 Pac. 375.

⁵⁷ Under a provision that stockholders of an insolvent corporation are liable to its creditors for a sum equal to the amount of their stock, and five per cent in addition thereto, the measure of a stockholder's liability is a sum equal to 105 per cent of the amount of his stock. *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

⁵⁸ *Branch v. Baker*, 53 Ga. 502; *Robinson v. Lane*, 19 Ga. 337; *Adkins v. Thornton*, 19 Ga. 325; *Lane v. Morris*, 10 Ga. 162; *Dane v. Young*, 61 Me. 160; *Crease v. Babcock*, 10 Mete. (Mass.) 525.

In California each stockholder of a corporation is liable for such proportion of all its debts and liabilities as the amount of stock owned by him bears to the subscribed capital stock of the corporation. *Provident Gold Min. Co. v. Haynes*, 173 Cal. 44, 159 Pac. 155; *Williams v. Carver*, 171 Cal. 658, 154 Pac. 472; *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915 B 825, 136 Pac. 284; *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942; *Sacramento Bank v. Pacific Bank*, 124 Cal. 147, 45 L. R. A. 863, 71 Am. St. Rep. 36, 56 Pac. 787; *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354; *Larrabee v. Baldwin*, 35 Cal. 155; *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac.

Under a charter provision making stockholders liable in proportion to "the amount of shares and the value thereof" held by them, the value of the stock is that placed upon it by the charter.⁵⁹

Where the liability is for such proportion of the corporate debts and liabilities as the amount of stock owned by the stockholder bears to the "subscribed" capital stock of the corporation, the complaint in an action by a creditor to enforce it must state such proportion, or facts from which it may be deduced,⁶⁰ and to this end the number of the defendant's shares, the total of the subscribed shares, and the amount of the debt sought to be recovered must be pleaded.⁶¹ Under such a provision unissued stock in the corporate treasury cannot be

63; *Miller & Lux v. Dunlap*, 28 Cal. App. 313, 152 Pac. 309; *San Francisco Commercial Agency v. Miller*, 4 Cal. App. 291, 87 Pac. 630; *Thomas v. Matthiessen*, 232 U. S. 221, 58 L. Ed. 577, rev'g judgment 192 Fed. 495; *Buttner v. Adams*, 236 Fed. 105; *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62.

"As the number of individual stockholders' shares is to the whole number of subscribed shares, so is his proportion of the debt to the total amount of the debt." *Roebbling's Sons Co. v. Butler*, 112 Cal. 677, 45 Pac. 6.

A creditor may recover such proportion of his total claim against the corporation as the amount of stock owned by the defendant stockholder at the time the debt was contracted bears to the whole subscribed capital stock. The liability of the stockholder is not a sum equal to such proportion of the total corporate indebtedness contracted while he was a stockholder as his stock bears to the total subscribed stock. *Gardiner v. Bank of Napa*, 160 Cal. 577, 117 Pac. 667.

⁵⁹ *Lane v. Morris*, 10 Ga. 162.

⁶⁰ *Bidwell v. Babcock*, 87 Cal. 29, 25 Pac. 752.

⁶¹ *Provident Gold Min. Co. v. Haynes*, 173 Cal. 44, 159 Pac. 155; *Roebbling's Sons Co. v. Butler*, 112 Cal. 677, 45 Pac. 6; *Bidwell v. Babcock*, 87 Cal. 29, 25 Pac. 752; *San*

Francisco Commercial Agency v. Miller, 4 Cal. App. 291, 87 Pac. 630.

If these facts are not pleaded, it is impossible to determine from the pleading what amount of liability is sought to be charged against a stockholder. *Roebbling's Sons Co. v. Butler*, 112 Cal. 677, 45 Pac. 6.

The averment of these facts is essential to the statement of a cause of action, and the omission of any of them may be reached by general demurrer. *Roebbling's Sons Co. v. Butler*, 112 Cal. 677, 45 Pac. 6; *Bidwell v. Babcock*, 87 Cal. 29, 25 Pac. 752; *San Francisco Commercial Agency v. Miller*, 4 Cal. App. 291, 87 Pac. 630.

"An averment of the amount of such subscribed stock is an essential part of the cause of action. Without it there is no showing of one of the elements necessary for the computation of the 'proportion' of the debt for which the defendant is liable." *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942.

An averment that a certain number of shares were "issued" is not equivalent to an averment that only that number of shares were subscribed. *San Francisco Commercial Agency v. Miller*, 4 Cal. App. 291, 87 Pac. 630.

An averment that the total number of shares "outstanding" was a certain amount, has been held to be suf-

considered in determining the amount for which a particular stockholder is liable;⁶² nor can stock owned by another corporation, virtually all of whose stock is in turn owned by the corporation against whose stockholders the liability is sought to be enforced. Under such circumstances the balance of the stock of the latter company may be regarded as its only subscribed capital stock, and, at the option of the creditor, its holders may be charged with the total debts and liabilities of the issuing corporation.⁶³ But it has been held that a stockholder may show an increased subscription of stock not shown by the corporate books, whereby his liability is less than it otherwise would be, and may insist upon his liability being fixed upon that basis.⁶⁴

Where the stockholders are liable in proportion to their stock, or "equally and ratably," the liability is several, and the liability of one stockholder is not increased by the fact that others are insolvent or nonresidents, so that nothing can be collected from them.⁶⁵ Nor is a stockholder's liability increased beyond the proportion which his stock bears to the whole capital stock by the fact that a part of the capital stock is held by the corporation itself.⁶⁶ And generally such a liability may be enforced by any creditor against any stockholder without joining the other creditors or stockholders.⁶⁷

§ 4156. — Liability until payment or subscription of capital stock.

The statutes sometimes, instead of imposing an absolute liability upon stockholders for debts of the corporation, impose such liability, either

ficient after judgment, where not demurred to. *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942.

An averment that at the time the indebtedness was created "there were subscribed, issued, and outstanding 9,588 shares, and no more," is sufficient, in the absence of a special demurrer. *Hanson v. Sherman*, 25 Cal. App. 169, 143 Pac. 73.

⁶² *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63.

⁶³ *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63.

Where the B. company owned 40 per cent of the stock of the N. company, and the N. company owned virtually the entire stock of the B. company, it was held that the stock of the N. company owned by the B.

company could not be regarded as subscribed capital stock, and hence that the remaining 60 per cent of the stock of the N. company could alone be considered in determining the liability of a stockholder. *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63.

⁶⁴ A stockholder may show an increased subscription of stock not shown by the corporate books, whereby his liability is less than it otherwise would be, and may insist upon his liability being fixed upon that basis. *Hughes Manufacturing & Lumber Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871.

⁶⁵ See § 4179, *infra*.

⁶⁶ *Crease v. Babcock*, 10 Mete. (Mass.) 525.

⁶⁷ See § 4218, *infra*.

to the extent of their stock, or without any limit at all, until the whole amount of the capital stock, or a certain amount thereof, shall have been paid in, and, generally, until a certificate thereof has been recorded or filed in some specified office. Under such a statute, each stockholder is individually liable until the entire amount of stock, or the specified amount thereof, has been paid in, and the certificate filed or recorded; ⁶⁸ and it is no defense for him to show that he has paid in

⁶⁸ **Illinois.** Act March 11, 1869; *Weidenger v. Spruance*, 101 Ill. 278; *Gulliver v. Roelle*, 100 Ill. 141; *Tibballs v. Libby*, 87 Ill. 142; *Richardson v. Akin*, 87 Ill. 138; *Butler v. Walker*, 80 Ill. 345; *Fogg v. Sidwell*, 8 Ill. App. 551; *Shufeldt v. Carver*, 8 Ill. App. 545.

Massachusetts. Rev. Laws 1902, c. 110, § 59, provides that the stockholders in any corporation shall be jointly and severally liable for such of its debts or contracts "as may be contracted before the original capital is fully paid in; but only those stockholders who have not paid in full the par value of their shares, and those who have purchased such shares with knowledge of the fact, shall be liable for such debts." Stat. 1870, c. 224, § 39, contained a similar provision. *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563. Rev. St. c. 38, § 16, made the stockholders jointly and severally liable for all debts and contracts of the corporation until the whole of the capital stock was paid in, and a certificate thereof made and filed. *Holyoke Bank v. Burnham*, 11 Cush. 183; *Johnson v. Somerville Dyeing & Bleaching Co.*, 15 Gray 216; *Curtis v. Harlow*, 12 Mete. 3. Rev. St. 1829, c. 53, § 6, contained a similar provision. *Mill Dam Foundry v. Hovey*, 21 Pick. 417.

New Hampshire. Pub. St. 1901, c. 150, § 8. *Carter, Rice & Co. v. Samuel Hano Co.*, 72 N. H. 549, 58 Atl. 243; *Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363; *Chesley v. Pierce*, 32 N. H. 388. The statute makes

the stockholders liable for all debts and contracts of the corporation until the whole amount of the capital has been paid in and a certificate thereof has been filed and recorded, "and not afterwards." Pub. St. 1901, c. 150, § 8; *Hub Const. Co. v. New England Breeders' Club*, 76 N. H. 289, 82 Atl. 164; *Flather v. Economy Slugging Mach. Co.*, 71 N. H. 398, 52 Atl. 454; *Chesley v. Pierce & Sawyer*, 32 N. H. 388. The liability ceases when the capital is paid in if there is at that time a certificate of that fact recorded in the proper place, without regard to the truth of such certificate when it was made. *Hub Const. Co. v. New England Breeders' Club*, 76 N. H. 289, 82 Atl. 164. The liability imposed is that of guaranteeing the performance of all contractual liabilities of the corporation until the whole of the capital has been paid in, and hence it attaches when and as the corporate liability accrues, even though at that time no action could be maintained against the corporation. *Hub Const. Co. v. New England Breeders' Club*, 76 N. H. 289, 82 Atl. 164. The liability of stockholders for work done for the corporation under a contract attaches when the work is done and not when the contract is made. Hence they are not liable for work done after the capital has been paid in under a contract made before it was paid in. *Hub Const. Co. v. New England Breeders' Club*, 76 N. H. 289, 82 Atl. 164. The fact that the treasurer exhibits a certified check for the amount of the capital stock to

full for his own shares,⁶⁹ except where the statute provides to the contrary.⁷⁰ It has been held that when a certificate of payment of the

the directors and tells them that the whole capital has been paid, when in fact the money represented thereby does not belong to the corporation and is to be returned to its owners after a certificate of payment has been made, is not a payment within the meaning of the statute, even though the money could have been recovered by the corporation from those to whom it was returned. *Hub Const. Co. v. New England Breeders' Club*, 76 N. H. 289, 82 Atl. 164.

New York. Laws 1892, c. 688, and other earlier statutes made stockholders jointly and severally liable to an amount equal to the amount of their stock for every debt of the corporation until the whole amount of its capital stock issued and outstanding at the time such debt was incurred was paid in full. *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24, aff'g 83 App. Div. 534, 82 N. Y. Supp. 319; *Close v. Potter*, 155 N. Y. 145, 49 N. E. 686; *Veeder v. Mudgett*, 95 N. Y. 295; *Hallett v. Metropolitan Messenger Co.*, 69 App. Div. 258, 74 N. Y. Supp. 639, modifying judgment 35 Misc. 659, 72 N. Y. Supp. 370; *Thompson v. Nicolai*, 21 Misc. 700, 49 N. Y. Supp. 422. Liability under this provision was not limited to commercial debts, but included every species of obligation on what could be termed a debt and which could be enforced against the corporation, such as an obligation to an attorney for services. *Hallett v. Metropolitan Messenger Co.*, 69 App. Div. 258, 74 N. Y. Supp. 639, modifying judgment 35 Misc. 659, 72 N. Y. Supp. 370; *Flash v. Conn*, 109 U. S. 371, 27 L. Ed. 966, construing the New York statute. A debt for services rendered between certain dates is not incurred until the last of said dates. *Hallett v. Metropolitan Messenger Co.*,

69 App. Div. 258, 74 N. Y. Supp. 639, modifying judgment 35 Misc. 659, 72 N. Y. Supp. 370. One who becomes a stockholder before the required certificate is made and recorded is liable to creditors where the stock has never been fully paid because of the overvaluation of property for which it was issued even though he did not know of such overvaluation. *White, Corbin & Co. v. Jones*, 167 N. Y. 158, 60 N. E. 422, rev'g judgment 45 App. Div. 241, 61 N. Y. Supp. 21. But an assessment subsequently paid in by the stockholders to an amount equal to such overvaluation cures the defect as to all creditors whose claims accrue thereafter. *Id.* This provision was abrogated by Laws 1901, c. 354. *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24, aff'g 83 App. Div. 534, 82 N. Y. Supp. 319.

Rhode Island. *Lazard Freres v. Phetteplace*, 26 R. I. 568, 59 Atl. 931; *Legg & Co. v. Dewing*, 25 R. I. 568, 57 Atl. 373; *Kilton v. Providence Tool Co.*, 22 R. I. 605, 48 Atl. 1039; *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497; *Fourth Nat. Bank of New York v. Francklyn*, 120 U. S. 747, 30 L. Ed. 825; *Penniman's Case*, 103 U. S. 714, 26 L. Ed. 602, aff'g 11 R. I. 333. The liability extends both to original subscribers for stock, and to persons who purchase stock after it has been issued. *Lazard Freres v. Phetteplace*, 26 R. I. 568, 59 Atl. 931.

⁶⁹ *Tibballs v. Libby*, 87 Ill. 142; *Butler v. Walker*, 80 Ill. 345; *Norris v. Wrenchschall*, 34 Md. 492; *Norris v. Johnson*, 34 Md. 485; *Veeder v. Mudgett*, 95 N. Y. 295.

⁷⁰ The Massachusetts statute limits the liability to those stockholders who have not paid in full the par value of their shares, and those who have purchased shares with knowledge of

whole capital stock is filed in accordance with the statute, it is conclusive evidence in favor of stockholders for the purpose of exempting them from liability for debts afterwards contracted.⁷¹ But there is also authority to the contrary,⁷² particularly where the liability is limited to the amount due on the stock, and the provision imposing it is not coupled with any provision as to the certificate.⁷³

When the whole amount of the capital stock is paid in, and the certificate of the fact filed, when required, the individual liability of the stockholders ceases.⁷⁴ And this is true, even though the stock is paid in and the certificate filed after a creditor has commenced an action against stockholders.⁷⁵

The application of statutes of this character to an increase of stock,⁷⁶ and the question of what constitutes payment for stock,⁷⁷ have been fully considered in previous sections.

It is sometimes provided that persons who organize a corporation and transact business in its name before the minimum capital stock has been subscribed for are liable to creditors to make good the minimum capital stock with interest,⁷⁸ or that they shall be personally

that fact. *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563.

The Rhode Island statute exempts from liability those stockholders who have paid for their stock in full. This exemption is a matter of defense, and need not be negatived in the complaint. *Lazard Freres v. Phetteplace*, 26 R. I. 568, 59 Atl. 931.

⁷¹ *Stedman v. Eveleth*, 6 Mete. (Mass.) 114.

The contrary was held to be true under St. 1870, c. 224, § 39, where the provision requiring the filing of the certificate was entirely separate from that imposing the liability. *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563.

⁷² *Veeder v. Mudgett*, 95 N. Y. 295.

⁷³ Under St. 1870, c. 224, § 39, a stockholder who has not paid for his stock in full is liable although the certificate, required by law, that the capital stock of the corporation has been paid in, was duly filed. *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563, distinguishing *Stedman v. Eveleth*, 6 Mete. (Mass.) 114.

⁷⁴ *Booth v. Campbell*, 37 Md. 522.

⁷⁵ *Booth v. Campbell*, 37 Md. 522.

⁷⁶ See § 3466, *supra*.

⁷⁷ See §§ 3501, *et seq.*, 3517 *et seq.*, *supra*.

⁷⁸ *Rogers v. Hathcock*, 138 Ga. 120, 74 S. E. 834; *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13; *Hill & Merry v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13; *Walters v. Porter*, 3 Ga. App. 73, 59 S. E. 452.

The liability is imposed upon organizers of a company who transact business in its name, whether they are actual stockholders or not. *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13.

The requirement that the minimum capital stock shall be subscribed for before the transaction of business is for the purpose of creating a fund, when the subscriptions have been paid, for the ultimate benefit of those who may extend credit to the corporation; and such persons have the right to presume that the statute has been complied with, and to rely, if necessary, upon the statutory liability

liable upon obligations, which are incurred in violation of the statute.⁷⁹

§ 4157. — Liability on failure to file report or statement. In some jurisdictions there are statutes requiring corporations, or corporations of a particular class, to file an annual report, stating the amount of their capital stock, the amount paid in, and the amount of their existing indebtedness, or other facts which the public are interested in knowing, and providing that, if any corporation shall fail to do so, its stockholders shall be liable individually for its debts.⁸⁰ And in some

of those failing to observe the law. Organizers of a company who transact business in its name before the minimum capital stock has been subscribed for are considered as committing a fraud upon those who may extend credit to the company, and the statute imposes a liability upon them for engaging in such fraudulent transaction. *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13.

To be liable under this provision a person must both participate in the organization of the corporation and also transact business in its name before the minimum capital stock has been subscribed. *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13.

⁷⁹ The Wisconsin statutes provide that no corporation shall transact any business until at least half of its stock shall have been subscribed and at least 20 per cent of said capital stock shall have been actually paid in, and that if any obligation is incurred in violation of this provision, the signers of the articles and the subscribers for stock transacting such business, or authorizing the same, or having knowledge thereof, consenting to the incurring of any debt or liability, as well as the stockholders then existing, shall be personally liable upon the same. Stat. 1915, § 1773. *Atlanta & Walworth Butter & Cheese Ass'n v. Smith*, 141 Wis. 377, 32 L.

R. A. (N. S.) 137, 135 Am. St. Rep. 42, 123 N. W. 106.

Acceptance by the corporation of the assignment to it of a lease running to one of its members, and assumption of the obligations thereby imposed upon the tenant, constitutes the incurring of an obligation to the lessors, within the meaning of this provision. *Zwietusch v. Becker*, 153 Wis. 213, 140 N. W. 1056.

A former statute imposed a similar personal liability upon the stockholders "then existing." The liability is determined by the law in force when it is alleged to have been created. *Heinze v. South Green Bay Land & Dock Co.*, 109 Wis. 99, 85 N. W. 145.

⁸⁰ *Sayles v. Brown*, 40 Fed. 8; *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214; *Wing v. Slater*, 19 R. I. 597, 33 L. R. A. 566, 35 Atl. 302.

The statutes of Rhode Island formerly contained such a provision. Gen. Laws 1896, c. 180, § 11; *First Nat. Bank of Pawtucket v. Littlefield*, 28 R. I. 411, 67 Atl. 594; *Starkweather & Shepley v. Brown*, 25 R. I. 176, 55 Atl. 324, 25 R. I. 142, 55 Atl. 201; *Elsbree v. Burt*, 24 R. I. 322, 53 Atl. 60; *Third Nat. Bank v. Angell*, 18 R. I. 1, 29 Atl. 500.

The liability was not affected by the fact that at the time when the debt sought to be enforced against the stockholder was contracted the corporation was insolvent to the

states there are statutes imposing a similar liability for failure of the corporation to publish annually a notice of the amount of all the existing debts of the corporation.⁸¹ Statutes of this character impose a penal liability.⁸²

§ 4158. — Liability because of defective organization. Statutes in some states provide that a failure to substantially comply with the statutory requirements in relation to the organization of the corporation and the publishing of notice of its incorporation shall render the individual property of the stockholders liable for the corporate debts, either without any limitation,⁸³ or to the extent of the unpaid subscription of any stockholder, and in addition thereto the

knowledge of the creditor. *Elsbree v. Burt*, 24 R. I. 322, 53 Atl. 60.

It was held that a provision that the obligation to file the required notices or reports should cease if the corporation should have become insolvent and made an assignment for the benefit of its creditors, only fixed an event after which no new cause of liability could arise, and did not bar any rights which had then accrued to creditors. *Elsbree v. Burt*, 24 R. I. 322, 53 Atl. 60. This provision was repealed March 28, 1901, but with a saving clause as to existing liabilities. *First Nat. Bank of Pawtucket v. Littlefield*, 28 R. I. 411, 67 Atl. 594.

Under a former statute the liability was limited to an amount equal to the par value of the shares held by a stockholder in addition to the par value thereof. *Third Nat. Bank v. Angell*, 18 R. I. 1, 29 Atl. 500.

Under a statute requiring corporations to file, on or before a certain day, an annual certificate of the amount of the capital stock paid in, the amount of their assets, and the amount of their debts or liabilities, and declaring that, if any corporation shall fail to do so, the stockholders shall be liable for "all the debts of the company then existing, and for all that shall be contracted before" such certificate is filed, it has been held

that failure to file such a certificate on or before the time specified does not make the stockholders liable under a contract previously made by the corporation unless the contract creates a debt against the corporation before a certificate is filed, and therefore that there is no liability under a contract by the corporation to purchase goods to be delivered in the future, where there is no delivery of goods under the contract until after a proper certificate is filed. *Garrison v. Howe*, 17 N. Y. 458; *Wing v. Slater*, 19 R. I. 597, 33 L. R. A. 566, 35 Atl. 302.

⁸¹ There is such a statute in Nebraska. *First Nat. Bank of Omaha v. Cooper*, 89 Neb. 632, 131 N. W. 958; *Id.* 91 Neb. 624, 136 N. W. 1023; *Talmage v. Minton-Woodward Co.*, 83 Neb. 29, 118 N. W. 1099; *Globe Pub. Co. v. State of Nebraska*, 41 Neb. 175, 27 L. R. A. 854, 59 N. W. 683; *New Hampshire Sav. Bank v. Richey*, 121 Fed. 956.

⁸² See § 4176, *infra*.

⁸³ *Iowa Code*, § 1616; *Brinkley Car Works & Manufacturing Co. v. Curfman*, 136 Iowa 476, 114 N. W. 12; *Clinton Novelty Iron Works v. Neiting*, 134 Iowa 311, 111 N. W. 974; *Seaton v. Grimm*, 110 Iowa 145, 81 N. W. 225; *Thornton v. Balcom*, 85 Iowa 198, 52 N. W. 190; *Clegg v. Hamilton & Wright County Grange Co.*, 61 Iowa

amount of capital stock owned by him, after the assets of the corporation have been exhausted.⁸⁴ As to creditors, such a provision requires compliance with the statutes relating to organization to the extent that nothing essential to corporate existence is omitted from the articles of incorporation or their due execution and filing; and, in respect of publicity, that notice is given of every fact incident to organization made material by the statute, and in the form and manner required by the statute.⁸⁵ Of course, a failure to give any notice at all will render

121, 15 N. W. 865; *Marshall v. Harris*, 55 Iowa 182, 7 N. W. 509; *Eisfeld v. Kenworth*, 50 Iowa 389.

The word "and" in the statute has been construed to mean "or." *Seaton v. Grimm*, 110 Iowa 145, 81 N. W. 225; *Eisfeld v. Kenworth*, 50 Iowa 389.

A failure of the articles to fix the highest amount of indebtedness or liability to which the stockholders may be subjected renders the stockholders liable under this provision. *Heuer v. Carmichael*, 82 Iowa 288, 47 N. W. 1034. And the same is true of a failure to publish any notice whatever. *Marshall v. Harris*, 55 Iowa 182, 7 N. W. 509; *Eisfeld v. Kenworth*, 50 Iowa 389.

A failure to comply literally with the statutes relative to incorporation and notice will not render the stockholders personally liable if there has been a substantial compliance. *Seaton v. Grimm*, 110 Iowa 145, 81 N. W. 225.

Since the publication of notice may be made within three months from the date of the certificate of incorporation, the stockholders are not liable for any indebtedness contracted within that time. Nor are they liable on a corporate note executed after the expiration of the three months in renewal of obligations incurred within that time. *Lowden Sav. Bank v. Neiting*, 147 Iowa 119, 124 N. W. 185.

One who purchases stock in a corporation within the time allowed by law for the publication of the notice

of incorporation is liable for debts incurred subsequently and after the expiration of such time, where it does not appear that he did not know all the facts connected with the organization of the corporation at the time when he became a member or when the indebtedness was incurred. *Clin-ton Novelty Iron Works v. Neiting*, 134 Iowa 311, 111 N. W. 974.

In *Houts v. Sioux City Brass Works*, 134 Iowa 484, 110 N. W. 166, it is said that whether one who buys stock in a defectively organized corporation incurs liability under this provision for debts contracted prior to the date of his stock purchase is an open question.

⁸⁴*Hogue v. Capital Nat. Bank*, 47 Neb. 929, 66 N. W. 1036; *Kleckner v. Turk*, 45 Neb. 176, 63 N. W. 469.

Originally the Nebraska statute made the property of all the stockholders liable for the corporate debts without any limitation. The limitation was added in 1891, by an act which repealed the original statute, and provided that it should apply to pending actions. *Hogue v. Capital Nat. Bank*, 47 Neb. 929, 66 N. W. 1036.

That this provision is penal in character, see § 4176, *infra*.

That the provision making the Act of 1891 applicable to pending actions was not unconstitutional as destroying vested rights, see § 4145.

⁸⁵*Brinkley Car Works & Manufacturing Co. v. Curfman*, 136 Iowa 476, 114 N. W. 12.

the stockholders personally liable.⁸⁶ But errors in the notice, either of omission or commission, which are purely technical in character, and which are not likely to disturb the general policy of the statute or work injury to an appreciable extent to any one dealing with the corporation will not have that effect.⁸⁷ Nor will a failure to publish the notice within the time prescribed by law, where it is published before the indebtedness sought to be enforced against the stockholders is incurred, and the creditors know when it is incurred that they are dealing with a corporation.⁸⁸ Such a provision applies only to defects in organization and publicity, and has no application to errors arising out of the subsequent conduct of the business of the corporation, either as between it and its stockholders, or between it and the general public.⁸⁹ Nor does it apply to a purely voluntary association of individuals who adopt a trade name, call themselves a company, and sell shares in the enterprise, where they make no attempt to incorporate, and do not hold themselves out as a corporation.⁹⁰ Persons who were among the original incorporators, and who acted as officers and directors of the corporation, and dealt with it as an entity, cannot hold other stockholders liable under such a provision because of failure to publish the notice of incorporation within the time required.⁹¹

In Mississippi corporations are required to make a report of their organization to the secretary of state within a specified time, and it is provided that, if such a report is not made within the time prescribed, "the charter granted shall be null and void, and all persons doing business thereunder shall be deemed and held to be partners in the business and liable as such."⁹² Stockholders may be held liable under

⁸⁶ *Houts v. Sioux City Brass Works*, 134 Iowa 484, 110 N. W. 166.

⁸⁷ *Brinkley Car Works & Manufacturing Co. v. Curfman*, 136 Iowa 476, 114 N. W. 12.

⁸⁸ *Seaton v. Grimm*, 110 Iowa 145, 81 N. W. 225.

⁸⁹ *Brinkley Car Works & Manufacturing Co. v. Curfman*, 136 Iowa 476, 114 N. W. 12.

⁹⁰ *Schumacher v. Sumner Tel. Co.*, 161 Iowa 326, Ann. Cas. 1916 A 201, 142 N. W. 1034.

⁹¹ *Seaton v. Grimm*, 110 Iowa 145, 81 N. W. 225.

⁹² *Hemingway's Ann. Code* 1917, § 4104; *Code* 1906, § 930; *Hessig-Elis Drug Co. v. Wilkerson*, 115 Miss.

668, 76 So. 570; *Ragland v. Doolittle*, 100 Miss. 498, 56 So. 445.

A certificate of the secretary of state showing the time when the report was filed, and that no other report was filed, is competent evidence to show that it was not filed within the time prescribed. *Ragland v. Doolittle*, 100 Miss. 498, 56 So. 445.

There must be an actual compliance with the statute, and not a mere attempt to comply. It is not enough to show that the required report was sent, but the incorporators must see that it is received as required by the statute. *Ragland v. Doolittle*, 100 Miss. 498, 56 So. 445.

this provision even though the corporation is a corporation de facto.⁹³ The liability is not confined to the officers and agents of the corporation who are actively engaged in carrying on its business, but extends to all of its stockholders, whether active or inactive,⁹⁴ including one who purchases his stock after the expiration of the time fixed for filing the report, and hence after the corporation has lost its right to do business as such.⁹⁵

In Florida it is provided that no corporation shall transact any business until it has had its letters patent and charter recorded and has filed with certain designated public officers duplicate affidavits by its treasurer that ten per cent of its capital stock has been subscribed and paid, and that if any corporation shall transact any business before complying with these requirements, its stockholders shall be personally liable for all of its debts as if they were members of a general partnership.⁹⁶

The fact that a person has dealt with and extended credit to a company as a corporation,⁹⁷ or has sued it and obtained judgment and execution against it as a corporation,⁹⁸ does not estop him from suing the stockholders under statutes of this character since they impose a liability upon them in addition to that resting upon the corporation, and do not substitute the one remedy for the other, nor require an election between them.

⁹³ Hessig-Ellis Drug Co. v. Wilkerson, 115 Miss. 668, 76 So. 570.

⁹⁴ Hessig-Ellis Drug Co. v. Wilkerson, 115 Miss. 668, 76 So. 570.

⁹⁵ Hessig-Ellis Drug Co. v. Wilkerson, 115 Miss. 668, 76 So. 570.

⁹⁶ Gen. St. 1906, § 2652; Charles v. Young, — Fla. —, 76 So. 869; Humphreys v. Drew, 59 Fla. 295, 52 So. 362; Heinberg Bros. v. Thompson, 47 Fla. 163, 37 So. 71.

Stockholders of a proposed corporation who execute a note in its name prior to the issuance of letters patent are liable thereon as partners under this provision. Humphreys v. Drew, 59 Fla. 295, 52 So. 362.

Affidavits made before the issuance of letters patent, and hence before there is any corporation in existence, are not a compliance with the statute, though filed after it comes into

existence, where they are not resworn to. Heinberg Bros. v. Thompson, 47 Fla. 163, 37 So. 71.

⁹⁷ Charles v. Young, — Fla. —, 76 So. 869; Humphreys v. Drew, 59 Fla. 295, 52 So. 362; Heinberg Bros. v. Thompson, 47 Fla. 163, 37 So. 71; Heurer v. Carmichael, 82 Iowa 288, 47 N. W. 1034; Ragland v. Doolittle, 100 Miss. 498, 56 So. 445. See also Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99.

To hold otherwise would nullify the statute. Ragland v. Doolittle, 100 Miss. 498, 56 So. 445.

This is also true where it is sought to enforce a similar liability on the part of corporate officers. See § 2624, supra.

⁹⁸ Charles v. Young, — Fla. —, 76 So. 869; Heurer v. Carmichael, 82 Iowa 288, 47 N. W. 1034.

§ 4159. — Liability where corporation has no capital stock. Under some statutes each member of a corporation having no capital stock is made individually and personally liable for an equal share of its debts and liabilities.⁹⁹

§ 4160. — Liability of stockholders of national banks. The National Bank Act provides that the shareholders of a national bank shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares.¹ In order to ascertain the amount of the separate liability of each shareholder, it is necessary to ascertain the whole amount of the par value of all the stock held by all the shareholders, and the amount of the deficit to be paid after exhausting all the assets of the bank, and then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value.² The liability of all the shareholders together cannot exceed

⁹⁹ Civ. Code, § 322; *Upton v. Woman's Club of Kern*, 19 Cal. App. 127, 124 Pac. 858.

¹ *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423; *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, 3 Ann. Cas. 500, rev'g judgment 119 Fed. 110; *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, aff'g 89 Fed. 843; *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216; *Williams v. Vreeland*, 244 Fed. 346; *Rankin v. Miller*, 207 Fed. 602; *Fowler v. Gowing*, 152 Fed. 801, aff'd 165 Fed. 891; *Williamson v. American Bank*, 115 Fed. 793, aff'g 109 Fed. 36; *Lease v. Barschall*, 106 Fed. 762; *Sykes v. Holloway*, 81 Fed. 432; *Graham v. Platt*, 28 Colo. 421, 65 Pac. 30; *Mortimer v. Potter*, 213 Ill. 178, 72 N. E. 817, aff'g 114 Ill. App. 422; *McLean v. Moore*, — Tex. Civ. App. —, 145 S. W. 1074.

Notes given by a bank as part of the consideration for the assumption of its debts by another bank repre-

sent in equity the "contracts, debts and engagements" of the bank, for which its stockholders are liable. *George v. Wallace*, 135 Fed. 286, aff'd 201 U. S. 230, 50 L. Ed. 738.

In *American Nat. Bank of Macon v. Commercial Nat. Bank of Macon*, 248 Fed. 187, 246 Fed. 721, an agreement between two national banks for the transfer of all the assets of one of them, which was about to go into voluntary liquidation, to transfer all of its assets to the other was held to be a contract of purchase, and not to create the relation of debtor and creditor between them, and hence that the purchaser could not hold the stockholders of the seller individually liable for the difference between the amount expended by it in paying the seller's debts assumed by it under the contract and the amount realized from the seller's assets.

² *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216; *Lease v. Barschall*, 106 Fed. 762.

the entire amount of the capital stock of the bank at its par value, and the liability of no one shareholder can exceed such sum as bears the same proportion to the whole amount of the deficit to be paid as the stock held by him bears to the whole amount of the capital stock.³ No stockholder can be required to make good the failure of another stockholder to pay the amount of his assessment.⁴ So, the fact that one stockholder is insolvent, or beyond the jurisdiction of the court, does not in any way affect the liability of another stockholder.⁵ And for the purpose of making a second assessment, the first one must be deemed to have been paid in full. In other words, a second assessment cannot be made to make good a deficiency resulting from a failure of certain of the stockholders to pay the first one.⁶ And if the bank itself holds some of its stock, it is regarded in all respects as if such stock were held by a natural person, and the extent of the individual liability of the other stockholders is to be computed accordingly.⁷ The liability of a stockholder in any case cannot exceed an amount equal to the par value of his stock.⁸

§ 4161. What corporations are within statutory or constitutional provisions—In general. A statutory or constitutional provision imposing upon stockholders individual liability for corporate debts may be general, and apply to all corporations,⁹ or it may in terms apply to corporations of a particular class only, as banking corporations, trust companies, and the like,¹⁰ or to manufacturing corpora-

³ United States v. Knox, 102 U. S. 422, 26 L. Ed. 216.

⁴ Lease v. Barsehall, 106 Fed. 762.

⁵ See § 4179, *infra*.

⁶ Lease v. Barsehall, 106 Fed. 762; Beckham v. Hague, 38 N. Y. Misc. 606, 78 N. Y. Supp. 79, *aff'd* 80 N. Y. App. Div. 626, 80 N. Y. Supp. 1129.

⁷ United States v. Knox, 102 U. S. 422, 26 L. Ed. 216.

⁸ Where the comptroller levies an assessment of 100 per cent, he cannot levy another assessment as long as the first one stands. Pepper v. Springfield Inst. for Savings, 218 Fed. 814.

⁹ Arenz v. Weir, 89 Ill. 25; Poor v. Willoughby, 64 Me. 379.

The constitutional provision (art. 10, § 3) imposing liability on the stockholders "in any corporation"

applies to stockholders of a state bank which is not a bank of issue or circulation. Northwestern Trust Co. v. Bradbury, 112 Minn. 76, 127 N. W. 386.

¹⁰ Arkansas. Davis v. Moore, 130 Ark. 128, 197 S. W. 295.

Colorado. Adams v. Clark, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642.

Georgia. Civ. Code 1910, § 2270; Crawford v. Swicord, 94 S. E. 1025, *rev'g* judgment 20 Ga. App. 35, 92 S. E. 394; Alexander v. Dever, — Ga. App. —, 95 S. E. 756.

Idaho. Rev. Codes, § 2979. McTamany v. Day, 23 Idaho 95, 128 Pac. 563.

Illinois. Banking corporations having special charters which availed themselves of the provisions of Act June 16, 1887, by its terms became

tions,¹¹ or those "whose object is a dividend of profits";¹² or it may in terms except a certain class or certain classes of corporations.¹³

subject to its provisions in every particular, and the liability of the stockholders is thereafter governed by its provisions rather than by those of the special charter. *Boor v. Tolman*, 113 Ill. App. 322.

Kentucky. Double liability is imposed upon stockholders in banks and in trust, guaranty, investment and insurance companies. Ky. St. 1915, § 547; *Barnes v. Scott*, 171 Ky. 115, 186 S. W. 904, 168 Ky. 640, 181 S. W. 1199, 168 Ky. 121, 181 S. W. 984; *Robertson v. Conway*, 188 Fed. 579; *Alsop v. Conway*, 188 Fed. 568, certiorari denied 223 U. S. 720, 56 L. Ed. 629 (mem. dec.); *Conway v. Owensboro Sav. Bank & Trust Co.*, 185 Fed. 950; *Id.* 165 Fed. 822.

Maryland. *Murphy v. Wheatley*, 100 Md. 358, 59 Atl. 704.

Mississippi. Laws 1914, c. 124, § 59; *Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601.

Montana. Rev. Codes, § 4012; *Barth v. Pock*, 51 Mont. 418, 155 Pac. 282.

Nebraska. *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67, 92 N. W. 189, where a so-called loan and trust company was held to be a "banking corporation or institution" within the meaning of the constitution.

New Mexico. *Jones v. Rankin*, 19 N. M. 56, 140 Pac. 1120.

New York. *Richards v. Schwab*, 101 Misc. 128, 167 N. Y. Supp. 535.

Oklahoma. Under the Oklahoma statute a stockholder of a bank organized under the Banking Act is additionally liable for the amount of stock owned by him, and no more, while a stockholder of a trust company organized under the Trust Company Act, is liable to the extent only of double the amount that is unpaid upon the stock held by him. The

Banking Act provides that any individual firm, or corporation who shall receive money on deposit shall be considered as doing a banking business, and shall be amenable to all of the provisions of the act. Under these provisions it has been held that the liability of stockholders of a corporation organized under the Trust Company Act is that fixed by that act, and not that fixed by the Banking Act, although it also does a banking business. Such a stockholder is neither "an individual, firm or corporation" doing a banking business, within the meaning of the statute, and the term "corporation," as used therein, is not broad enough to cover the stockholders of a corporation doing a banking business. *Lankford v. Menefee*, 45 Okla. 228, 145 Pac. 375.

Pennsylvania. The words "trust companies" as used in Act May 11, 1874, imposing a double liability upon the stockholders of banks, trust companies, etc., apply only to those trust companies created by special acts prior to the adoption of the new constitution and which were given the right to engage in the banking business, and not to a trust company incorporated under the General Corporation Act of 1874. *De Haven v. Pratt*, 223 Pa. 633, 72 Atl. 1068.

South Carolina. *J. H. Wilkes & Co. v. Arthur*, 91 S. C. 163, 74 S. E. 361.

¹¹ *Johnson v. Somerville Dyeing & Bleaching Co.*, 15 Gray (Mass.) 216.

¹² Under such a provision stockholders of a club organized for the purpose of promoting social recreation, and amusement, and not for the purpose of making money for its shareholders, are not individually liable for its debts and contracts. *Coulombe v. Eastman*, 76 N. H. 248, 81 Atl. 704.

¹³ See § 4162, *infra*.

If the constitution imposes liability upon the stockholders of all corporations, the legislature cannot exempt the stockholders of any corporation from liability, whether created by special act or under a general law.¹⁴ But in the absence of such a restriction the legislature has discretionary power to classify corporations in this respect, and the court will not disturb its judgment unless it is manifestly arbitrary and unjust.¹⁵ Nor does a provision of a state constitution exempting the stockholders of corporations organized for the purpose of carrying on any kind of manufacturing or mechanical business violate the Federal Constitution by making an improper classification of corporations and arbitrarily denying to those not within the excepted class the equal protection of the laws.¹⁶

A general statutory or constitutional provision, making stockholders of corporations individually liable for corporate debts, applies to corporations created by special act, as well as to those formed under general laws, unless they are excluded in express terms or by necessary implication by the act creating them,¹⁷ or unless, in the case of a statutory provision, the corporation was created before the passage of the act, and its charter is not subject to alteration or amendment.¹⁸

A constitutional or statutory provision imposing individual liability upon the stockholders of every corporation for banking purposes issuing bank notes or paper credits to circulate as money does not apply to any banks except banks of issue.¹⁹

As we have seen in a previous chapter, a statutory liability for corporate debts may be enforced against the stockholders of a de facto corporation to the same extent as though it were a corporation de jure.²⁰

¹⁴ See § 4142, *supra*.

¹⁵ *Williams v. Nall*, 108 Ky. 21, 55 S. W. 706.

¹⁶ *Way v. Barney*, 116 Minn. 285, 38 L. R. A. (N. S.) 648, Ann. Cas. 1913 A 719, 133 N. W. 801.

¹⁷ *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; *Poor v. Willoughby*, 64 Me. 379; *Came v. Brigham*, 39 Me. 35.

In *Murphy v. Wheatley*, 100 Md. 358, 59 Atl. 704, a general statute imposing liability upon the stockholders of trust companies was held to apply to a trust company subsequently in-

corporated by a special act, although not referred to in its charter.

¹⁸ See § 4146, *supra*.

¹⁹ *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696. See also *Allen v. Clayton*, 63 Iowa 11, 50 Am. Rep. 716, 18 N. W. 663; *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Allen v. Walsh*, 25 Minn. 543.

²⁰ See § 321, *supra*. See also *Wesco Supply Co. v. Smith*, — Ark. —, 203 S. W. 6, decided since the above section was written.

§ 4162. — Provisions excepting certain classes of corporations.

The statutory or constitutional provision imposing the liability may in terms except the stockholders of a certain class or certain classes of corporations.²¹ And as we have seen the legislature has discretionary power to classify corporations in this respect,²² unless restricted by the constitution.²³

Whether a particular corporation comes within such an exception must be determined solely from the language of its charter or articles of incorporation, showing the purposes for which it was organized.²⁴ If they bring the corporation within the exception, the stockholders are not liable because the organizers intended to engage in a business not within the exception, and actually did engage therein, and made it appear from the articles that the corporation was to engage in an excepted business for the purpose of avoiding the stockholders' liability, for the powers of the corporation are limited to the purposes stated in the articles, and persons dealing with it are chargeable with notice of such limitation.²⁵ On the other hand stockholders

²¹ *Gilbert v. Southern Indiana Coal & Iron Co.*, 62 Ind. 522; *Burkam v. Fitch*, 51 Ind. 375; *Wood v. Harrison*, 50 Ind. 480; *Whitney v. Hammond*, 44 Me. 305.

Kentucky St. 1899, § 547, imposes liability upon the stockholders of each corporation not organized for certain specified purposes. *Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co.*, 116 Ky. 759, 76 S. W. 862; *Williams v. Nall*, 108 Ky. 21, 55 S. W. 706.

A provision exempting the stockholders of corporations organized for the construction or operation of electric plants does not exempt the stockholders of a corporation organized for the purpose of conducting a "general electric business." *Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co.*, 116 Ky. 759, 76 S. W. 862.

See also the notes following.

²² See § 4161, *supra*.

²³ See § 4142, *supra*.

²⁴ *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537 (under the Minnesota Constitution); *Gamewell Fire Alarm Tel. Co. v. Fire & Police*

Tel. Co., 116 Ky. 759, 76 S. W. 862; *Merchants' Nat. Bank v. Minnesota Thresher Mfg. Co.*, 90 Minn. 144, 95 N. W. 767; *Senour Mfg. Co. v. Church Paint & Manufacturing Co.*, 81 Minn. 294, 84 N. W. 109; *Marin v. Augedahl*, 32 N. D. 536, 156 N. W. 101 (under the Minnesota Constitution).

²⁵ *Senour Mfg. Co. v. Church Paint & Manufacturing Co.*, 81 Min. 294, 84 N. W. 109.

"It is immaterial that the corporation was organized under the statute providing for organizing manufacturing corporations or what the actual intention of the incorporators was, or that the corporation in fact carried on only a manufacturing business, but its articles of incorporation are the sole criterion as to such intention and the purposes for which the corporation was organized; and, unless it fairly appears therefrom that it was organized for the exclusive purpose of engaging in manufacturing and such incidental business as may be reasonably necessary for effectuating the purpose of its organization, its stockholders are not within the exception

cannot exempt themselves from liability by organizing in form under an act governing the formation of corporations of the excepted class and alleging their organization to be for the excepted purposes, when it is evident, not only from their articles, but also from the character of the business actually carried on, that the primary object is to carry on a business wholly foreign to the excepted purpose.²⁶

The corporation must be organized exclusively for one of the excepted purposes. If it is organized for the purpose of carrying on a business coming within the exception and is also authorized to carry on other kinds of business not properly incidental thereto or necessarily connected therewith, and not within the exception, the stockholders will be liable,²⁷ even though, as a matter of fact, the corpora-

to the general rule of constitutional liability of stockholders for the debts of their corporation." *Merchants' Nat. Bank v. Minnesota Thresher Mfg. Co.*, 90 Minn. 144, 95 N. W. 767, quoted in *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537.

The mere fact that a manufacturing corporation actually engages in a business not authorized by its articles of incorporation with the knowledge of the stockholders does not render them liable for corporate debts under the Minnesota Constitution. *Senour Mfg. Co. v. Church Paint & Manufacturing Co.*, 81 Minn. 294, 84 N. W. 109; *Nicollet Nat. Bank v. Frisk-Turner Co.*, 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160.

A corporation whose articles state that "its business shall be the manufacturing of clothing of every description, and the sale of clothing so manufactured, and the transaction of all other business necessary and incidental to such manufacture and sale of clothing," is a manufacturing corporation, and its stockholders are exempt from personal liability. Such articles do not authorize it to engage also in the mercantile business of buying and selling clothing made by others, and if it does so, and thus exceeds its powers, this does not render its stockholders liable. *Nicollet Nat.*

Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160.

²⁶ *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1024.

²⁷ *Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co.*, 116 Ky. 759, 76 S. W. 862.

To relieve the stockholders from liability under the Minnesota Constitution, the corporation must be organized exclusively for the purpose of carrying on a manufacturing or mechanical business. If the articles authorize it to carry on a manufacturing or mechanical business, and also to carry on some other business not incidental to such business,—as the buying and selling of goods manufactured by others, which is a mercantile business, or a warehouse or elevator business, or the buying and selling of land, etc.,—the stockholders cannot claim the benefit of the exemption. *Goddard v. Jost*, 136 Minn. 28, 161 N. W. 223; *Nicollet Nat. Bank v. Frisk-Turner Co.*, 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160; *Commercial Bank of St. Paul v. Azotine Mfg. Co.*, 66 Minn. 413, 69 N. W. 217; *Holland v. Duluth Iron Mining & Development Co.*, 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50; *Anderson v. Anderson Iron Co.*, 65 Minn.

tion was never engaged in the kinds of business which were non-

281, 33 L. R. A. 510, 68 N. W. 49; Cowling v. Zenith Iron Co., 65 Minn. 263, 33 L. R. A. 508, 60 Am. St. Rep. 471, 68 N. W. 48; St. Paul Barrel Co. v. Minneapolis Distilling Co., 62 Minn. 448, 64 N. W. 1143; First Nat. Bank of Winona v. Winona Plow Co., 58 Minn. 167, 59 N. W. 997; Densmore v. Shepard, 46 Minn. 54, 48 N. W. 528, 681; Arthur v. Willius, 44 Minn. 409, 46 N. W. 851; Mohr v. Minnesota Elevator Co., 40 Minn. 343, 41 N. W. 1074; State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020; First Nat. Bank v. Converse, 200 U. S. 425, 50 L. Ed. 537. See also Senour Mfg. Co. v. Church Paint & Manufacturing Co., 51 Minn. 294, 84 N. W. 109. So the exemption does not apply to a corporation organized for the purpose of "the manufacture and sale of lime, quarrying stone for making lime and for building and other purposes, digging and selling sand, together with the buying and selling of lime, hair, sand, cement; and like articles and other building materials" (Densmore v. Shepard, 46 Minn. 54, 48 N. W. 528, 681); or to a corporation for the manufacture and sale of farm implements, and also for the purpose of buying and selling implements ready manufactured (First Nat. Bank of Winona v. Winona Plow Co., 58 Minn. 167, 59 N. W. 997); or to a corporation for the purpose of mining, smelting, etc., and also for the purpose of "buying, selling, * * * and dealing in mineral lands" (Anderson v. Anderson Iron Co., 65 Minn. 281, 33 L. R. A. 510, 68 N. W. 49; Holland v. Duluth Iron Mining & Development Co., 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50); or to a corporation for the purpose of manufacturing flour and feed to some extent, but also for the purpose of buying, selling, shipping, and storing of grain, build-

ing materials, cattle, etc. (Mohr v. Minnesota Elevator Co., 40 Minn. 343, 41 N. W. 1074); or to a corporation "to manufacture and deal in azotine and other fertilizing materials, grease and stearin" (Commercial Bank of St. Paul v. Azotine Mfg. Co., 66 Minn. 413, 69 N. W. 217); or a corporation "to manufacture, sell, use and lease machinery and manufactured articles" (Minnesota Title Insurance & Trust Co. v. Regan, 72 Minn. 431, 75 N. W. 722); or a corporation to purchase the capital stock and assets of a manufacturing corporation and the evidences of indebtedness issued by it, or any portion thereof, and to manufacture and sell engines, farm implements and machinery, etc. (Merchants' Nat. Bank of St. Paul v. Minnesota Thresher Mfg. Co., 90 Minn. 144, 95 N. W. 767. See also State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020). But the fact that a corporation organized for manufacturing purposes was organized under a statute authorizing it to "take, acquire and hold stock in any other corporation, if a majority in amount of the stockholders shall so elect," does not prevent it from being within the exemption as a manufacturing corporation exclusively, where it has never taken the benefit of the statute with respect to the taking and holding of such other stock. Cowling v. Zenith Iron Co., 65 Minn. 263, 33 L. R. A. 508, 60 Am. St. Rep. 471, 68 N. W. 48.

A corporation organized to conduct a general manufacturing business, and to generate and distribute electric light, heat and power, and to furnish and supply electrical appliances and devices of all kinds, and in carrying out such purposes to conduct the business of electrical contractors, and electrical and mechanical engineers,

incidental or not necessarily connected.²⁸

The Federal Supreme Court will follow the decisions of the highest court of the state where the corporation was organized as to the method of determining whether a corporation is within such an exception, and also its decision as to whether a particular corporation comes within such exception.²⁹

In Minnesota, the Constitution, in making stockholders of corporations liable for corporate debts to the amount of their stock, expressly exempts from such liability the stockholders in any corporation "organized for the purpose of carrying on any kind of manufacturing or mechanical business."³⁰ The purpose of the exception is to en-

as well as other business specifically authorized, is not within the exception. *Goddard v. Jost*, 136 Minn. 28, 161 N. W. 223.

²⁸ *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537 (under the Minnesota Constitution); *Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co.*, 116 Ky. 759, 76 S. W. 862; *Merchants' Nat. Bank v. Minnesota Thresher Mfg. Co.*, 90 Minn. 144, 95 N. W. 767.

²⁹ *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537.

³⁰ *Goddard v. Jost*, 136 Minn. 28, 161 N. W. 223; *Neff v. Lamm*, 99 Minn. 115, 108 N. W. 849; *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1024; *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98; *Marin v. Augedahl*, 32 N. D. 536, 156 N. W. 101.

That a corporation does not belong to such class that assessments may be levied on its stock after insolvency cannot be availed of on appeal, in an action to recover the amount of an assessment, where no such issue was raised by the answer or at the trial, or before the court levying the assessment. *Neff v. Lamm*, 99 Minn. 115, 108 N. W. 849.

The exemption applies to a corporation organized for manufacturing clothing, and selling the clothing so manufactured (*Nicollet Nat. Bank v.*

Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160); and to a corporation for the purpose of manufacturing or brewing lager beer, and selling and disposing of the same (*Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28, 67 N. W. 652); and to a corporation organized "to acquire and hold real estate and water power, purchase or construct canals or water courses, lease and operate the water power and necessary fixtures connected therewith, transmit the same for business purposes, and dispose of its property by sale or lease" (*Cuyler v. City Power Co.*, 74 Minn. 22, 76 N. W. 948); and to a corporation organized for the purpose of generating and distributing electricity (*Goddard v. Jost*, 136 Minn. 28, 161 N. W. 223; *Vencedor Inv. Co. v. Highland Canal & Power Co.*, 125 Minn. 20, 145 N. W. 611; *Cuyler v. City Power Co.*, 74 Minn. 22, 76 N. W. 948); even though it is invested with the power of eminent domain for the purpose of acquiring property for the conduct of its business (*Vencedor Inv. Co. v. Highland Canal & Power Co.*, 125 Minn. 20, 145 N. W. 611); and to a corporation organized for the purpose of manufacturing and selling biscuits, crackers, candies, confections, cereals and other kindred products (*Marin v. Augedahl*, 32 N. D. 536, 156 N.

courage manufacturing and mechanical enterprises by exempting those investing their capital in such a business from personal liability. And another consideration that not improbably induced its adoption was that "ordinarily the added security of the personal liability of stockholders is less needed in the case of such corporations, inasmuch as manufacturing is the process of adding value to raw material by labor, and hence, if honestly conducted, is a safer business, and less liable to speculative risks, than trade generally."³¹

A corporation for the purpose of constructing a railway is a "railway corporation," within the meaning of a statutory provision exempting stockholders from liability beyond the amount of their stock.³² Nor does the fact that a corporation empowered to operate a railway is nominally a construction company prevent it from coming within the exemption.³³ But it has been held that a constitutional provision excepting the stockholders of "railroad corporations" from individual liability does not apply to stockholders in street railroad corporations.³⁴

§ 4163. Liabilities to which the statutory or constitutional provisions apply—In general. The statutory and constitutional provisions imposing individual liability upon stockholders of corporations differ in the terms which they use to designate the obligations to which the liability shall extend. Among the terms used are "debts," "demands," "debts and contracts," "debts contracted," "dues," "indebtedness," and the like. There has been considerable diversity of opinion among the courts in construing the various provisions for the purpose of determining what classes of contract obligations are cov-

W. 101, construing the Minnesota statute).

A "mechanical business," within the meaning of the constitution, is closely allied with, or incidental to, some kind of manufacturing business. The mining of iron ore is such a mechanical business, and stockholders of a corporation organized for such a purpose are exempt from liability. *Cowling v. Zenith Iron Co.*, 65 Minn. 263, 33 L. R. A. 508, 60 Am. St. Rep. 471, 68 N. W. 48. A "general laundry business" has been held not to be a mechanical business, within the

meaning of the exemption. *Gould v. Fuller*, 79 Minn. 414, 82 N. W. 673.

³¹ *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1024, quoted with approval in *Way v. Barney*, 116 Minn. 285, 38 L. R. A. (N. S.) 648, Ann. Cas. 1913 A 719, 133 N. W. 801.

³² *First Nat. Bank of Davenport v. Davies*, 43 Iowa 424.

³³ *Langan v. Iowa & M. Const. Co.*, 49 Iowa 317.

³⁴ *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023, construing the Kansas Constitution.

ered by them,³⁵ and whether they include liabilities of a corporation arising out of a tort.³⁶

Statutes sometimes prohibit corporations from contracting certain debts, and provide that stockholders shall be individually liable for all debts contracted in violation of the statute.³⁷ On the other hand it is sometimes expressly provided that the stockholders shall not be liable for certain classes of debts, as for example, debts secured by mortgage.³⁸

The liability is not restricted to debts contracted within the state of the corporation's domicile, but applies as well to debts contracted in other states.³⁹

It would seem that, where a creditor has several claims or demands against a corporation, for some of which stockholders are not liable, and recovers a single judgment against the corporation for all of them, he cannot enforce the judgment against a stockholder at all, since all the claims or demands are merged therein.⁴⁰ But the contrary has been held to be true where the jury in the action in which the judgment is recovered finds the amount due on the claims for which the stockholders are liable specially, in answer to interrogatories.⁴¹ It has also been held, under a statute making stockholders of a corporation jointly and severally liable for its debts and contracts, that a creditor having two or more demands against a corporation, on one only of which the stockholders were liable, and who had recovered a single judgment for all the demands, could levy an execution on the property of the stockholders to the amount of the demand for which they were liable.⁴²

³⁵ See § 4165, *infra*.

³⁶ See § 4164, *infra*.

³⁷ *Lawler v. Burt*, 7 Ohio St. 340.

That such a statute is penal in character, see § 4176, *infra*.

³⁸ An agreement by a corporation to pay a mortgage debt of another does not make it a mortgage debt of the corporation, within a statute making stockholders liable to creditors of the corporation, but excepting creditors whose claim consists of a mortgage debt of the corporation. This is true, for example, where a corporation purchases land subject to a mortgage and assumes the mortgage debt. *Barron v. Burrill*, 86 Me. 72, 29 Atl. 938; *Barron v. Paine*, 83 Me. 312, 22 Atl. 218.

³⁹ *Hutchins v. New England Coal Min. Co.*, 4 Allen (Mass.) 580.

This is true under a statute making the stockholders of a corporation personally liable for all debts that may be due and owing to laborers for services performed for the corporation. *Clokus v. Hollister Min. Co.*, 92 Wis. 325, 66 N. W. 398.

⁴⁰ See *Smith v. Schmitz*, 10 Neb. 600, 7 N. W. 329.

⁴¹ *Card v. Groesbeck*, 140 N. Y. App. Div. 30, 124 N. Y. Supp. 372, *aff'd* 204 N. Y. 301, 97 N. E. 728.

⁴² *Stedman v. Eveleth*, 6 Mete. (Mass.) 114.

Generally, to render the stockholders liable in any case, the debt must be in existence and enforceable against the corporation at the time when the action is brought;⁴³ and it follows that "whatever satisfies or extinguishes the debt as to the corporation, extinguishes, also, the liability of the stockholders, because the creditor can claim only one satisfaction of the debt."⁴⁴

In order to avoid liability, a stockholder may show that a debt with which he is sought to be charged was incurred through fraud and collusion with the directors.⁴⁵ And it has been held that an action by a creditor to charge a stockholder for a debt of the corporation represented by a promissory note is not governed by the rules controlling commercial paper, and the fact that the plaintiff is a bona fide holder of the note before maturity does not prevent the defendant from setting up defenses to the note of which the corporation could not avail itself.⁴⁶

Losses of corporate assets due to the misconduct of a receiver appointed in sequestration proceedings against the corporation must be borne by the stockholders rather than by the creditors.⁴⁷

The stockholders of a national bank cannot be held individually liable for a loan made to the liquidating agent of the bank in case of a voluntary liquidation.⁴⁸

In an action to enforce the liability, the contract of the corporation out of which it arises must be pleaded.⁴⁹ The indebtedness cannot be proved by entries in the books of the corporation made by its employees.⁵⁰

⁴³ *Hayward v. Sencenbaugh*, 141 Ill. App. 395; *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, 88 Am. St. Rep. 229, 64 Pac. 984.

⁴⁴ See § 4259, *infra*.

⁴⁵ *National Carriage Mfg. Co. v. Story & Isham Commercial Co.*, 111 Cal. 531, 44 Pac. 157; *Close v. Potter*, 155 N. Y. 145, 49 N. E. 686, rev'g 11 N. Y. Misc. 729, 34 N. Y. Supp. 1136. Compare *Jewell v. Rock River Paper Co.*, 101 Ill. 57.

⁴⁶ *Close v. Potter*, 155 N. Y. 145, 49 N. E. 686, rev'g 11 N. Y. Misc. 729, 34 N. Y. Supp. 1136.

⁴⁷ *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378, 69 Atl. 771.

Losses due to investments made by the receiver of a national bank in endeavoring to save debts of the bank must be borne by the creditors, and cannot be charged to shareholders and made the subject of additional assessments. *Lease v. Barschall*, 106 Fed. 762.

⁴⁸ *American Nat. Bank of Macon v. Commercial Nat. Bank of Macon*, 248 Fed. 187, 246 Fed. 721.

⁴⁹ *Foreign Mines Development Co. v. Boyes*, 180 Fed. 594; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047.

⁵⁰ *Neilson v. Crawford*, 52 Cal. 248; *Hager v. Cleveland*, 36 Md. 476.

§ 4164. — **Liabilities based upon tort.** Whether a constitutional or statutory provision imposing individual liability upon stockholders includes liabilities of the corporation arising out of a tort is not always clear, and, in construing some of the terms used, the courts have differed. It seems very clear that the term "contracts," used in such a statute, cannot be held to include liabilities arising out of tort. Some of the courts have held that a statute making stockholders liable for "debts" of the corporation is intended to apply to such obligations only as arise on express or implied contracts growing out of dealings between the corporation and other corporations or individuals where the financial condition of the corporation would or might be the foundation of credit, and that it does not render stockholders liable for an unliquidated claim for damages for a tort committed by the officers or agents of the corporation,⁵¹ even though the tort might have been waived, and an action *ex contractu* maintained against the corporation.⁵² And it has been held that the term "demand" in such a statute does not include a claim for unliquidated damages for tort.⁵³ Further than this, it has been held that a judgment recovered against the corporation for a tort is not such a "debt" as is contemplated by the statutes.⁵⁴

Other courts have construed the word "debts" or "indebtedness" more broadly, and have held that it includes any just demand against the corporation, although the demand may be for unliquidated damages for a tort, as for infringement of a patent.⁵⁵ It has even been held that the words "debts contracted" in such a statute mean, not only debts in the strict legal sense, but any liabilities incurred by the corporation, although the liability may be for unliquidated damages

⁵¹ **United States.** *Brown v. Trail*, 89 Fed. 641.

Massachusetts. *Child v. Boston & F. Iron Works*, 137 Mass. 516, 50 Am. Rep. 328; *Proprietors of Mill Dam Foundry v. Hovey*, 21 Pick. 417.

Michigan. *Bohn v. Brown*, 33 Mich. 257.

Missouri. *Cable v. Gaty*, 34 Mo. 573; *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214.

Nebraska. *Doolittle v. Marsh*, 11 Neb. 243, 9 N. W. 54.

New Hampshire. See *Hub Const. Co. v. New England Breeders' Club*, 76 N. H. 289, 82 Atl. 164.

New York. *Doyle v. Kimball*, 23

Misc. 431, 52 N. Y. Supp. 195 (under section 54 of the New York Stock Corporation Law); *Heacock v. Sherman*, 14 Wend. 58.

⁵² *Bohn v. Brown*, 33 Mich. 257; *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214; *Heacock v. Sherman*, 14 Wend. (N. Y.) 58.

⁵³ *Heacock v. Sherman*, 14 Wend. (N. Y.) 58.

⁵⁴ *Brown v. Trail*, 89 Fed. 641; *Bohn v. Brown*, 33 Mich. 257.

⁵⁵ *Carver v. Braintree Mfg. Co.*, 2 Story 432, Fed. Cas. No. 2,485. See also *Rider v. Fritchey*, 49 Ohio St. 285, 15 L. R. A. 513, 30 N. E. 692.

for a tort.⁵⁶ It has also been held that a provision making stockholders liable for "dues" from the corporation renders them liable for an unliquidated claim for damages for a tort,⁵⁷ or for a judgment recovered against the corporation for a tort,⁵⁸ especially when the liability extends only to the amount remaining unpaid on the shares,⁵⁹ and that the word "debt" or "indebtedness" in a statute imposing liability upon stockholders includes a judgment recovered against the corporation for a tort.⁶⁰ A stockholder is liable for the torts of the corporation under a statute making stockholders individually liable "for all acts of and contracts made by" the company.⁶¹ And a provision making stockholders liable for the "debts and liabilities" of the corporation includes a liability for a tort,⁶² or a judgment based on a tort, especially when the liability extends only to the amount unpaid on the stock.⁶³

§ 4165. — Liabilities arising out of contract. The term "debts" in a statute imposing liability on the stockholders for the debts of the corporation is not used in the technical sense, so as to be limited to such demands as will sustain a common-law action of debt, but

⁵⁶ *Carver v. Braintree Mfg. Co.*, 2 Story 432, Fed. Cas. No. 2,485.

⁵⁷ *Rider v. Fritchey*, 49 Ohio St. 285, 15 L. R. A. 513, 30 N. E. 692; *Flenniken v. Marshall*, 43 S. C. 80, 28 L. R. A. 402, 20 S. E. 788.

⁵⁸ *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, on rehearing 76 Kan. 736, 93 Pac. 173. See also *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915 B 797, Ann. Cas. 1913 A 378, 119 Pac. 74.

⁵⁹ *Rogers v. Stag Min. Co.*, 185 Mo. App. 659.

⁶⁰ *Powell v. Oregonian Ry. Co.*, 38 Fed. 187, 36 Fed. 726; *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, on rehearing 76 Kan. 736, 93 Pac. 173. See also *Child v. Boston & F. Iron Works*, 137 Mass. 516, 50 Am. Rep. 328; *Frost v. St. Paul Banking & Investment Co.*, 57 Minn. 325, 59 N. W. 308.

The obligation arising on the implied contract of a corporation to pay for coal wrongfully mined from the

property of another is a "debt unpaid" within the meaning of a provision authorizing suits against the stockholders of a corporation which is dissolved leaving debts unpaid. *Abernathy v. Loftus*, 95 Kan. 87, 147 Pac. 818.

⁶¹ *Kelly v. Clark*, 21 Mont. 291, 42 L. R. A. 621, 69 Am. St. Rep. 668, 53 Pac. 959.

⁶² *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63; *Buttner v. Adams*, 236 Fed. 105 (under the laws of California).

The liability extends to a claim for damages for personal injuries. *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63.

Where the tort is of a maritime nature, a court of admiralty has jurisdiction of a libel in personam against the stockholders to enforce their individual liability in respect to it. *Buttner v. Adams*, 236 Fed. 105.

⁶³ *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330.

includes a claim for unliquidated damages arising out of a breach of contract, express or implied.⁶⁴ "The word 'dues' is one of general significance, which covers all contractual obligations,"⁶⁵ and "is equivalent to debts or that which is owing."⁶⁶

A claim against a corporation for breach of warranty of title on a sale of goods is a "debt," within the meaning of such a statute.⁶⁷ And a bank's covenant of warranty in a deed has been held to be a "contract" and an "engagement" of the bank within the meaning of the National Bank Act.⁶⁸

A judgment, if based upon a contract liability, is clearly a "debt," within the meaning of a statute imposing individual liability upon stockholders.⁶⁹ And this is true of a judgment recovered against the corporation and others jointly.⁷⁰ A judgment also comes within the term "contracts, debts and engagements,"⁷¹ and within the term "dues."⁷²

To render stockholders liable for a debt for money borrowed by the corporation, it is not necessary to show that the money was applied to the use of the corporation.⁷³

Under a statute requiring every manufacturing corporation to file annually a certificate stating the amount of its capital stock actually paid in, the value of its real estate and personal assets, and the amount of its debts or liabilities on a certain date, and providing that, if

⁶⁴ *Proprietors of Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Dryden v. Kellogg*, 2 Mo. App. 87; *Haynes v. Brown*, 36 N. H. 545.

⁶⁵ *Ward v. Joslin*, 186 U. S. 142, 46 L. Ed. 1093, aff'g 105 Fed. 224, 100 Fed. 676; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 44 L. Ed. 587; *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, certiorari denied 196 U. S. 638, 49 L. Ed. 630 (mem. dec.).

⁶⁶ *Ward v. Joslin*, 186 U. S. 142, 46 L. Ed. 1093, aff'g 105 Fed. 224, 100 Fed. 676. See also *Rogers v. Stag Min. Co.*, 185 Mo. App. 659, 171 S. W. 676; *Rider v. Fritchey*, 49 Ohio St. 285, 15 L. R. A. 513, 30 N. E. 692.

⁶⁷ *Dryden v. Kellogg*, 2 Mo. App. 87.

⁶⁸ *McLean v. Moore*, — Tex. Civ. App. —, 145 S. W. 1074.

⁶⁹ See *Powell v. Oregonian Ry. Co.*, 38 Fed. 187, 36 Fed. 726; *Charles v.*

Young, — Fla. —, 76 So. 869; *Frost v. St. Paul Banking & Investment Co.*, 57 Minn. 325, 59 N. W. 308.

Where the liability attaches only to debts contracted while a stockholder holds the stock, and which are payable within two years after they are contracted, the pleader should allege the original debt, and may not rely on the allegation of a judgment obtained against the corporation. *Graeber v. Ehr Gott*, — N. Y. App. Div. —, 169 N. Y. Supp. 32.

As to judgments based upon tort, see § 4164, *supra*.

⁷⁰ *Frost v. St. Paul Banking & Investment Co.*, 57 Minn. 325, 59 N. W. 308.

⁷¹ *Union Nat. Bank of Omaha v. Halley*, 19 S. D. 474, 104 N. W. 213.

⁷² *Hayward v. Sencenbaugh*, 158 Ill. App. 72.

⁷³ *Borland v. Haven*, 37 Fed. 394.

any corporation shall fail to do so, its stockholders shall be jointly and severally liable "for all the debts of the company then existing, and for all that shall be contracted before such notice shall be given," etc., failure to file the required certificate does not render stockholders liable under a contract previously made by the corporation, unless the contract created a debt against it at the time it was made, or, at the least, before the filing of the certificate. It does not render them liable, therefore, under a contract by the corporation to purchase goods, to be delivered and paid for in the future, where no goods are delivered under the contract until after a certificate is filed.⁷⁴

§ 4166. — Claims under ultra vires contracts. Some courts have held that a statutory liability for corporate debts and contracts extends only to such debts and contracts as have been lawfully made and incurred in the exercise of powers possessed by the corporation, and does not extend to ultra vires debts or contracts,⁷⁵ even though the corporation itself might be estopped to set up their ultra vires character.⁷⁶ But other courts have held that the stockholders can-

⁷⁴ Wing v. Slater, 19 R. I. 597, 33 L. R. A. 566, 35 Atl. 302. And see Garrison v. Howe, 17 N. Y. 458.

⁷⁵ Leighton v. Knapp, 115 N. Y. Supp. 1040.

A provision that "dues from corporations" shall be secured by individual liability of the stockholders, imposes the liability "only in respect of corporate indebtedness lawfully incurred, that is to say, in respect of dues resulting in regular course of business and in the exercise of powers possessed," and does not impose such liability in respect to an ultra vires contract. Ward v. Joslin, 186 U. S. 142, 46 L. Ed. 1093, aff'g 105 Fed. 224, 100 Fed. 676.

A statute making stockholders liable "for all contracts, debts and engagements" of the corporation applies only to such debts, contracts and engagements as have been duly contracted by the corporation in the ordinary course of its business, and are not ultra vires in their nature. Assets Realization Co. v. Howard, 70 N. Y. Misc. 651, 127 N. Y. Supp. 798, judgment

aff'd 152 N. Y. App. Div. 900, 136 N. Y. Supp. 1130, 211 N. Y. 430, 105 N. E. 680.

Under a statute making stockholders liable to the amount of their stock "for all debts contracted by" the corporation, they cannot be held liable on an indebtedness which the corporation had no right to incur. Leighton v. Leighton Lea Ass'n, 74 N. Y. Misc. 229, 131 N. Y. Supp. 561. See also Id. 146 N. Y. App. Div. 255, 130 N. Y. Supp. 935.

In Leighton v. Leighton Lea Ass'n, 62 N. Y. Misc. 73, 114 N. Y. Supp. 918, it was held that stockholders who had actively promoted the making of the contracts out of which the indebtedness arose thereby ratified the act of the corporation in incurring the indebtedness, and could not set up ultra vires in order to escape liability.

⁷⁶ Ward v. Joslin, 186 U. S. 142, 46 L. Ed. 1093, aff'g 105 Fed. 224, 100 Fed. 676.

As to the estoppel of the corporation, see Chap. 37, supra.

not escape liability on the ground that the debt or contract in question was ultra vires, where it does not appear that the creditors seeking to enforce it knew of that fact,⁷⁷ especially where the stockholders have knowingly profited by the ultra vires transaction.⁷⁸

Whether a corporation which has made an ultra vires purchase of or subscription for stock in another corporation can be held liable as a stockholder is considered in a subsequent section.⁷⁹

§ 4167. — Statutes imposing liability for special debts only—In general. In some jurisdictions there are, or have been, statutes imposing individual liability upon stockholders of corporations, or of corporations of a particular class, not for all debts of the corporation, but for certain special debts only; and in order that a creditor of a corporation may hold a stockholder liable under such a statute, he must show affirmatively that his demand is within the terms of the statute.⁸⁰ If he has recovered a judgment against the corporation, he must show that it was for a debt specified in the statute.⁸¹

§ 4168. — — Debts due laborers, servants, clerks, employees, etc. Thus, a charter or statutory provision sometimes makes the stockholders of a corporation liable for debts due from the corporation to laborers, servants, apprentices, clerks, employees, etc.⁸² Under such

⁷⁷ *Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363.

⁷⁸ Stockholders of a bank which, with their knowledge, has organized and controlled branch banks, and has provided capital for them, elected their officers, and absorbed their profits, cannot set up that the establishment of such branches was ultra vires. *Kipp v. Miller*, 47 Colo. 598, 135 Am. St. Rep. 236, 108 Pac. 164.

Knowledge on the part of the stockholders will be presumed from long acquiescence with ample opportunity to obtain it. *Kipp v. Miller*, 47 Colo. 598, 135 Am. St. Rep. 236, 108 Pac. 164.

⁷⁹ See § 4189, *infra*.

⁸⁰ See the cases specifically cited in the following sections.

⁸¹ *Conant v. Van Schaick*, 24 Barb. (N. Y.) 87.

The fact that claims for services

and another claim for which the stockholders are not liable are joined in one action against the corporation, and included in a single judgment against it, will not prevent a recovery against the stockholder for the amount due for services, where the jury finds that amount specially in answer to interrogatories. *Card v. Groesbeck*, 140 N. Y. App. Div. 30, 124 N. Y. Supp. 372, *aff'd* 204 N. Y. 301, 97 N. E. 728.

⁸² *Card v. Groesbeck*, 204 N. Y. 301, 97 N. E. 728, modifying judgment 140 N. Y. App. Div. 30, 124 N. Y. Supp. 372.

Such a statute extends to debts due for labor performed in other states. *Clokus v. Hollister Min. Co.*, 92 Wis. 325, 66 N. W. 398.

In Michigan the stockholders are made individually liable for all labor performed for the corporation. *Shurlock v. Lewis*, 170 Mich. 493, 41 L. R.

a provision, of course, a creditor of a corporation cannot collect his demand from the stockholders unless he shows that it is such a demand as to come within the terms of the statute, and the burden of showing this is upon him. A provision that the stockholders of a corporation "shall be individually liable for all labor performed for such corporation" imposes liability over and above what may have been paid or may be due for stock.⁸³

The term "laborer" in such a statute is restricted to such persons as do manual work, as the section hands on a railroad, the linemen of a telegraph or telephone company, porters and other servants doing manual work in a store, drivers, truckmen, and the like.⁸⁴ The term "servant" is broader than "laborer." It applies, in its broadest sense, not merely to laborers, or persons employed to do manual work, but to any one who is employed to render personal services to his employer, otherwise than in the pursuit of an independent calling, and who, in such service, remains under the control and direction of the employer. A particular statute, however, may use the term in a narrower sense. It was said, speaking of the term "servant" in a New York case: "That term is one in general use. In common parlance, it is understood to relate and apply only to a person rendering service of a subordinate, but not necessarily of a menial, character to an employer, varying in its nature, according to the business or occupation in which it is rendered, and not to extend to and include every employee or party who does work for another. The context in which it is used, in the section referred to, being associated with 'laborers' and 'apprentices,' indicates that it was intended to apply to a person employed to devote his time, and render his service in the performance of work, similar in its general character to that done by those employees."⁸⁵

A statute imposing upon stockholders of a corporation liability for debts due to laborers or servants clearly does not apply to debts due to independent contractors, as a person who has contracted for the construction of part of a railroad, or a person who has contracted to

A. (N. S.) 975, 136 N. W. 484; *Wine-man v. Fisher*, 135 Mich. 604, 98 N. W. 404.

⁸³ *Milroy v. Spurr Mountain Iron Min. Co.*, 43 Mich. 231, 5 N. W. 287.

⁸⁴ See *Jones v. Avery*, 50 Mich. 326, 15 N. W. 494; *Peck v. Miller*, 39 Mich. 594; *Brockway v. Innes*, 39 Mich. 47, 33 Am. Rep. 348; *Hovey v. Ten Broeck*, 3 Robt. (N. Y.) 316.

⁸⁵ *Hill v. Spencer*, 61 N. Y. 274; *Coffin v. Reynolds*, 37 N. Y. 640; *Chapman v. Chumar*, 54 Hun (N. Y.) 636, 7 N. Y. Supp. 230; *Krauser v. Ruckel*, 17 Hun (N. Y.) 463; *Dean v. De Wolf*, 16 Hun (N. Y.) 186; *Vincent v. Bamford*, 42 How. Pr. (N. Y.) 109; *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335.

furnish the labor and services of others, or of teams, etc., for they are neither laborers nor servants.⁸⁶ It has also been held that such a statute does not render stockholders liable to a general agent or superintendent of a mining or other corporation,⁸⁷ or to a general manager and bookkeeper of a manufacturing company,⁸⁸ or to a secretary of a corporation,⁸⁹ or secretary and bookkeeper,⁹⁰ or an attorney employed by a corporation on a salary to render such professional services as may be required of him.⁹¹

A chief engineer or assistant chief engineer of a railroad company is not a laborer, within a statute imposing liability for debts due for labor;⁹² and a consulting engineer, rendering professional services as such for a steamship company, is not within a statute imposing upon stockholders of such a corporation liability for debts due and owing to laborers and operatives.⁹³

On the other hand, it has been held that a statute imposing upon stockholders of a corporation liability for debts due to laborers or servants renders them liable for services of a foreman of a manufac-

⁸⁶ *Taylor v. Manwaring*, 48 Mich. 171, 12 N. W. 28; *Peck v. Miller*, 39 Mich. 594; *Balch v. New York & O. Midland R. Co.*, 46 N. Y. 521; *Aikin v. Wasson*, 24 N. Y. 482; *Gallagher v. Ashby*, 26 Barb. (N. Y.) 143; *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293.

A stockholder is not liable, under such a statute, for money due under a contract with the corporation, by which the contractor was to carry on certain quarrying operations at his own expense, and for a term of years, in a quarry owned by the corporation, and deliver rock to the corporation at certain rates. *Taylor v. Manwaring*, 48 Mich. 171, 12 N. W. 28.

A statute making stockholders of a corporation liable for debts due and owing to any of its laborers or servants for services performed for the corporation applies only to the immediate servants of the corporation, and does not render stockholders of a railroad company liable for labor performed by laborers employed by contractors in the construction of its road. *Gallagher v. Ashby*, 26 Barb. (N. Y.) 143.

⁸⁷ *Hill v. Spencer*, 61 N. Y. 274; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Krauser v. Ruckel*, 17 Hun (N. Y.) 463; *Dean v. De Wolf*, 16 Hun (N. Y.) 186. See also *Cocking v. Ward* (Tenn. Ch. App.), 48 S. W. 287. Compare *Vincent v. Bamford*, 42 How. Pr. (N. Y.) 109.

⁸⁸ *Wakefield v. Fargo*, 90 N. Y. 213.

A mere bookkeeper, however, would undoubtedly be within the statute as a servant, if not as a laborer. See *infra*, this section, note 3.

⁸⁹ *Coffin v. Reynolds*, 37 N. Y. 640; *Viele v. Wells*, 9 Abb. N. Cas. (N. Y.) 277. Compare *Richardson v. Abendroth*, 43 Barb. (N. Y.) 162.

⁹⁰ *Viele v. Wells*, 9 Abb. N. Cas. (N. Y.) 277.

⁹¹ *Bristor v. Smith*, 158 N. Y. 157, 53 N. E. 42, 29 N. Y. App. Div. 624, 52 N. Y. Supp. 1138; *Bristor v. Kretz*, 22 N. Y. Misc. 55, 49 N. Y. Supp. 404.

⁹² *Brockway v. Innes*, 39 Mich. 47, 33 Am. Rep. 348.

⁹³ *Ericsson v. Brown*, 38 Barb. (N. Y.) 390.

turing company, although he may perform no manual labor;⁹⁴ for the services of a civil engineer and rodman of a railroad company,⁹⁵ or of a civil engineer and traveling agent, employed at a fixed salary;⁹⁶ or of an employee of a mining company, whose duties are to instruct new men employed to work, to act as superintendent in the absence of the regular superintendent, and to work with the men when the superintendent is present;⁹⁷ or of a reporter employed by a newspaper company, or a city or assistant editor, not being also an officer of the company;⁹⁸ or of one employed as an overseer and bookkeeper, and "man of all work" of a mining and manufacturing company;⁹⁹ or of one employed by a manufacturing company to act as foreman, help to manufacture stone, keep time of the hands, solicit orders, and to do whatever else may be required of him by the superintendent.¹

A bookkeeper is not a laborer, within the meaning of such a statute;² but he is a servant,³ unless he is also an officer of the corporation,⁴ and he is also an employee.⁵

A traveling salesman employed by a manufacturing company is not a laborer, within the meaning of a statute imposing liability for labor debts,⁶ although he may be within a statute imposing liability for debts due to servants as well as laborers.⁷ A traveling salesman who spends about half of his time on the road, selling goods and collecting, and the rest of his time at the company's place of business, shipping and receiving goods, and making sales and collections in the city, is a clerk, within the meaning of a statute making stock-

⁹⁴ *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335.

⁹⁵ *Conant v. Van Schaick*, 24 Barb. (N. Y.) 87.

⁹⁶ *Williamson v. Wadsworth*, 49 Barb. (N. Y.) 294.

⁹⁷ *Vincent v. Bamford*, 42 How. Pr. (N. Y.) 109.

⁹⁸ *Harris v. Norvell*, 1 Abb. N. Cas. (N. Y.) 127.

⁹⁹ *Hovey v. Ten Broeck*, 3 Robt. (N. Y.) 316.

¹ *Sohrt v. Medberry*, 29 Hun (N. Y.) 39.

² *Sherman v. Herbert*, 2 N. Y. City Ct. 314.

³ *Chapman v. Chumar*, 54 Hun (N. Y.) 636, 7 N. Y. Supp. 230.

⁴ See notes 87-90, *supra*, and cases there cited.

⁵ *Farnum v. Harrison*, 167 N. Y. App. Div. 704, 152 N. Y. Supp. 835, *aff'd* 218 N. Y. 672, 113 N. E. 1055; *Id.* 83 N. Y. Misc. 424, 145 N. Y. Supp. 36.

"Nor does the fact that, as an incident to his ordinary subordinate position, he is at times called upon, in the absence of several superiors, to answer inquiries in the ordinary course of business, remove him from the class of employees and promote him to that of an official." *Farnum v. Harrison*, 167 N. Y. App. Div. 704, 152 N. Y. Supp. 835, *aff'd* 218 N. Y. 672, 113 N. E. 1055.

⁶ *Jones v. Avery*, 50 Mich. 326, 15 N. W. 494.

⁷ See *Williamson v. Wadsworth*, 49 Barb. (N. Y.) 294.

holders liable for money due "laborers, servants, clerks, and operatives."⁸ An attorney employed by a corporation on a salary is not an "employee," within the meaning of the New York statute making stockholders of a corporation personally liable for debts due "any of its laborers, servants, or employees other than contractors," for services performed by them for the corporation.⁹ The work of a "boss" of a gang of miners is within a statute making the stockholders of a mining company liable for debts due to "miners, quarrymen, and other laborers employed by said companies."¹⁰ A charter provision making stockholders liable for debts due mechanics, workmen, and laborers employed by the company does not make them liable for a claim against the company for repairing a wagon belonging to it by a wagon maker who is in business on his own account, and repairs wagons for the public generally, as he is neither a laborer nor a mechanic, within the meaning of the provision.¹¹ A corporation aggregate, it has been held, cannot be an "employee" of another corporation, within the meaning of a statute making stockholders of a mining or manufacturing corporation liable for "all debts due and owing laborers, servants, apprentices, and employees for services rendered such corporation."¹²

Under a statute making the stockholders individually liable, in addition to the liability of the corporation, for the wages of servants and employees of the corporation, an employee does not waive his rights against individual stockholders by taking a note from the corporation for the amount due him, or by obtaining a judgment against the corporation on the note, and receiving a pro rata payment thereon out of the assets of the company.¹³

§ 4169. — Debts due for materials, supplies, etc. Statutes sometimes make stockholders liable individually for debts due from the corporation for materials, machinery, supplies, etc., furnished it. It has been held that a provision that stockholders of a corporation shall be liable "for debts due to miners, quarrymen and other laborers employed by such company and for machinery, provisions, merchandise, country produce and materials furnished for" it, applies

⁸ *Hand v. Colé*, 88 Tenn. 400, 7 L. R. A. 96, 12 S. W. 922.

⁹ *Bristor v. Smith*, 158 N. Y. 157, 53 N. E. 42, 29 N. Y. App. Div. 624, 52 N. Y. Supp. 1138; *Bristor v. Kretz*, 22 N. Y. Misc. 55, 49 N. Y. Supp. 404.

¹⁰ *Thomas v. Bevans*, 2 Luz. Leg. Obs. (Pa.) 99.

¹¹ *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293.

¹² *Dukes v. Love*, 97 Ind. 341.

¹³ *Jackson v. Meek*, 87 Tenn. 69, 10 Am. St. Rep. 620, 9 S. W. 225. See also § 4257, *infra*.

only in the case of an ordinary sale and delivery to the company in the course of its usual business.¹⁴ Such a provision applies to debts due by a corporation for goods furnished to miners employed by it on its orders.¹⁵ Under a statute incorporating a manufacturing company, and providing that its stockholders should be individually liable "for debts due mechanics, workmen, and laborers, employed by said company, and for materials furnished," it was held that the word "materials" referred only to such as formed part of the products of the company.¹⁶ Where goods are sold to a corporation under a contract by which an accounting is to be had on each pay day, and acceptances are to be given for the amount found due, a judgment on an acceptance so given is for goods sold, within the meaning of a statute providing that, after the return unsatisfied of an execution against a corporation on such a judgment, the stockholders shall be liable thereon.¹⁷

§ 4170. — Liability for taxes. Statutes sometimes impose upon the stockholders of a corporation individual liability for taxes. Under a statute imposing a tax upon the gross earnings of "every" corporation, or corporation of a particular class, and providing that the stockholders of every such corporation shall be personally liable for the tax, and for the penalty imposed for nonpayment thereof, stockholders of a corporation coming within the statute are personally liable for the tax and for its nonpayment, although the charter of the corporation may exempt stockholders from personal liability for its debts.¹⁸

§ 4171. — Deposits in banks, etc. Stockholders in banks are sometimes made personally liable to depositors for all moneys deposited in the bank.¹⁹ The word "depositors" in such a statute is to be given its ordinary meaning in the business of banking.²⁰ It includes holders of certificates of deposit, provided they represent

¹⁴ Weiss v. Mauch Chunk Iron Co., 58 Pa. St. 295.

¹⁵ Reading Industrial Mfg. Co. v. Graeff, 64 Pa. St. 395.

¹⁶ Moyer v. Pennsylvania Slate Co., 71 Pa. St. 293.

¹⁷ Kirkpatrick v. Mehalitch, 113 Mich. 631, 71 N. W. 1077.

¹⁸ Anderson v. Com., 18 Gratt. (Va.) 295.

¹⁹ Civ. Code 1910, § 2270; Crawford v. Swicord, — Ga. —, 94 S. E. 1025, rev'g judgment 20 Ga. App. 35, 92 S. E. 394; Alexander v. Dever, — Ga. App. —, 95 S. E. 756. Laws 1914, c. 124, § 59; Pate v. Bank of Newton, 116 Miss. 666, 77 So. 601.

²⁰ Wedemeyer v. Hindelang, 161 Mich. 600, 126 N. W. 708.

money actually deposited in the bank,²¹ but not otherwise.²² A provision imposing liability upon the stockholders of banks "for the benefit of the depositors of said bank," cannot be extended to include those who are not depositors, but only creditors of the institution for merchandise sold to it.²³ Nor can stockholders be considered as depositors to the amount of the surplus of the bank at the time it closed its doors.²⁴ Under a provision making stockholders of a bank personally liable for all funds deposited "as savings, and in trust with said corporation," they are not liable for ordinary deposits, but only for savings deposits.²⁵

Stockholders in banks are sometimes made personally liable for public funds deposited in the bank which it fails to repay on demand.²⁶

²¹ *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085; *J. H. Wilkes & Co. v. Arthur*, 91 S. C. 163, 74 S. E. 361.

²² Where a bank gives its certificate of deposit to another bank, and in consideration thereof is allowed to draw on the payee bank for the same amount, and it draws in excess of such amount, and gives another certificate of deposit for the excess, the certificates are not entitled to a dividend of moneys collected by the receiver of the former bank from its stockholders, under a statute making stockholders of banks liable to depositors to the amount of their stock, for the transaction resulting in the issue of the certificates is not a deposit. *State Sav. Bank v. Foster*, 118 Mich. 268, 42 L. R. A. 404, 76 N. W. 499.

²³ *Norris Safe & Lock Co. v. Weaver*, 81 Ore. 670, 160 Pac. 807.

²⁴ They are not creditors of the bank to the amount of such surplus. *Wedemeyer v. Hindelang*, 161 Mich. 600, 126 N. W. 708.

²⁵ *Bromley v. Goodwin*, 95 Ill. 118.

²⁶ *Kirby's Dig. Ark.* § 1990, provides that "collectors of taxes, county treasurers and treasurers of cities and incorporated towns may deposit the public funds in their custody in incorporated banks for safe keeping; and the said officers and the

sureties on their official bonds, the bank and the stockholders of the bank, shall be liable for all funds that such bank on demand shall fail to pay to the person entitled to receive the same." *Johnson v. Wallace*, 123 Ark. 74, 184 S. W. 835; *Steed v. Henry*, 120 Ark. 583, 180 S. W. 508; *Black v. Special School Dist. No. 2*, 116 Ark. 472, 173 S. W. 846, 1104; *Bank of Midland v. Harris*, 114 Ark. 344, Ann. Cas. 1916 B 1255, 170 S. W. 67; *Warren v. Nix*, 97 Ark. 374, 135 S. W. 896.

Only the treasurers and collectors named therein can have the benefit of this provision, and the stockholders are liable only for deposits made for the benefit of such officials. But a deposit by the officers of a school district is for the benefit of the county treasurer, within this rule, since he is the legal custodian of the school funds. *Black v. Special School Dist. No. 2*, 116 Ark. 472, 173 S. W. 846, 1104.

A liability under this provision which had become fixed by the failure to pay over a deposit before the taking effect of Acts 1913, No. 113, imposing a double liability upon stockholders of banks generally, was not affected by that act. *Black v. Special School Dist. No. 2*, 116 Ark. 472, 173 S. W. 846, 1104.

Acts 1909, No. 196, § 4, containing

§ 4172. — Liability dependent upon maturity of debt or time of bringing suit against corporation. The statute imposing the liability may restrict it to such debts as shall be payable within a certain time after they are contracted, or to debts upon which a suit shall be brought against the corporation within a certain time after they become due, etc. And, of course, in order that a stockholder may be held liable, the case must be brought within the statute.²⁷ But a statutory provision limiting the liability to debts payable within a specified time after they were contracted is invalid where the constitution provides that the stockholders of a corporation shall be liable to the amount of their shares "for all its debts and liabilities of every kind."²⁸

a similar provision with respect to deposits of public funds in Logan county was not repealed by Acts 1913, No. 113, imposing a double liability upon stockholders in banks generally. *Roberts v. State*, 116 Ark. 410, 172 S. W. 1039. Nor was Act No. 113 of Acts of 1905, containing a similar provision with respect to deposits of public funds in Carroll, Benton and White counties. *Steed v. Henry*, 120 Ark. 583, 180 S. W. 508.

²⁷ **United States.** *Cox v. Gould*, 4 Blatchf. 341, Fed. Cas. No. 3,301.

Missouri. *Adamson v. Davis*, 47 Mo. 268; *Dryden v. Kellogg*, 2 Mo. App. 87.

New York. *Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354; *Graeber v. Ehrgott*, — App. Div. —, 169 N. Y. Supp. 32; *Ford v. Chase*, 118 App. Div. 605, 103 N. Y. Supp. 30, aff'd 189 N. Y. 504, 81 N. E. 1164; *Dean v. Mace*, 19 Hun 391; *Assets Realization Co. v. Howard*, 70 Misc. 651, 127 N. Y. Supp. 798, judgment aff'd 152 App. Div. 900, 136 N. Y. Supp. 1130, 211 N. Y. 430, 105 N. E. 680; *Leighton v. Leighton Lea Ass'n*, 62 Misc. 73, 114 N. Y. Supp. 918; *Id.* 122 N. Y. Supp. 139; *Barnes v. Arnold*, 23 Misc. 197, 51 N. Y. Supp. 1109, aff'd 45 App. Div. 314, 61 N. Y. Supp. 85, 169 N. Y. 611, 62 N. E. 1093; *Goff v. Whitney*, 2 City Ct. 256; *Hill v. Conkling*, 7 Daly 397;

McIntyre v. Strong, 63 How. Pr. 43; *Hovey v. Ten Broeck*, 3 Robt. 316.

South Carolina. *Hall v. Klinck*, 25 S. C. 348, 60 Am. Rep. 505.

Wisconsin. *Harrod v. Hamer*, 32 Wis. 162.

Where the limitation is two years, the complaint must allege that the debt was payable within two years after it was contracted, and that action for its collection was brought within two years after it became due since these are conditions precedent to the liability. *Graeber v. Ehrgott*, — N. Y. App. Div. —, 169 N. Y. Supp. 32.

Under a statute making stockholders liable for debts due and owing laborers, servants and apprentices, "which are to be paid within one year from the time the debt is contracted, and on which a suit is brought against the company within one year after the debt becomes due," a stockholder is liable for the salary or wages of a servant or laborer, payable by the year, and for which a suit is brought against the company within a year after they became due, although the employment was to continue indefinitely. *Hovey v. Ten Broeck*, 3 Robt. (N. Y.) 316.

²⁸ *Van Tuyl v. Sullivan*, 173 N. Y. App. Div. 391, 156 N. Y. Supp. 309, aff'd 217 N. Y. 691, 112 N. E. 1078. See also *Smith v. Quale*, 86 N. Y.

The purpose of such a provision is to prevent the extension of a credit to a corporation for a longer period than that specified.²⁹ It has been held that the liability attaches only to such debts as, by their terms, are payable within the time prescribed, and that it is not sufficient that they may be payable within that time;³⁰ but there is also authority to the contrary.³¹ It has also been held that the restriction as to the maturity of the debt is limited to the time within which the corporation can be held liable, and that it does not include time during which the debt existed prior to the time when it became the debtor. So it has been held that the liability may be enforced where the debt matures within the prescribed period after the corporation assumes and agrees to pay it, though more than that period after it was originally created.³²

The requirement that suit shall be brought against the corporation within a certain time will be considered in a subsequent section.³³

§ 4173. — Debts barred by limitation. Stockholders cannot be held liable for a debt which has become barred as against the corporation by the statute of limitations.³⁴ If the liability imposed is for debts of the corporation due at the time of its dissolution, there is no liability for debts barred as against the corporation at the time of its dissolution although the stockholders could not have been sued in respect to them before that time,³⁵ or although the statute may not then have run as against the stockholders.³⁶

Misc. 259, 148 N. Y. Supp. 448; Gause v. Boldt, 49 N. Y. Misc. 340, 99 N. Y. Supp. 442, aff'd 115 N. Y. App. Div. 987, 100 N. Y. Supp. 1117.

²⁹ Ford v. Chase, 118 N. Y. App. Div. 605, 103 N. Y. Supp. 30, aff'd 189 N. Y. 504, 81 N. E. 1164.

³⁰ Assets Realization Co. v. Howard, 70 N. Y. Misc. 651, 127 N. Y. Supp. 798, judgment aff'd 152 N. Y. App. Div. 900, 136 N. Y. Supp. 1130, 211 N. Y. 430, 105 N. E. 680.

³¹ The liability is not limited to those debts which, by their terms, are required to be paid within the time prescribed. A claim for breach of warranty, which may be enforced at any time, does not come within a provision that no stockholder shall be liable for any debt "which is not to be paid within one year from the time

the debt is contracted." Dryden v. Kellogg, 2 Mo. App. 87.

³² Ford v. Chase, 118 N. Y. App. Div. 605, 103 N. Y. Supp. 30, aff'd 189 N. Y. 504, 81 N. E. 1164.

³³ See § 4234, *infra*.

³⁴ Hayward v. Sencenbaugh, 141 Ill. App. 395; Van Hook v. Whitlock, 3 Paige (N. Y.) 409.

³⁵ Van Hook v. Whitlock, 3 Paige (N. Y.) 409.

³⁶ So where the cause of action against the corporation accrues on its dissolution and the cause of action against the stockholder does not accrue until a year after dissolution, and the period of limitation as to both is the same, a debt barred as to the corporation cannot be enforced against the stockholders although the statute has not run as against them. Pacific

The statute of limitations furnishes a personal defense which may be waived by the person entitled to use it, and for this reason a stockholder who has paid the claim of a creditor and who sues to recover the amount so paid from one who has agreed to hold him harmless from any debts or liabilities of the corporation for which he may be obligated as a stockholder need not plead that the statute was not available as a defense to such claim.³⁷

§ 4174. — Liability for interest. When a liability for interest is a debt against the corporation, it is like any other debt, and the stockholders are liable therefor, as well as for the principal, provided, of course, they are not thereby held to any greater liability in amount than is fixed by the statute.³⁸ So the liability of stockholders on a judgment against the corporation is commensurate with that of the corporation, and extends to interest on the judgment, provided the extent of the stockholders' liability is not exceeded.³⁹ And where

Elevator Co. v. Whitbeck, 63 Kan. 102, 88 Am. St. Rep. 229, 64 Pac. 984.

³⁷ *Eva v. Andersen*, 166 Cal. 420, 137 Pac. 16.

³⁸ *United States*. *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864; *Whitman v. Citizens' Bank of Reading*, 110 Fed. 503.

California. *Wells, Fargo & Co. v. Enright*, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047.

Colorado. *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565.

Georgia. *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085.

Kansas. *Rankin v. Ware*, 88 Kan. 23, 127 Pac. 531.

New York. *Wheeler v. Millar*, 90 N. Y. 353; *Mahoney v. Bernhard*, 45 App. Div. 499, 63 N. Y. Supp. 642, modifying judgment 27 Misc. 339, 58 N. Y. Supp. 748, judgment aff'd 169 N. Y. 589, 62 N. E. 1097; *Parker v. Adams*, 38 Misc. 325, 77 N. Y. Supp. 861; *Barnes v. Arnold*, 23 Misc. 197, 51 N. Y. Supp. 1109, aff'd 45 App. Div. 314, 61 N. Y. Supp. 85, 169 N. Y. 611, 62 N. E. 1093.

Ohio. *Marriott v. Columbus, S. &*

H. R. Co., 16 Ohio Dec. (N. P.) 135.

South Carolina. *Haslett's Ex'rs v. Wotherspoon*, 1 Strobb. Eq. 209.

Interest upon the total amount of the contracts, debts and engagements of the corporation "runs until their total amount is ascertained and liquidated, and the ratable apportionment thereupon made. This interest thus helps to make up the total sum to be apportioned and the stockholder's liability is for his share of this total sum, to the extent of the amount of his stock at its par value." *Mahoney v. Bernhard*, 45 N. Y. App. Div. 499, 63 N. Y. Supp. 642, modifying judgment 27 N. Y. Misc. 339, 58 N. Y. Supp. 748, judgment aff'd 169 N. Y. 589, 62 N. E. 1097; *Parker v. Adams*, 38 N. Y. Misc. 325, 77 N. Y. Supp. 861.

That this is true where it is sought to hold a stockholder liable for the benefit of creditors for a balance due on his stock, see § 4101, *supra*.

³⁹ *Grund v. Tucker*, 5 Kan. 70; *Estate of Warren*, 52 Mich. 557, 18 N. W. 356; *Marriott v. Columbus, S. & H. R. Co.*, 16 Ohio Dec. (N. P.) 135.

interest is added to a claim against a corporation, and a note given for the amount, it becomes a debt for which the stockholders are liable, and it makes no difference that there was no written agreement to pay interest.⁴⁰ It has been held, however, that, where a stockholder is personally liable for a corporate debt, he is liable for interest thereon only from the time of a demand on him for payment of the debt, or the commencement of a suit against him.⁴¹ And it has been held that individual liability imposed upon the stockholders of a bank to pay all "bills" which shall remain unpaid on dissolution of the bank does not extend to the payment of interest thereon, either from the dissolution or from the filing of a bill to enforce the liability.⁴²

The liability, when it exists, extends to interest accruing pending sequestration proceedings against the corporation.⁴³ And it has been

⁴⁰ Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

⁴¹ Dutton v. Connecticut Bank, 13 Conn. 493; Burr v. Wilcox, 22 N. Y. 551.

⁴² Grew v. Breed, 10 Mete. (Mass.) 569; Crease v. Babcock, 10 Mete. (Mass.) 525.

In Lane v. Morris, 10 Ga. 162, it was held that a billholder was only entitled to interest from the time of a demand made by him upon the stockholder for the payment of the bills, and not from the time of a demand made upon the bank.

⁴³ Flynn v. American Banking & Trust Co., 104 Me. 141, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378, 69 Atl. 771.

The liabilities of the receivers of a corporation appointed in sequestration proceedings "are fully discharged when they have administered its assets. If nothing remains for the payment of subsequent accrued interest [interest accruing after the institution of the proceedings], creditors have no remedy against the corporation, its assets, or receivers for such interest. But, though the corporation and its receivers may thus be freed from actions by creditors to

recover claims for interest or other claims, it does not follow that the contracts, debts, and engagements of the corporation have been fulfilled. If the contract, debt, or engagement is such that interest accrues for delay in fulfillment, it is not fulfilled until that interest also is paid. Whoever is made liable by contract or by statute for those contracts, debts, and engagements is made liable for the interest accrued and accruing on them. The liability of the shareholders for them and for the interest on them is not discharged when the corporation is dissolved. It continues until they are fulfilled, interest as well as principal. It was imposed to insure that fulfillment in case the corporation should become defunct before itself fulfilled them. The creditor then acquired the same right against the shareholders to recover principal and interest (of course, not in excess of their maximum liability fixed by the statute) that he would have had against the corporation, had it continued solvent and possessed of its assets." Flynn v. American Banking & Trust Co., 104 Me. 141, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378, 69 Atl. 771.

held that the liability of the stockholders may be enforced solely for the purpose of paying interest so accruing, although the principal of the claims of the creditors and interest up to the date of the receivership has been paid in full.⁴⁴ It is a general rule, however, that when a corporation has become insolvent and a court has taken possession of its assets, through a receiver, for the payment of its debts, and there is not enough to pay all creditors, interest will not be computed on claims so as to work inequality or injustice in the distribution of the fund among the creditors.⁴⁵

It has been held in some jurisdictions that a stockholder is liable for interest on the amount for which he is liable after he is put in default by a demand for payment or otherwise, although the interest may increase his liability beyond the amount of his stock or other limit fixed by the statute.⁴⁶ But in other jurisdictions, the decisions are to the contrary.⁴⁷

In some jurisdictions interest is allowable on the amount recovered from stockholders in a suit by creditors or a receiver from the date

⁴⁴ *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 19 L. R. A. 428, 129 Am. St. Rep. 378, 69 Atl. 771; *Parker v. Adams*, 38 N. Y. Misc. 325, 77 N. Y. Supp. 861.

The creditors receive dividends in the sequestration proceedings merely as dividends and not as payment of their claims. Such dividends are applicable to the debts, but their reception and application entails upon the creditors no forfeiture of the accruing and accumulating interest. *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378, 69 Atl. 771.

⁴⁵ See the chapter on Insolvency.

⁴⁶ *Georgia*. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

Kansas. *Pine v. Western Nat. Bank*, 63 Kan. 462, 65 Pac. 690.

New York. *Handy v. Draper*, 89 N. Y. 334; *Burr v. Wilcox*, 22 N. Y. 551.

Ohio. *Blair v. Newbegin*, 65 Ohio St. 425, 58 L. R. A. 644, 62 N. E. 1040; *Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. 435.

Wisconsin. *Cleveland v. Burnham*, 64 Wis. 347, 25 N. W. 407.

Interest is recoverable, from the date when the apportioned sum for which the stockholder is liable has been ascertained and liquidated, whether such sum is the par value of his stock, or a less amount. *Mahoney v. Bernhard*, 45 N. Y. App. Div. 499, 63 N. Y. Supp. 642, modifying 27 N. Y. Misc. 339, 58 N. Y. Supp. 748, judgment aff'd 169 N. Y. 589, 62 N. E. 1097.

In *Kirschler v. Wainwright*, 255 Pa. 525, 100 Atl. 484, the interest allowed was apparently in addition to the full amount of the statutory liability.

⁴⁷ *Adams v. Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642; *Munger v. Jacobson*, 99 Ill. 349; *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378, 69 Atl. 771; *Cole v. Butler*, 43 Me. 401; *Sackett's Harbour Bank v. Blake*, 3 Rich. Eq. (S. C.) 225.

It is error to award judgment for double the amount of the par value of the stock with interest thereon to the date of the rendition of the decree. *Adams v. Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642.

of the commencement of such suit,⁴⁸ while in others it is allowable only from the date when the amount for which the stockholder is liable is ascertained and liquidated.⁴⁹ In some jurisdictions it runs from the date of the levying of an assessment on the stock,⁵⁰ or the date when such assessment becomes due and payable.⁵¹ Under the National Bank Act, interest runs on the amount called from stockholders from the date of the comptroller's order.⁵²

48 United States. *Ramsden v. Keene* Five Cents Sav. Bank, 198 Fed. 807; *Alsop v. Conway*, 188 Fed. 568, certiorari denied 223 U. S. 720, 56 L. Ed. 629 (mem. dec.).

Georgia. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

Kansas. *Pine v. Western Nat. Bank*, 63 Kan. 462, 65 Pac. 690; *Ramsden v. Keene Five Cents Sav. Bank*, 198 Fed. 807.

Kentucky. *Senn v. Levy*, 111 Ky. 318, 63 S. W. 776.

Ohio. *Blair v. Newbegin*, 65 Ohio St. 425, 58 L. R. A. 644, 62 N. E. 1040.

49 National Commercial Bank v. McDonnell, 92 Ala. 387, 9 So. 149; *Palmer v. Bank of Zumbrota*, 72 Minn. 266, 75 N. W. 380; *Cleveland v. Burnham*, 64 Wis. 347, 25 N. W. 407.

Interest begins to run from the time when the apportioned sum for which he is liable has been ascertained and liquidated, and not from the date of the commencement of the creditors' suit in which the apportionment is made. Primarily the stockholder is liable only to the extent of the par value of his stock, not to the extent of that par value plus interest from any date. *Mahoney v. Bernhard*, 45 N. Y. App. Div. 499, 63 N. Y. Supp. 642, modifying 27 N. Y. Misc. 339, 58 N. Y. Supp. 748, judgment aff'd 169 N. Y. 589, 62 N. E. 1097.

In *Barnes v. Arnold*, 23 N. Y. Misc. 197, 51 N. Y. Supp. 1109, aff'd 45 N. Y. App. Div. 314, 61 N. Y. Supp. 85, 169 N. Y. 611, 62 N. E. 1093, it was held that the liability of each stockholder is limited to the amount of the stock held by him, at its par value,

with interest thereon from the date of the commencement of the action. The question of interest was not considered by either the appellate division or the court of appeals.

Where each of the defendant stockholders is adjudged to pay a certain part of his liability, and the case is held for a further decree in case some of them do not pay, and this contingency happens and a second decree is rendered against the solvent stockholders to make up the deficiency, stockholders who pay the amount first adjudged against them are liable for interest on the amount of the second judgment from the date of demand and refusal only, and not from the date of the first decree. *First Nat. Bank of Omaha v. Cooper*, 91 Neb. 624, 136 N. W. 1023.

50 Kirschler v. Wainwright, 255 Pa. 525, 100 Atl. 484.

Interest on the liability of the stockholders of a bank should be computed from the time when it was determined by the court that it was necessary to enforce the stockholders' liability, rather than from the day when the bank was closed. *Wedemeyer v. Hindelang*, 161 Mich. 600, 126 N. W. 708.

The levying of an assessment on the stock of an insolvent bank liquidates the claim, and if not paid when due interest is recoverable as upon any other overdue obligation. *May v. Ulbrich*, 132 Mich. 6, 92 N. W. 493.

51 Converse v. Ayer, 197 Mass. 443, 84 N. E. 98.

52 Bowden v. Johnson, 107 U. S. 251, 27 L. Ed. 386; *Casey v. Galli*, 94 U. S.

§ 4175. — Liability for costs. In a suit by or in behalf of the creditors of a corporation to enforce a statutory liability of a stockholder, the plaintiff is entitled to costs in addition to the amount of the liability.⁵³

The liability of stockholders on a judgment against the corporation extends to the costs.⁵⁴ But where the liability of a stockholder is on the original demand against the corporation, although the creditor may be required by the statute to exhaust his remedy against the corporation by recovering judgment and issuing execution before proceeding against stockholders, a stockholder, in an action against him by a creditor, cannot be held liable for the costs of the action against the corporation.⁵⁵

Where the stockholder is liable only for a particular class of debts, he cannot be charged with costs incurred in the defense of an action prosecuted against the corporation for damages upon causes of action other than that embraced in the statute imposing the liability.⁵⁶

The stockholders are not liable for the fees of attorneys employed by creditors to prosecute their action against the corporation or their action against the stockholders.⁵⁷

673, 24 L. Ed. 168; *Davis' Estate v. Watkins*, 56 Neb. 288, 76 N. W. 575.

⁵³ *Maine*. *Cole v. Butler*, 43 Me. 401; *Grose v. Hilt*, 36 Me. 22.

Massachusetts. *Coyle v. Taunton Safe Deposit & Trust Co.*, 216 Mass. 156, 103 N. E. 288.

Michigan. See *Kirkpatrick v. Mehalitch*, 113 Mich. 631, 71 N. W. 1077.

New York. *Girbekian v. Costikyan*, 126 App. Div. 812, 111 N. Y. Supp. 243. See also *Bailey v. Bancker*, 3 Hill 188, 38 Am. Dec. 625.

Ohio. *Blair v. Newbegin*, 65 Ohio St. 425, 58 L. R. A. 644, 62 N. E. 1040.

South Carolina. See *Haslett's Ex'rs v. Wotherspoon*, 1 Strobb. Eq. 209.

The plaintiff may be granted an extra allowance under the New York statute. The amount should be computed upon the amount remaining unpaid after the application of the corporate assets to his claim. *Mosler Safe Co. v. Guardian Trust Co.*, 208 N. Y. 524, 101 N. E. 786, modifying

and affirming judgment 153 N. Y. App. Div. 117, 138 N. Y. Supp. 298.

⁵⁴ *Estate of Warren*, 52 Mich. 557, 18 N. W. 356. See also *Fleeson v. Savage Silver Min. Co.*, 3 Nev. 157.

⁵⁵ *Bailey v. Bancker*, 3 Hill (N. Y.) 188, 38 Am. Dec. 625. And see *Rorke v. Thomas*, 56 N. Y. 559.

⁵⁶ Where the statute makes stockholders liable for debts due laborers, servants or employees for services, they cannot be held liable for costs incurred in defending a cause of action for breach of contract which is joined with causes of action for services. *Card v. Groesbeck*, 204 N. Y. 301, 97 N. E. 728, modifying judgment 140 N. Y. App. Div. 30, 124 N. Y. Supp. 372.

⁵⁷ *Marriott v. Columbus, S. & H. R. C.*, 16 Ohio Dec. (N. P.) 135; *Buist v. Williams*, 81 S. C. 495, 62 S. E. 859.

On a bill to charge stockholders with corporate debts, the fees of the complainant's solicitors are not a proper charge against the fund ob-

Under some statutes, in a creditors' suit against stockholders, the creditors are entitled to recover receiver's fees in addition to their debts and statutory costs and disbursements, not exceeding the amount of the stockholders' liability.⁵⁸ And where the liability is enforced by means of an assessment against the stock, which is collected by a receiver,⁵⁹ the expenses of the receivership, including the expense of collecting assessments against the stock,⁶⁰ and the fees of the receiver and his attorney⁶¹ are to be taken into consideration and included in the estimate of the amount necessary to be raised. It has been held, however, that where the right of the receiver who prosecutes the suit is the same as that of the creditors, the expenses of the receivership cannot be included.⁶²

Stockholders are jointly and severally liable for costs, even though their liability for the corporate debts is several only.⁶³

§ 4176. Whether the liability is contractual or penal. Whether the liability imposed by a statute upon the stockholders of a corporation for its debts is contractual or penal in its nature depends, not necessarily upon the form of the statute, but upon its effect. If a statute commands or prohibits some act, and imposes individual

tained from the stockholders. *Alling v. Wenzell*, 27 Ill. App. 511.

Expenses and attorney's fees are not recoverable against the defendants in a suit by creditors to enforce the liability imposed upon persons who organize a corporation and transact business in its name before the minimum capital stock is subscribed. *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13.

⁵⁸ *Waltersheid v. Bowdish*, 77 Kan. 665, 96 Pac. 56; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069.

The stockholders are entitled to credit on their liability for the assets of the corporation realized by the receiver, but only for the net assets, after deducting the expenses of the receivership, and this though they are not parties to the proceeding in which the receiver was appointed. Where they are not parties to the cause in which the expenses are allowed, they are entitled to be heard on the accounts of the receiver, and

to attack any items thereon that they may deem improper or excessive. *Buist v. Williams*, 81 S. C. 495, 62 S. E. 859.

⁵⁹ See §§ 4223-4225, *infra*.

⁶⁰ *Bernheimer v. Converse*, 206 U. S. 516, 51 L. Ed. 516; *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98; *Marriott v. Columbus, S. & H. R. Co.*, 16 Ohio Dec. (N. P.) 135.

That such expenses may be included in fixing the amount of an assessment against stockholders who have not paid for their stock in full, see § 4101, *supra*.

⁶¹ *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98; *Marriott v. Columbus, S. & H. R. Co.*, 16 Ohio Dec. (N. P.) 135. See also § 4101, *supra*.

⁶² *Coyle v. Taunton Safe Deposit & Trust Co.*, 216 Mass. 156, 103 N. E. 288.

⁶³ *Coyle v. Taunton Safe Deposit & Trust Co.*, 216 Mass. 156, 103 N. E. 288.

liability upon stockholders for violation of the command or prohibition, as a punishment, the liability is penal, and not contractual, although the statute also provides a remedy in favor of creditors for enforcing the penalty. A penal statute is one which imposes a penalty or forfeiture for transgressing its provisions, or for doing a thing prohibited, and it is none the less a penal statute because it is also remedial.⁶⁴ "It is the effect, not the form, of the statute," said the Illinois court, "that is to be considered, and when its object is clearly to inflict a punishment on a party for violating it—i. e., doing what is prohibited, or failing to do what is commanded to be done,—it is penal in its character, and the circumstance that in punishing, remedy is likewise afforded to those having an interest in the observance of the statute, is unimportant."⁶⁵

On the other hand, if a charter, statutory or constitutional provision imposes an individual liability for corporate debts upon stockholders, not as a punishment for doing an act prohibited, or for omitting to do an act commanded, but merely for the purpose of doing away with the common-law exemption of stockholders from individual liability, in whole or in part, and affording additional security to creditors of the corporation, the liability thereby imposed is not penal, but contractual, in its nature. While it is true that the contract is made between the creditor and the corporation, still the stockholders, by becoming or being members of the corporation when a valid statutory, constitutional or charter provision expressly declares that they shall be individually liable for corporate debts, impliedly agree to become so liable to the extent prescribed. The liability, therefore, is not imposed upon them without their consent, but is the result of their agreement, and is contractual in its nature.⁶⁶ The statute or

⁶⁴ Sedgwick, Stat. & Const. Law, 14; Leyner Engineering Works v. Kempner, 163 Fed. 605; Diversey v. Smith, 103 Ill. 378, 42 Am. Rep. 14; Kleckner v. Turk, 45 Neb. 176, 63 N. W. 469; Globe Pub. Co. v. State Bank of Nebraska, 41 Neb. 175, 27 L. R. A. 854, 59 N. W. 683. See also Seaton v. Grimm, 110 Iowa 145, 81 N. E. 225; Coulbourn v. Boulton, 100 Md. 350, 59 Atl. 711; Kulp v. Fleming, 65 Ohio St. 321, 87 Am. St. Rep. 611, 62 N. E. 334. And see standard works on statutory construction.

⁶⁵ Diversey v. Smith, 103 Ill. 378, 42 Am. Rep. 14.

⁶⁶ California. Royal Trust Co. v. MacBean, 168 Cal. 642, 144 Pac. 139; Ferguson v. Sherman, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023; Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846; Lininger v. Botsford, 32 Cal. App. 386, 163 Pac. 63; Miller & Lux v. Katz, 10 Cal. App. 576, 102 Pac. 946; Thomas v. Matthiessen, 232 U. S. 221, 58 L. Ed. 577, rev'g judgment 192 Fed. 495; Pinney v. Nelson, 183 U. S. 144, 46 L. Ed. 125; Buttner v. Adams, 236 Fed. 105; Lanigan v. North, 69 Ark. 62, 63 S. W. 62.

Colorado. Adams v. Clark, 36 Colo.

constitution "prescribes the terms upon which individuals are permitted to transact business through the medium of a corporation, and

65, 10 Ann. Cas. 774, 85 Pac. 642; Miller v. Spaulding, 107 Me. 264, 78 Atl. 358; Miller v. Connor, 177 Mo. App. 630, 160 S. W. 582.

Florida. Saussey v. Liggett, 78 So. 354; Charles v. Young, 76 So. 869; McNeill v. Pace, 69 Fla. 349, 68 So. 177; Heinberg Bros. v. Thompson, 47 Fla. 163, 37 So. 71; Gibbs v. Davis, 27 Fla. 531, 8 So. 633.

Georgia. Crawford v. Swieord, 94 S. E. 1025, rev'g judgment 20 Ga. App. 25, 92 S. E. 394; Brunswick Terminal Co. v. National Bank of Baltimore, 99 Fed. 635, 48 L. R. A. 625, rev'g judgment 88 Fed. 607.

Illinois. Golden v. Cervenka, 278 Ill. 409, 116 N. E. 273; Bell v. Farwell, 176 Ill. 489, 42 L. R. A. 804, 68 Am. St. Rep. 194, 52 N. E. 346; Queenan v. Palmer, 117 Ill. 619, 7 N. E. 613; Diversey v. Smith, 103 Ill. 378, 42 Am. Rep. 14.

Kansas. Douglass v. Loftus, 85 Kan. 720, L. R. A. 1915 B 797, Ann. Cas. 1913 A 378, 119 Pac. 74; Walterscheid v. Bowdish, 77 Kan. 665, 96 Pac. 56; Stocker v. Davidson, 74 Kan. 214, 118 Am. St. Rep. 315, 86 Pac. 136; Manley v. Mayer, 68 Kan. 377, 1 Ann. Cas. 825, 75 Pac. 550; Pacific Elevator Co. v. Whitbeck, 63 Kan. 102, 88 Am. St. Rep. 229, 64 Pac. 984; Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331; Whitman v. Oxford Nat. Bank, 176 U. S. 559, 44 L. Ed. 587; Schwartz v. Loftus, 216 Fed. 320; Little v. Kohn, 185 Fed. 295; Ramsden v. Knowles, 151 Fed. 721, 10 L. R. A. (N. S.) 897; Harrison v. Remington Paper Co., 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.); Anglo-American Land, Mortgage & Agency Co. v. Lombard, 132 Fed. 721, certiorari denied 196 U. S. 638, 49 L. Ed. 630 (mem. dec.); Whitman v. Citizens'

Bank of Reading, 110 Fed. 503; Ward v. Joslin, 105 Fed. 224, aff'g 100 Fed. 676, judgment aff'd 186 U. S. 142, 46 L. Ed. 1093; Hobbs v. National Bank of Commerce of Kansas City, Missouri, 96 Fed. 396; Schiffer v. Trustees of Columbia College in City of New York, 87 Fed. 166; Love v. Pusey & Jones Co., 3 Pennw. (Del.) 577, 52 Atl. 542; Pulsifer v. Greene, 96 Me. 438, 52 Atl. 921; Broadway Nat. Bank v. Baker, 176 Mass. 294, 57 N. E. 603; Blair v. Newbegin, 65 Ohio St. 425, 58 L. R. A. 644, 62 N. E. 1040; Kulp v. Fleming, 65 Ohio St. 321, 87 Am. St. Rep. 611, 62 N. E. 334. Compare Marshall v. Sherman, 148 N. Y. 9, 34 L. R. A. 757, 51 Am. St. Rep. 654, 42 N. E. 419; Hancock Nat. Bank v. Farnum, 20 R. I. 466, 40 Atl. 341, judgment rev'd 176 U. S. 640, 44 L. Ed. 619.

Maine. Johnson v. Libby, 111 Me. 204, Ann. Cas. 1916 C 681, 88 Atl. 667; Childs v. Cleaves, 95 Me. 498, 50 Atl. 714; Hawthorne v. Calef, 2 Wall. (U. S.) 10, 17 L. Ed. 776; Putnam v. Misoichi, 189 Mass. 421, 109 Am. St. Rep. 648, 4 Ann. Cas. 733, 75 N. E. 956.

Maryland. Coulbourn Bros. v. Boulton, 100 Md. 350, 59 Atl. 711; Norris v. Wrenschall, 34 Md. 492; Republic Iron & Steel Co. v. Carlton, 189 Fed. 126; Myers v. Knickerbocker Trust Co., 139 Fed. 111, 1 L. R. A. (N. S.) 1171, aff'g 133 Fed. 764. See also Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 113 Am. St. Rep. 863, 77 N. E. 877, rev'g judgment 109 N. Y. App. Div. 688, 96 N. Y. Supp. 588; Id. 53 N. Y. Misc. 80, 103 N. Y. Supp. 1108, aff'd 122 N. Y. App. Div. 889, 106 N. Y. Supp. 1134.

Michigan. Foster v. Row, 120 Mich.

1, 77 Am. St. Rep. 565, 79 N. W. 696.

Minnesota. Hanson v. Davison, 73 Minn. 454, 76 N. W. 254; Selig v.

the necessary legal effect of the conditions thus prescribed is, that a corporation when created becomes the agent of its stockholders to

Hamilton, 234 U. S. 652, 58 L. Ed. 1518, Ann. Cas. 1917 A 104; Converse v. Hamilton, 224 U. S. 243, 56 L. Ed. 749, Ann. Cas. 1913 D 1292, rev'g judgment 136 Wis. 589, 118 N. W. 190; Bernheimer v. Converse, 206 U. S. 516, 51 L. Ed. 516; Converse v. Mears, 162 Fed. 767; Converse v. Nichols, 202 Mass. 270, 89 N. E. 135; Converse v. Ayer, 197 Mass. 443, 84 N. E. 98.

Missouri. Rogers v. Stag Min. Co., 185 Mo. App. 659, 171 S. W. 676; Blakeman v. Benton, 9 Mo. App. 107.

Montana. Barth v. Pock, 51 Mont. 418, 155 Pac. 282.

Nebraska. Goss v. Carter, 156 Fed. 746; Wyman v. Bowman, 127 Fed. 257.

New York. Howarth v. Angle, 162 N. Y. 179, 47 L. R. A. 725, 56 N. E. 489; Close v. Potter, 155 N. Y. 145, 49 N. E. 686; Cochran v. Wiechers, 119 N. Y. 399, 7 L. R. A. 553, 23 N. E. 803; Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Van Tuyl v. Schwab, 174 App. Div. 665, 161 N. Y. Supp. 323, aff'd 220 N. Y. 661, 116 N. E. 1081; Leighton v. Leighton Lea Ass'n, 146 App. Div. 255, 130 N. Y. Supp. 935; Richards v. Gill, 138 App. Div. 75, 122 N. Y. Supp. 620; Girbekian v. Costikyan, 126 App. Div. 812, 111 N. Y. Supp. 243; Richards v. Schwab, 101 Misc. 128, 167 N. Y. Supp. 535; Barnes v. Arnold, 23 Misc. 197, 51 N. Y. Supp. 1109, aff'd 45 App. Div. 314, 61 N. Y. Supp. 85, 169 N. Y. 611, 62 N. E. 1093; Platt v. Wilmot, 193 U. S. 602, 48 L. Ed. 809.

North Carolina. Smathers v. Western Carolina Bank, 135 N. C. 410, 47 S. E. 893.

North Dakota. Johnson v. Morgan, 178 Iowa 577, 160 N. W. 2.

Ohio. Hawkins v. Furnace Co., 40 Ohio St. 507; Brown v. Hitchcock, 36 Ohio St. 678; Kirtley v. Holmes, 107 Fed. 1, 52 L. R. A. 738; Pfaff v. Gruen,

92 Mo. App. 560, 69 S. W. 405.

Oklahoma. Lankford v. Menefee, 45 Okla. 228, 145 Pac. 375.

South Carolina. Sullivan v. Sullivan Mfg. Co., 14 S. C. 494.

South Dakota. Bearse v. Mabie, 193 Mass. 451, 84 N. E. 1015.

Tennessee. Van Tuyl v. Carpenter, 135 Tenn. 629, 188 S. W. 234; Woods v. Wicks, 7 Lea 40.

Vermont. Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176.

Washington. Howarth v. Lombard, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888; Howarth v. Angle, 162 N. Y. 179, 47 L. R. A. 725, 56 N. E. 489, aff'g 39 N. Y. App. Div. 151, 57 N. Y. Supp. 187, 25 N. Y. Misc. 551, 55 N. Y. Supp. 1108; King v. Cochran, 76 Vt. 141, 104 Am. St. Rep. 922, 56 Atl. 667.

West Virginia. Nimick v. Mingo Iron Works Co., 25 W. Va. 184.

Wisconsin. Rehbein v. Rahr, 109 Wis. 136, 85 N. W. 315.

"The basis of the stockholder's liability and of the action to enforce it is his contract to pay the debts of the corporation. The Constitution, the statutes under which the corporation is organized, and the established rules of law in force when he became a stockholder, are read into and become a part of his contract. By his subscription for his stock, or by his receipt and acceptance of it, he solemnly agrees, in consideration of the benefits derived from its ownership, that he will faithfully perform the obligations and discharge the duties imposed upon a stockholder by the Constitution, the statutes, and the law." Harrison v. Remington Paper Co., 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.).

"By the act of subscription for

make such contracts and incur such liabilities as are authorized by law and its articles of incorporation, and the contracts which it thus makes bind the stockholders to the extent named."⁶⁷

Thus, the liability is contractual in the sense of the constitutional prohibition against laws impairing the obligation of contracts, so that the legislature cannot constitutionally relieve stockholders from a liability for existing debts by repealing a statute in force when the debts were contracted;⁶⁸ and in the sense that it survives the death of the stockholder and may be enforced against his estate.⁶⁹ And it has also been held to be contractual, within the meaning of a statute

stock, the stockholder assumes the provisions of the law creating his liability for the debt of the company as part of the contract of subscription." *Gibbs v. Davis*, 27 Fla. 531, 8 So. 633, quoted with approval in *McNeill v. Pace*, 69 Fla. 349, 68 So. 177.

"A purchaser of stock after it is issued assumes the same statutory liability by the contract of purchase." *McNeill v. Pace*, 69 Fla. 349, 68 So. 177.

"There is an implied contract on his part, entered into when he acquires his stock, that he will be liable in the manner and to the extent prescribed by the statute." *Van Tuyl v. Schwab*, 174 N. Y. App. Div. 665, 161 N. Y. Supp. 323, aff'd 220 N. Y. 661, 116 N. E. 1081.

"This liability, unlike the liability imposed by the statute upon directors or officers of a corporation for its debts, because of their fraud or negligence in the management of the affairs of the corporation, is not penal in its nature,—to be regarded as a purely statutory liability—it is a liability voluntarily assumed by the act of becoming a stockholder, and an obligation thus assumed is purely contractual, contains all the elements of a contract, and is to be enforced as such." *Adams v. Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642.

"The provision of the statute does not create the liability; it is merely a

legislative requirement that whoever becomes a stockholder shall at the same time assume an individual liability to the creditor; it is to declare the legal effect of the acts of the parties, which enable them to contract in a manner not authorized at common law." *Kulp v. Fleming*, 65 Ohio St. 321, 87 Am. St. Rep. 611, 62 N. E. 334.

"Perhaps a better statement of the principal would be that the liability arises out of the statute which imposes it, but the statute becomes binding on the stockholder through his subscription, whereby he places himself in such relation to it, as that he is bound by its terms, and so may be said to agree by implication that he will pay when the conditions of his liability for a specified amount are lawfully made to appear." *Van Tuyl v. Carpenter*, 135 Tenn. 629, 188 S. W. 234.

⁶⁷ *Kennedy v. California Sav. Bank*, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846.

"The liability of a stockholder is one founded upon contract made by the corporation for and on account of its stockholders, their personal liability attaching to and attending that of the corporation." *Kiefhaber Lumber Co. v. Newport Lumber Co.*, 15 Cal. App. 37, 113 Pac. 691.

⁶⁸ See § 4147, *supra*.

⁶⁹ See § 4195, *infra*.

to facilitate the recovery of judgment in suits "where the cause of action is a contract, whether in writing or not, or whether express or implied,"⁷⁰ within the statute of limitations,⁷¹ and within a statute authorizing an attachment in an action on a contract,⁷² and within a statute defining the jurisdiction of courts in actions arising upon contracts.⁷³ Some courts, however, have held that the liability imposed by such a statute is a statutory liability and not in any sense a contractual one.⁷⁴

A contractual, and not a penal, liability is imposed by a statutory or constitutional provision which, for the purpose of affording additional security to creditors, and not as a punishment or penalty for doing or omitting any act prohibited or commanded, declares that stockholders shall be personally liable for all debts and demands contracted by the corporation, or all debts and demands of a particular kind, whether the liability is unlimited in amount, or limited to the amount of stock held by the stockholders respectively, or in proportion to the amount of their stock.⁷⁵ The fact that the liability ceases when

⁷⁰ *Norris v. Wrenschall*, 34 Md. 492.

⁷¹ See § 4238, *infra*.

⁷² *Kennedy v. California Sav. Bank*, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846; *Adams v. Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642.

As to the remedy by attachment generally, see § 4222, *infra*.

⁷³ *Dennis v. Superior Court*, 91 Cal. 548, 27 Pac. 1031; *Coulbourn Bros. v. Boulton*, 100 Md. 350, 59 Atl. 711.

⁷⁴ *Arkansas*. *Davis v. Moore*, 130 Ark. 128, 197 S. W. 295.

Mississippi. *Robinett v. Starling*, 72 Miss. 652, 18 So. 421.

New Hampshire. *Tompkins v. Blakey*, 70 N. H. 584, 49 Atl. 111; *Crippen v. Loughton*, 69 N. H. 540, 46 L. R. A. 467, 76 Am. St. Rep. 192, 44 Atl. 538; *Rice v. Merrimack Hosiery Co.*, 56 N. H. 114, 128.

North Carolina. *Smathers v. Western Carolina Bank*, 155 N. C. 283, Ann. Cas. 1912 C 398, 71 S. E. 345.

Rhode Island. *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497. See also *Hancock Nat. Bank v. Farnum*, 20 R. I. 466, 40 Atl. 341, judgment *rev'd* 176 U. S. 640, 44 L. Ed. 619.

Liability of stockholders for the debts of the corporation over and above the amount due on their stock "arises altogether by force of the statute, and not out of the contract between the stockholders and the corporation. The obligation of that contract is merely that the corporation shall answer to the stockholders to the extent of the par value of the stock and the accumulated profits; in other words, the value of the stock is the measure of the contractual liability of the corporation to its stockholders." *Davis v. Moore*, 130 Ark. 128, 197 S. W. 295.

⁷⁵ *United States*. *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864; *Hawthorne v. Calef*, 2 Wall. 10, 17 L. Ed. 776.

California. *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023; *Kennedy v. California Sav. Bank*, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846; *Young v. Rosenbaum*, 39 Cal. 646.

Connecticut. *Paine v. Stewart*, 33 Conn. 516.

Illinois. *Bell v. Farwell*, 176 Ill.

the prescribed conditions are complied with does not change the nature of the liability and make that a penalty which would otherwise be a liability founded on contract.⁷⁶

It has been held that a statute authorizing the formation of a corporation, and providing that it shall not commence business until certain specified things are done, and that, until those things are done, the incorporators shall be severally liable for all the debts of the company, either without limit, or to the extent of the stock held by them respectively, is penal in its character.⁷⁷ It has been so held, for example, of a statute authorizing the formation of a corporation, but prohibiting it from commencing business until the whole amount of its capital stock is paid in, and a certificate thereof by the incorporators filed, and providing that, until this is done, the incorporators shall be severally liable for all the debts and responsibilities of the company to the amount of their stock.⁷⁸ And it has also been held that a penal liability is imposed by a statute making stockholders liable for corporate debts in case the corporation fails to comply substantially with the statutory requirements in relation to the organization of corporations and the giving of notice thereof,⁷⁹ or fails to make and file annual reports or certificates required by law,⁸⁰ by a statute imposing liability upon persons who organize a corporation and transact business in its name before the minimum capital stock is sub-

489, 42 L. R. A. 804, 68 Am. St. Rep. 194, 52 N. E. 346; *Queenan v. Palmer*, 117 Ill. 619.

Michigan. *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696; *Western Nat. Bank of New York v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *In re Warren's Estate*, 52 Mich. 557, 18 N. W. 356.

Minnesota. *Hencke v. Twomey*, 58 Minn. 550, 60 N. W. 667.

New York. *Cochran v. Wiechers*, 119 N. Y. 399, 7 L. R. A. 553, 23 N. E. 803; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Harger v. McCullough*, 2 Den. 119.

Wisconsin. *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797.

⁷⁶ *Flash v. Conn*, 109 U. S. 371, 27 L. Ed. 966.

⁷⁷ *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14.

⁷⁸ *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14; *Gridley v. Barnes*, 103 Ill. 211; *Weidenger v. Spruance*, 101 Ill. 278; *Norris v. Wrenschall*, 34 Md. 492.

⁷⁹ *Hogue v. Capital Nat. Bank*, 47 Neb. 929, 66 N. W. 1036; *Kleckner v. Turk*, 45 Neb. 176, 63 N. W. 469.

⁸⁰ *Sayles v. Brown*, 40 Fed. 8; *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214; *Globe Pub. Co. v. State Bank of Nebraska*, 41 Neb. 175, 27 L. R. A. 854, 59 N. W. 683; *Starkweather & Shepley v. Brown*, 25 R. I. 142, 55 Atl. 201; *Kilton v. Providence Tool Co.*, 22 R. I. 605, 48 Atl. 1039; *Wing v. Slater*, 19 R. I. 597, 33 L. R. A. 566, 35 Atl. 302. See also *Halsey v. McLean*, 12 Allen (Mass.) 438; *Derrickson v. Smith*, 27 N. J. L. 166.

As to the statutes imposing liability upon officers, see § 2597 et seq., *supra*.

scribed,⁸¹ and by a statute making the stockholders of a bank individually liable on paper issued in violation of a statutory prohibition.⁸² On the other hand, it has been held that a contractual, and not a penal, liability is imposed by a statute which does not prohibit doing business and contracting debts before payment of the capital stock and filing of a certificate, but, for the protection of creditors, makes stockholders individually liable for debts until this is done,⁸³ on the theory that such a statute "says the thing may be done, and the stockholders, etc., shall be liable, either absolutely or until some subsequent thing shall be done. In the one case the liability is in consequence of violating the law, or suffering it to be violated; in the other the liability is incurred in strict compliance with the law,—in short, in the one case the liability is for a wrong done—a tort; in the other it is upon contract."⁸⁴ It has been held that a statute which prohibits the transaction of business until the letters patent and a certified copy of the charter have been recorded, and affidavits filed that a certain per cent of the capital stock has been subscribed and paid, and making the stockholders personally liable for the corporate debts as partners in case the corporation transacts any business before complying with its provisions, does not prescribe a penalty or forfeiture for failure to perform duties, but imposes or continues a contract obligation upon stockholders.⁸⁵ And it has also been held that a statute making the stockholders of foreign corporations personally liable on its contracts made before compliance with the statutes prescribing conditions on which such corporations may do business within the state, though penal in its nature, is not a penal law in such sense as to prevent the

⁸¹ In *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13, such a liability was held to be so far penal in its nature as to require a strict construction.

⁸² *Lawler v. Burt*, 7 Ohio St. 340.

⁸³ *Cuykendall v. Miles*, 10 Fed. 342; *Flash v. Conn*, 16 Fla. 428, 26 Am. Rep. 721, 109 U. S. 371, 27 L. Ed. 966; *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14; *Corwith v. Culver*, 69 Ill. 502; *Steel v. Dunne*, 65 Ill. 298; *Culver v. Third Nat. Bank of Chicago*, 64 Ill. 528; *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24, aff'g 83 N. Y. App. Div. 534, 82 N. Y. Supp. 319; *Cochran v. Wiechers*, 119 N. Y. 399, 7 L. R. A.

553, 23 N. E. 803; *Wiles v. Suydam*, 64 N. Y. 173.

⁸⁴ *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14.

⁸⁵ This has been held to be true of the Florida statute making stockholders liable for corporate debts as partners, if the corporation transacts business before its letters patent and a certified copy of its charter has been recorded and before it has filed duplicate affidavits that ten per cent of its capital stock has been subscribed and paid. *Charles v. Young*, — Fla. —, 76 So. 869; *Heinberg Bros. v. Thompson*, 47 Fla. 163, 37 So. 71.

enforcement of the liability in another state.⁸⁶ A statute imposing individual liability on stockholders for debts due and owing to laborers, servants or employees, has also been held to be penal.⁸⁷

The liability of stockholders in a national bank, though in a sense contractual, does not arise wholly out of contract, but is rather a liability imposed by the statute.⁸⁸ For this reason it has been held that it may be enforced against a married woman who has lawfully become the owner of stock in such a bank even in a state where her common-law disability to contract has not been removed by statute.⁸⁹ And also that the statute of limitations relative to actions to enforce a statutory liability applies to actions to enforce it rather than the statute relative to actions on contracts.⁹⁰ It is so far contractual that it survives the death of the stockholder, however.⁹¹

The federal courts will follow the decisions of the highest court of the state where the statute was enacted in determining whether the liability thereunder is contractual or penal.⁹²

⁸⁶ *Leyner Engineering Works v. Kempner*, 163 Fed. 605.

But see *Utley v. Clark-Gardner Lode Min. Co.*, 4 Colo. 369, where this provision is referred to as one prescribing a penalty.

⁸⁷ *Laws 1909, c. 61, § 57; Consol. Laws, c. 59, is penal. Farnum v. Harrison*, 167 N. Y. App. Div. 704, 152 N. Y. Supp. 835, aff'd 218 N. Y. 672, 113 N. E. 1055.

⁸⁸ *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, 5 Ann. Cas. 740, aff'g 134 Fed. 842; *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, 3 Ann. Cas. 500, rev'g 119 Fed. 110; *Keyser v. Milton*, 228 Fed. 594, certiorari denied 241 U. S. 661, 60 L. Ed. 1226 (mem. dec.); *Aldrich v. Bingham*, 131 Fed. 363; *Robinson v. Turrentine*, 59 Fed. 554; *Witters v. Sowles*, 32 Fed. 767; *Id.* 35 Fed. 640, 1 L. R. A. 64. See also *McDonald v. Thompson*, 184 U. S. 71, 46 L. Ed. 437, aff'g 101 Fed. 183.

In the following cases the liability is said to be contractual. *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864; *Deweese v. Smith*, 106 Fed. 438, 66 L. R. A. 971, rev'g judgment 97 Fed. 309, judgment aff'd 187 U. S. 637, 47 L. Ed. 344 (mem. dec.); *Hill v. Gra-*

ham, 11 Colo. App. 536, 53 Pac. 1060; *Rankin v. Ware*, 88 Kan. 23, 127 Pac. 531.

In *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364, 372, 43 L. Ed. 1007, rev'g judgment 79 Fed. 51, it is said "Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation." The court further said that whether the liability was statutory or contractual was not a practical question in the case.

In *Weitzel v. Brown*, 224 Mass. 190, 112 N. E. 945, the liability is said to be contractual and not statutory.

⁸⁹ See § 4188, *infra*.

⁹⁰ See § 4242, *infra*.

⁹¹ *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, aff'g 73 Minn. 170, 75 N. W. 1041; *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864; *Rankin v. Miller*, 207 Fed. 602. See § 4195, *infra*.

⁹² *Flash v. Conn*, 109 U. S. 371, 27 L. Ed. 966.

§ 4177. Whether the liability is that of sureties or guarantors. It has often been said that the individual contractual liability of stockholders for corporate debts, imposed by a charter, statutory or constitutional provision, is that of sureties or guarantors, or is analogous to such a liability.⁹³ And on this theory it has been held, under some

In *Leyner Engineering Works v. Kempner*, 163 Fed. 605, it was held that the question was one of general jurisprudence, which a federal court sitting in another state must determine, uncontrolled by local decisions.

93 Georgia. See *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626. And see *Brunswick Terminal Co. v. National Bank of Baltimore*, 192 U. S. 386, 48 L. Ed. 491, aff'g 112 Fed. 812, where a special charter of a Georgia corporation in terms provided that the stockholders should be liable as sureties.

Kansas. *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, 88 Am. St. Rep. 229, 64 Pac. 984; *Hayward v. Sencenbaugh*, 141 Ill. App. 395. See also *Ramsden v. Knowles*, 151 Fed. 718. "While a stockholder is not in all respects a surety for the debts of the corporation, still he stands in the relation of a surety." *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, 88 Am. St. Rep. 229, 64 Pac. 984.

Massachusetts. *Grew v. Breed*, 10 Mete. 569.

Minnesota. *Minneapolis Baseball Co. v. City Bank*, 66 Minn. 441, 38 L. R. A. 415, 69 N. W. 331. "The constitutional liability is sui generis, yet it is in many respects analogous to that of surety or guarantor, and sustains the relation of surety for the debts of the corporation." *Way v. Barney*, 116 Minn. 285, 38 L. R. A. (N. S.) 648, Ann. Cas. 1913 A 719, 133 N. W. 801. And see to the same effect, *Willis v. Mabon*, 48 Minn. 140, 16 L. R. A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110. Where the liability of one who has transferred his stock for a debt contracted while he was a

stockholder is secondary to that of the transferee and that of the corporation, his position is in a sense that of a surety. *Way v. Mooers*, 135 Minn. 339, 160 N. W. 1014.

New Hampshire. *Hub Const. Co. v. New England Breeders' Club*, 76 N. H. 289, 82 Atl. 164; *Hicks v. Burns*, 38 N. H. 141.

New York. In *Barnes v. Arnold*, 23 Misc. 197, 51 N. Y. Supp. 1109, aff'd 45 App. Div. 314, 61 N. Y. Supp. 85, 169 N. Y. 611, 62 N. E. 1093, it is said "The corporation is the principal debtor, and the stockholder's individual liability is that of a surety." In *Assets Realization Co. v. Howard*, 70 Misc. 651, 127 N. Y. Supp. 798, judgment aff'd 152 App. Div. 900, 136 N. Y. Supp. 1130, 211 N. Y. 430, 105 N. E. 680, it is said "The stockholders stand somewhat in the relation of sureties on the indebtedness." In this case the court of appeals says that "sometimes it is queried whether the liability is that of a surety or a principal debtor," but does not pass on the question. In *Moss v. McCullough*, 5 Hill 131, it was held that the stockholders occupy the relation of sureties. In *Harger v. McCullough*, 2 Den. 119, and *Moss v. McCullough*, 7 Barb. 299, it was held that the stockholders were principal debtors, where they were made jointly and severally liable for the debt, though only after an execution returned unsatisfied against the company. In *Moss v. Averill*, 10 N. Y. 449, it is said, "the notion which at one time prevailed, that the stockholders were guarantors or sureties of the corporation, has been repudiated by

of the statutes, that a stockholder is discharged from liability to a creditor by the latter's extending the time for payment by the corporation, and accepting its note;⁹⁴ or by parting with or rendering unavailable any security or fund which he has a right to apply in satisfaction of the debt;⁹⁵ that a provision in the insolvency law that the release of any insolvent debtor under the act "shall not operate to discharge any other party liable as surety, guarantor, or otherwise for the same debt," applies to stockholders who are by statute or by the constitution made liable for debts of the corporation;⁹⁶ that it is not necessary to show that the corporation is insolvent in order to enforce the liability of the stockholder;⁹⁷ that a judgment recovered against a corporation is not even *prima facie* evidence of indebtedness in an action against stockholders to enforce their individual liability;⁹⁸ that no action can be maintained against the stockholder unless the liability of the corporation exists at the time when the action is commenced;⁹⁹ that a creditor cannot maintain an action against a stockholder without notice of the corporation's neglect to pay the debt;¹ and that the cause of action accrues against a stockholder, and the statute of limitations begins to run in his favor, immediately upon the default of the corporation.²

In other cases, under different provisions, it has been expressly and

this court," citing *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287. See also *Miller v. White*, 50 N. Y. 137.

South Carolina. In *Marine & River Phosphate Min. & Mfg. Co. v. Bradley*, 105 U. S. 175, 26 L. Ed. 1034, it was held that the liability, under a South Carolina statute making stockholders liable until the full amount of the capital stock had been paid in and a certificate thereof filed, was, in one aspect, a suretyship for the corporation, in view of a provision giving a stockholder paying a debt of the company for which he was personally liable an action against it for indemnity.

Texas. *Texas, G. & N. R. Co. v. Berlin*, — Tex. Civ. App. —, 165 S. W. 62.

Washington. *Bennett v. Thorne*, 36 Wash. 253, 68 L. R. A. 113, 78 Pac. 936,

⁹⁴ See § 4257, *infra*.

⁹⁵ See § 4257, *infra*.

⁹⁶ See § 4264, *infra*.

⁹⁷ *Texas, G. & N. R. Co. v. Berlin*, — Tex. Civ. App. —, 165 S. W. 62.

⁹⁸ *Moss v. McCullough*, 5 Hill (N. Y.) 131.

As to the conclusiveness of such a judgment generally, see § 4236, *infra*.

⁹⁹ It was so held in relation to the liability of stockholders of Kansas corporations. *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, 88 Am. St. Rep. 229, 64 Pac. 984; *Hayward v. Sencenbaugh*, 141 Ill. App. 395. But see *Ramsden v. Knowles*, 151 Fed. 718.

¹ *Hicks v. Burns*, 38 N. H. 141.

² *Bennett v. Thorne*, 36 Wash. 253, 68 L. R. A. 113, 78 Pac. 936.

As to when the cause of action accrues within the meaning of the statute of limitations, see § 4239, *infra*.

emphatically denied that the liability of stockholders is that of sureties or guarantors.³ So stockholders have been held to be primarily liable as principal debtors and not as sureties or guarantors under the provision of the California Constitution that each stockholder of a corporation "shall be individually and personally liable for such proportion of all its debts and liabilities as the amount of its capital stock owned by him bears to the whole of the capital stock,"⁴ and under a provision "when default shall be made in the payment of any debt or liability contracted" by a corporation, "the stockholders shall

3 Colorado. The liability of a stockholder of a national bank is that of a principal debtor, not of a surety. *Graham v. Platt*, 28 Colo. 421, 65 Pac. 30.

Georgia. *Hatch v. Burroughs*, 1 Woods 439, Fed. Cas. No. 6,203, where the liability under a special charter was held to be a principal and absolute one. See also *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085.

Maryland. The liability under Md. Acts 1892, p. 153, c. 109, § 851, was that of a principal debtor and not that of a surety or guarantor. *Knickerbocker Trust Co. v. Myers*, 133 Fed. 764, aff'd 139 Fed. 111, 1 L. R. A. (N. S.) 1171.

Michigan. The statutory liability of a stockholder of a bank for the benefit of its depositors is not that of a surety. *Wedemeyer v. Hindelang*, 161 Mich. 600, 126 N. W. 708. In *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696, it is said that the stockholder is something more than a surety; he is one of the associates of the bank, citing *Estate of Warren*, 52 Mich. 557, 18 N. W. 356, where it is said, "The shareholder, it is true, occupies as regards the creditor the position of surety for the bank; *Hanson v. Donkersley*, 37 Mich. 184; but he is something more than a surety; he is one of the associates of the bank, and by the very terms of the association he is deemed to undertake for the debts which the bank contracts." In *Hanson v. Donkersley*, cited by the court, it was appar-

ently held that the liability of stockholders under Const. art. 15, § 7, for labor performed for the corporation was that of a principal debtor and that he was not a surety. See also *Milroy v. Spurr Mountain Iron Min. Co.*, 43 Mich. 231, 5 N. W. 287; *Peck v. Miller*, 39 Mich. 594.

Mississippi. *Perkins v. Sanders*, 56 Miss. 733.

Pennsylvania. *Aultman's Appeal*, 98 Pa. St. 505 (in effect overruling *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. St. 117, on this point); *Craig's Appeal*, 92 Pa. St. 396.

West Virginia. *Dunn v. Bank of Union*, 74 W. Va. 594, L. R. A. 1915 B 168, 82 S. E. 578.

⁴ *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; *Brown v. Merrill*, 107 Cal. 446, 48 Am. St. Rep. 145, 40 Pac. 557; *Hyman v. Coleman*, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62; *Sonoma Valley Bank v. Hill*, 59 Cal. 107; *Young v. Rosenbaum*, 39 Cal. 646; *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427; *Davidson v. Rankin*, 34 Cal. 503; *Mokelumne Hill Canal & Mining Co. v. Woodbury*, 14 Cal. 265; *Niles State Bank v. Jennings*, 22 Cal. App. 66, 133 Pac. 329; *Trindade v. Atwater Canning & Packing Co.* (Cal. App.), 128 Pac. 756; *Thomas v. Matthiessen*, 232 U. S. 221, 58 L. Ed. 577, rev'g judgment 192 Fed. 495; *Buttner v. Adams*, 236 Fed. 105; *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62.

be held individually responsible for an amount equal to the amount of stock held by them respectively.”⁵

When the stockholders are liable as principal debtors, they are not discharged from liability for a corporate debt because of the fact that the creditor has extended the time of payment by agreement with the corporation,⁶ or has released or settled with persons secondarily liable,⁷ or because the corporate debt is secured by a mortgage and proceedings are pending to foreclose it.⁸ Nor is their liability extinguished or suspended by the recovery of a judgment against the corporation on the indebtedness.⁹ Nor can they utilize debts of the corporation paid by them as claims against the corporation.¹⁰

§ 4178. Whether the liability is that of partners. It has repeatedly been held that the effect of a statutory or constitutional provision that the stockholders of a corporation shall be personally liable jointly and severally for all debts or demands contracted by the corporation, or for a particular class of debts, or that they shall be so liable in proportion to their stock, or to the extent or amount of their stock, is to make them liable as partners or members of an unincorporated association to the extent prescribed,—in other words, that such a provision merely does away with the common-law exemption of the stockholders from individual liability, to the extent prescribed, and leaves them liable as if they were unincorporated.¹¹ In a New York

⁵ *Schalucky v. Field*, 124 Ill. 617, 7 Am. St. Rep. 399, 16 N. E. 904; *Thompson v. Meisser*, 108 Ill. 359; *Fuller v. Ledden*, 87 Ill. 310; *Schrader v. Heinzelman Bros.*, 51 Ill. App. 31, aff'd 150 Ill. 227.

⁶ See § 4257, *infra*.

⁷ See § 4257, *infra*.

⁸ See § 4180, *infra*.

⁹ *Young v. Rosenbaum*, 39 Cal. 646. And see § 4263, *infra*.

¹⁰ *Schrader v. Heinzelman*, 51 Ill. App. 31, aff'd 150 Ill. 227. See §§ 4246, 4261, *infra*.

¹¹ **California.** *Hyman v. Coleman*, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62; *Mokelumne Hill Canal & Mining Co. v. Woodbury*, 14 Cal. 265; *Buttner v. Adams*, 236 Fed. 105; *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62.

Connecticut. *Paine v. Stewart*, 33

Conn. 517; *Deming v. Bull*, 10 Conn. 409; *Southmayd v. Russ*, 3 Conn. 52.

Florida. The statute imposing an individual liability on the stockholders of a corporation which does business before ten per cent of its capital has been subscribed and paid expressly provides that they shall be liable as partners. *Charles v. Young*, 76 So. 869; *Humphreys v. Drew*, 59 Fla. 295, 52 So. 362; *Heinberg Bros. v. Thompson*, 47 Fla. 163, 37 So. 71.

Illinois. *Schalucky v. Field*, 124 Ill. 617, 7 Am. St. Rep. 399, 16 N. E. 904; *Thompson v. Meisser*, 108 Ill. 359; *Buchanan v. Meisser*, 105 Ill. 638; *Fuller v. Ledden*, 87 Ill. 310; *Gauch v. Harrison*, 12 Ill. App. 457.

Michigan. Under a statute making stockholders individually liable for all labor performed for the corporation, their liability is substantially the

case, under a statute making stockholders personally liable, jointly and severally, for the payment of all debts or demands contracted by the corporation, Judge Bronson said: "I think the stockholders in their individual, as well as their corporate capacity, are principal debtors. Although they have been incorporated with many of the privileges usually granted to men associated in that form, yet the privilege of exemption from personal liability for the debts of the company has been denied to them, and their personal liability has been expressly declared. They are thus placed, in relation to the creditors of the company, upon the same footing as though they were an unincorporated association, or partnership."¹²

Of course, when it is said that the stockholders are liable as partners, it is not meant that they are partners for all purposes, but only with respect to their liability, and even with respect to their liability only to the extent prescribed by the statute.

When the stockholders are thus liable substantially as partners, one stockholder, who is also a creditor of the corporation, cannot maintain an action at law against the other stockholders, for one partner cannot sue the other partners for a debt due from all.¹³

same as that of partners. *Shurlow v. Lewis*, 170 Mich. 493, 41 L. R. A. (N. S.) 975, 136 N. W. 484.

Mississippi. *Perkins v. Sanders*, 56 Miss. 733.

New Hampshire. *Erickson v. Ne-smith*, 46 N. H. 371.

New York. *Wiles v. Suydam*, 64 N. Y. 173; *Story v. Furman*, 25 N. Y. 214; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Thompson v. Nicolai*, 21 Misc. 700, 49 N. Y. Supp. 422; *Harger v. McCullough*, 2 Den. 119; *Bailey v. Bancker*, 3 Hill 188, 38 Am. Dec. 625; *Moss v. Oakley*, 2 Hill 265; *Allen v. Sewall*, 2 Wend. 327.

Rhode Island. *New England Commercial Bank v. Newport Steam Factory*, 6 R. I. 154, 75 Am. Dec. 688.

South Carolina. *Planters' Bank of Fairfield v. Bivingsville Cotton Mfg. Co.*, 10 Rich. L. 95.

Wisconsin. *Eau Claire Nat. Bank v. Benson*, 106 Wis. 624, 82 N. W. 604; *Merchants' Bank v. Chandler*, 19 Wis. 434; *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797.

Such is the effect of a statute providing that the stockholders of a corporation, or of particular kinds of corporations, shall be jointly and severally liable in their individual capacities and estates for all debts, contracts or other liabilities of the corporation contracted or incurred during the time they respectively own their stock, or are beneficially interested therein. The liability thus imposed is without reference to the amount that may have been paid in by the stockholders for their stock, and is unlimited. In effect, it does away altogether with the common-law exemption of stockholders from individual liability for corporate debts, and renders them liable as partners. *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Harger v. McCullough*, 2 Den. (N. Y.) 119; *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. St. 117.

¹² *Harger v. McCullough*, 2 Den. (N. Y.) 119.

¹³ See § 4211, *infra*.

§ 4179. Whether the liability is joint or several, or joint and several. Under a statutory or constitutional provision that stockholders shall be liable for corporate debts to the amount of their stock subscribed and unpaid, it has been held that their liability, like the liability to the corporation on subscriptions for stock, is several,¹⁴ but there is also authority to the contrary.¹⁵ If it is provided that stockholders shall be liable, without any limit, for all corporate debts, their liability is joint.¹⁶ The liability of stockholders is several; however, in the absence of anything to show a contrary intention on the part of the legislature, where they are made liable to the extent or amount of their stock, or in proportion to their stock, etc.¹⁷ The liability is

¹⁴*Shipman v. Portland Const. Co.*, 64 Ore. 1, 128 Pac. 989; *Hodges v. Silver Hill Min. Co.*, 9 Ore. 200.

¹⁵Liability under Laws of 1901, c. 354, p. 971, amending Laws 1892, c. 688, p. 1841, so as to make "every holder of capital stock not fully paid * * * personally liable" for the amount unpaid, the liability is joint. Prior to the amendment the statute expressly provided for a joint and several liability. *Dyer v. Drucker*, 104 N. Y. Supp. 166.

¹⁶*Deming v. Bull*, 10 Conn. 409; *Shafer v. Moriarty*, 46 Ind. 9.

¹⁷*United States. Terry v. Little*, 101 U. S. 216, 25 L. Ed. 864.

Connecticut. *Paine v. Stewart*, 33 Conn. 517.

Georgia. *Adkins v. Thornton*, 19 Ga. 325; *Lane v. Harris*, 16 Ga. 217.

Indiana. *Shafer v. Moriarty*, 46 Ind. 9.

Kansas. The double liability formerly provided for by the Kansas Constitution and statutes was several. *Waller v. Hamer*, 65 Kan. 168, 69 Pac. 185; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50, L. Ed. 331 (mem. dec.); *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, certiorari denied 196 U. S. 638, 49 L. Ed. 630 (mem. dec.); *New York Life Ins. Co. v. Beard*, 80 Fed.

66; *Love v. Pusey & Jones Co.*, 3 Pennw. (Del.) 577, 52 Atl. 542; *Pulsifer v. Greene*, 96 Me. 438, 52 Atl. 921; *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Blair v. Newbegin*, 65 Ohio St. 425, 58 L. R. A. 644, 62 N. E. 1040; *Kulp v. Fleming*, 65 Ohio St. 321, 87 Am. St. Rep. 611, 62 N. E. 334. And this was true under the statute providing for the enforcement of the stockholders' statutory and subscription liability by a receiver, although the receiver was required to proceed against all of the stockholders jointly. *Waller v. Hamer*, 65 Kan. 168, 69 Pac. 185.

Kentucky. *Castleman v. Holmes*, 4 J. J. Marsh. 1.

Massachusetts. *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 42 L. R. A. 396, 70 Am. St. Rep. 232, 44 N. E. 349; *Crease v. Babcock*, 10 Metc. 525.

Michigan. *Pettibone v. McGraw*, 6 Mich. 441.

Missouri. *Perry v. Turner*, 55 Mo. 418.

New York. *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473.

Tennessee. *Ohio Life Insurance & Trust Co. v. Merchants' Insurance & Trust Co.*, 11 Humph. 1, 53 Am. Dec. 742; *Brightwell v. Mallory*, 10 Yerg. 198.

Wisconsin. *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

generally held to be several under provisions declaring that "each" stockholder shall be liable for corporate debts to a certain amount;¹⁸ or that stockholders "shall be held individually responsible, equally and ratably, and not one for another,"¹⁹ or that stockholders shall be "severally and individually" liable,²⁰ or "individually responsible and liable,"²¹ or "individually responsible,"²² or "individually and personally liable."²³ But the liability has been held to be joint under a provision making "every holder of capital stock not fully paid * * * personally liable" for the amount unpaid.²⁴

A statute sometimes expressly provides that stockholders shall be

¹⁸ *McCarthy v. Lavasche*, 89 Ill. 270, 31 Am. Rep. 83; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254; *Selig v. Hamilton*, 234 U. S. 652, 58 L. Ed. 1518, Ann. Cas. 1917 A 104 (construing Minnesota Constitution); *Converse v. Hamilton*, 224 U. S. 243, 56 L. Ed. 749, Ann. Cas. 1913 D 1292, rev'g judgment 136 Wis. 589, 118 N. W. 190 (construing Minnesota Constitution); *Vick v. Lane*, 56 Miss. 681; *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11; *Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. 435; *Brown v. Hitchcock*, 36 Ohio St. 667; *Uinsted v. Buskirk*, 17 Ohio St. 113; *Wright v. McCormack*, 17 Ohio St. 86.

Where the liability is measured by the amount of stock owned by each stockholder, rather than by the debts, it is several. *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254.

¹⁹ *Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co.*, 116 Ky. 759, 76 S. W. 862; *Hyatt v. Anderson's Trustee*, 25 Ky. L. Rep. 132, 74 S. W. 1094.

The liability under such a provision is several and not joint and several. *Coyle v. Taunton Safe Deposit & Trust Co.*, 216 Mass. 156, 103 N. E. 288.

The liability imposed by the National Bank Act is several. *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216; *Kennedy v. Gibson*, 8 Wall. (U. S.) 498, 19 L. Ed. 476; *Bailey v.*

Sawyer, 4 Dill. 463, Fed. Cas. No. 744.

²⁰ *Flash v. Conn.*, 109 U. S. 371, 27 L. Ed. 966; *Winecock v. Turpin*, 96 Ill. 135; *Culver v. Third Nat. Bank of Chicago*, 64 Ill. 528; *Norris v. Wrenschall*, 34 Md. 492; *Norris v. Johnson*, 34 Md. 485; *Pfohl v. Simpson*, 74 N. Y. 137; *Mathez v. Neidig*, 72 N. Y. 100; *Week v. Love*, 50 N. Y. 568.

The liability of stockholders in banks under the Montana statute is several and individual. *Barth v. Pock*, 51 Mont. 418, 155 Pac. 282.

²¹ *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

²² *Van Tuyl v. Kress*, 172 N. Y. App. Div. 563, 158 N. Y. Supp. 810; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473.

In Colorado the liability of stockholders in banks is several. *Miller v. Willett*, 70 N. J. Eq. 396, 62 Atl. 178, judgment aff'd 71 N. J. Eq. 741, 65 Atl. 681.

²³ In California the liability is several, and not joint and several, although the statute permits any creditor to commence joint or several actions against any of its stockholders. *Gardiner v. Bank of Napa*, 160 Cal. 577, 117 Pac. 667; *Brown v. Merrill*, 107 Cal. 446, 40 Pac. 557; *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354.

²⁴ Liability under Laws of 1901, c. 354, p. 971, amending Laws 1892, c. 688; p. 1841, is joint. Prior to the

“jointly and severally” liable for corporate debts, thus making them liable, not jointly only, nor severally only, but either jointly or severally.²⁵ But where a statute declaring stockholders jointly and severally liable further provided that such sums as might be decreed to be paid by stockholders in a suit in equity should be assessed upon them in proportion to the amount of stock held by them respectively, and that no stockholder should be required to pay a larger sum than the amount of stock held by him at its par value, it was held that each stockholder was only liable severally for his proportion of the corporate debts.²⁶

When stockholders are made severally liable, each must be sued severally at law.²⁷ If several of them are joined in a suit in equity, a judgment in solido cannot be entered against them.²⁸

If the liability is several, a judgment against part of the stockholders does not have the effect of releasing the others.²⁹

amendment the statute expressly provided for a joint and several liability. *Dyer v. Drucker*, 104 N. Y. Supp. 166.

²⁵ *Kansas*. *Grund v. Tucker*, 5 Kan. 70.

Nebraska. *First Nat. Bank of Omaha v. Cooper*, 89 Neb. 632, 131 N. W. 958; *Id.* 91 Neb. 624, 136 N. W. 1023.

New Hampshire. *Hicks v. Burns*, 38 N. H. 141.

New York. *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24, aff'g 83 App. Div. 534, 82 N. Y. Supp. 319.

South Carolina. *Hall v. Klinck*, 25 S. C. 348, 60 Am. Rep. 505.

Under § 303 of the Banking Law (Consol. Laws 1909, c. 2), the stockholders of a safe deposit company are “jointly and severally liable.” *Mosler Safe Co. v. Guardian Trust Co.*, 208 N. Y. 524, 101 N. E. 786, modifying and affirming judgment 153 N. Y. App. Div. 117, 138 N. Y. Supp. 298. The liability under § 303 is to be distinguished in this respect from that imposed by other provisions of the Banking Law (Consol. Laws, c. 2, § 71), relating to banks, under which the stockholders are individually responsible, equally and ratably, and not one for another, to the extent of their stock at its par value, and

(Consol. Laws, c. 2, § 196) relating to trust companies, under which the stockholders' liability is also equal and ratable to the extent of the par value of their respective shares. *Mosler Safe Co. v. Guardian Trust Co.*, 208 N. Y. 524, 101 N. E. 786, modifying and affirming judgment 153 N. Y. App. Div. 117, 138 N. Y. Supp. 298.

²⁶ *Burnap v. Haskins Steam-Engine Co.*, 127 Mass. 586.

²⁷ See § 4227, *infra*.

²⁸ *Crease v. Babcock*, 10 Metc. (Mass.) 525; *Vick v. Lane*, 56 Miss. 681; *Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. 435; *Shipman v. Portland Const. Co.*, 64 Ore. 1, 128 Pac. 989.

Two stockholders are not prejudiced by a judgment against them jointly for a much smaller sum than the amount of the liability of either, and such a judgment is not ground for reversal where it does not appear that there is more than one creditor or that it will require any more than the amount of his judgment to close up the affairs of the corporation. *Walterscheid v. Bowdish*, 77 Kan. 665, 96 Pac. 56.

²⁹ See § 4262, *infra*.

If the liability is several, and is limited, the liability of one stockholder cannot be increased because other stockholders are beyond the jurisdiction of the court, so that they cannot be reached by process,³⁰ or because they are insolvent.³¹ Nor will a compromise or settlement by a receiver with one stockholder increase the liability of another.³²

If the liability is joint and several, the fact that all of the stockholders joined as defendants in a creditor's suit are not served, is immaterial.³³ And solvent stockholders may be compelled to make good a deficiency resulting from the failure of other stockholders to pay amounts adjudged to be due from them, up to the extent of their liability.³⁴

§ 4180. Whether the liability is primary or secondary. Whether the individual liability of stockholders is primary or secondary depends upon the language of the particular statute or constitutional provision under consideration.³⁵ Under some provisions the liability is a primary one,³⁶ and where such is the case, creditors may sue and collect from the stockholders to the extent of their liability without

³⁰ *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216; *Maine Trust & Banking Co. v. Southern Loan & Trust Co.*, 92 Me. 444, 43 Atl. 24; *Crease v. Babcock*, 10 Mete. (Mass.) 525.

That stockholders beyond the jurisdiction of the court need not be joined as defendants in a suit in equity to enforce the liability, see § 4228, *infra*.

³¹ *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216; *Adkins v. Thornton*, 19 Ga. 325; *Maine Trust & Banking Co. v. Southern Loan & Trust Co.*, 92 Me. 444, 43 Atl. 24; *Crease v. Babcock*, 10 Mete. (Mass.) 525.

"The liability of those stockholders from whom collection can be enforced is not to be increased to make up for the inability or irresponsibility of other stockholders." *Coyle v. Taunton Safe Deposit & Trust Co.*, 216 Mass. 156, 103 N. E. 288.

³² *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085.

³³ *Mosler Safe Co. v. Guardian Trust Co.*, 208 N. Y. 524, 101 N. E. 786, modifying and affirming judgment 153 N.

Y. App. Div. 117, 138 N. Y. Supp. 298.

³⁴ *First Nat. Bank of Omaha v. Cooper*, 91 Neb. 624, 136 N. W. 1023.

³⁵ *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085.

³⁶ *California*. The liability imposed by the provision of the constitution that each stockholder of a corporation "shall be individually and personally liable for such proportion of all its debts and liabilities as the amount of its capital stock owned by him bears to the whole of the capital stock," is a primary one. *Eva v. Andersen*, 166 Cal. 420, 137 Pac. 16; *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; *Knowles v. Sanderecock*, 107 Cal. 629, 40 Pac. 1047; *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354; *Faymonville v. McCullough*, 59 Cal. 285; *Young v. Rosenbaum*, 39 Cal. 646; *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427; *Davidson v. Rankin*, 34 Cal. 503; *Linninger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63; *Trindade v. Atwater Canning & Packing Co.* (Cal. App.), 128

first exhausting the assets of the corporation by the recovery of a judgment against it and the issuance and return of an execution thereon, or otherwise. Nor, under such circumstances, is a creditor prevented from suing a stockholder by reason of the fact that he has in his hands, and undisposed of, property of the corporation pledged as security for his claim,³⁷ nor because his claim is secured by a mortgage which he has made no effort to foreclose,³⁸ or even though

Pac. 756; *Buttner v. Adams*, 236 Fed. 105; *Dolbear v. Foreign Mines Development Co.*, 196 Fed. 646; *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62.

Illinois. The liability of stockholders in banks under the constitution is a primary one. *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273. The liability to the extent of their unpaid subscriptions imposed upon the stockholders of a corporation which has dissolved or ceased doing business, leaving debts unpaid is a primary one. *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725, aff'g 105 Ill. App. 271. The liability under Act Feb. 18, 1857 (Sess. Laws 1857, p. 163), was a primary one. *Culver v. Third Nat. Bank of Chicago*, 64 Ill. 528. In *Harper v. Union Mfg. Co.*, 100 Ill. 225, it was held that the corporation's assignee for the benefit of creditors was a necessary party to suit in equity to enforce the liability, since it would be inequitable to require individual stockholders to pay any portion of the liability of the corporation until its assets were exhausted. In *Schalucky v. Field*, 124 Ill. 617, 7 Am. St. Rep. 399, 16 N. E. 904, and *Queenan v. Palmer*, 117 Ill. 619, 7 N. E. 613, the liability imposed by certain special charters was held to be primary.

Indiana. *Shafer v. Moriarty*, 46 Ind. 9. See also *Marion Township Union Draining Co. v. Norris*, 37 Ind. 424. Compare *Ewing v. Stultz*, 9 Ind. App. 1, 36 N. E. 170.

Iowa. *Marshall v. Harris*, 55 Iowa 182, 7 N. W. 509.

Minnesota. In *Gebhard v. Eastman*

& *Gibson*, 7 Minn. 56, the liability under a special charter was held to be primary. The present constitutional liability is secondary. *Way v. Mooers*, 135 Minn. 339, 160 N. W. 1014.

Mississippi. The liability imposed upon stockholders in banks by Law 1914, c. 124, § 59, is a primary one. *Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601.

North Dakota. The liability to the amount of the stockholders' unpaid stock imposed by Rev. Codes 1899, § 2902, is a primary one. *Marshall-Wells Hardware Co. v. New Era Coal Co.*, 13 N. D. 396, 100 N. W. 1084.

Texas. Under *Vernon's Sayles'* Civ. Stat. arts. 459, 552, making "each stockholder" in any bank "personally liable," and providing for the enforcement of such liability by the commissioner of banks by means of an assessment, the liability is a primary and not a secondary one. *Stringfellow v. Patterson*, — Tex. Civ. App. —, 192 S. W. 555.

Wisconsin. *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315; *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335; *Merchants' Bank v. Chandler*, 19 Wis. 434; *Cleveland v. Marine Bank*, 17 Wis. 545.

³⁷ *Sonoma Valley Bank v. Hill*, 59 Cal. 107. See, however, *Albitztigui v. Guadalupe y Caloo Min. Co.*, 92 Tenn. 598, 22 S. W. 739.

³⁸ *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047; *Dolbear v. Foreign Mines Development Co.*, 196 Fed. 646. See also *Foreign Mines Development Co. v. Boyes*, 180 Fed. 594.

a proceeding to foreclose the same is pending,³⁹ and, under the statute, but one action may be maintained on a debt secured by a mortgage. And he may also enforce the liability of stockholders on a note of the corporation without first exhausting his remedy against sureties on the note.⁴⁰

Generally, however, the liability is a secondary one,⁴¹ to be resorted to only in case the assets of the corporation are insufficient

This is true regardless of whether the mortgage is given at the time when the debt is incurred or afterwards. *Dolbear v. Foreign Mines Development Co.*, 196 Fed. 646.

³⁹ *Niles State Bank v. Jennings*, 22 Cal. App. 66, 133 Pac. 329.

⁴⁰ *Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363.

⁴¹ *Colorado*. *Abbott v. Goodall*, 100 Me. 231, 60 Atl. 1030; *Miller v. Connor*, 177 Mo. App. 630, 160 S. W. 582; *Miller v. Smith*, 26 R. I. 146, 66 L. R. A. 473, 106 Am. St. Rep. 699, 58 Atl. 634.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Georgia. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626; *Lane v. Harris*, 16 Ga. 217; *Thornton v. Lane*, 11 Ga. 459.

Indiana. *Ewing v. Stultz*, 9 Ind. App. 1, 36 N. E. 170. Compare *Shaffer v. Moriarty*, 46 Ind. 9, and *Marion Township Union Draining Co. v. Norris*, 37 Ind. 424.

Kansas. *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.).

Maine. In *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378, 69 Atl. 771, the liability under a provision of a special charter was held to be secondary.

Massachusetts. *Brown v. Eastern Slate Co.*, 134 Mass. 590.

Michigan. *Milroy v. Spurr Moun-*

tain Iron Min. Co., 43 Mich. 231, 5 N. W. 287; *Hanson v. Donkersley*, 37 Mich. 184.

Minnesota. *Way v. Mooers*, 135 Minn. 339, 160 N. W. 1014. In *Gebhard v. Eastman & Gibson*, 7 Minn. 56, the liability under a special charter was held to be primary.

Nebraska. *Holcomb v. Tierney*, 79 Neb. 660, 113 N. W. 204; *Rawson v. Taylor*, 69 Neb. 473, 95 N. W. 1033; *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67, 92 N. W. 189; *Id.* 72 Neb. 81, 100 N. W. 202; *Goss v. Carter*, 156 Fed. 746; *Francis v. Hazlett*, 192 Mass. 137, 116 Am. St. Rep. 230, 78 N. E. 405; *Hazlett v. Woodhead*, 28 R. I. 452, 67 Atl. 736, 27 R. I. 506, 63 Atl. 952.

New York. *Gause v. Boldt*, 49 Misc. 340, 99 N. Y. Supp. 442, aff'd 115 App. Div. 897, 100 N. Y. Supp. 1117, 188 N. Y. 546, 80 N. E. 566; *Richards v. Coe*, 19 Abb. N. Cas. 79; *Lindsley v. Simonds*, 2 Abb. Pr. (N. S.) 69. "Whatever the technical nature of the liability may be, there can be no question that in its practical aspects and consequences it is of a secondary and exceptional character which is developed only by the unusual contingency that the corporation has become insolvent and unable to pay its debts." *Assets Realization Co. v. Howard*, 211 N. Y. 430, 105 N. E. 680, aff'g 152 App. Div. 900, 136 N. Y. Supp. 1130, 70 Misc. 651, 127 N. Y. Supp. 798.

Ohio. *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11; *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. 234;

to satisfy its debts,⁴² and then only to such an extent as is necessary to make up the deficiency.⁴³ And, when such is the case, there can be no recovery against stockholders by creditors who have in their possession, in trust for themselves and other creditors, assets of the company which are more than sufficient to pay all corporate debts, and which they have a right to subject to the payment of their claims.⁴⁴ Nor can creditors proceed against stockholders to enforce their liability without first exhausting their legal remedies against the corporation by recovering a judgment against it and having an execution thereon returned wholly or partially unsatisfied,⁴⁵ unless they show that this was impossible, or would have been useless.⁴⁶

§ 4181. Dissolution, failure, insolvency, etc., as a condition precedent to liability. The statutes imposing individual liability upon stockholders for corporate debts sometimes expressly provide that they shall be liable on the dissolution of the corporation,⁴⁷ or on its in-

Bronson v. Schneider, 49 Ohio St. 438, 33 N. E. 233; *Barriek v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798, 24 N. E. 259; *Hawkins v. Iron Valley Furnace Co.*, 40 Ohio St. 507; *Brown v. Hitchcock*, 36 Ohio St. 667; *Wright v. McCormack*, 17 Ohio St. 86; *Irvine v. Elliott*, 203 Fed. 82; *Pfaff v. Gruen*, 92 Mo. App. 560, 69 S. W. 405. The stockholders' additional liability under the Ohio Constitution and statutes is a secondary and contingent liability. It becomes a primary one enforceable against the stockholders when the corporation becomes insolvent, and its assets including unpaid stock subscriptions are insufficient to pay its debts. *Irvine v. Baker*, 225 Fed. 834; *Blackburn v. Irvine*, 205 Fed. 217, aff'g 198 Fed. 360.

Pennsylvania. *In re Means' Appeal*, 85 Pa. St. 75; *Patterson & Co. v. Wyomissing Mfg. Co.*, 40 Pa. St. 117.

Rhode Island. *Andrews v. O'Reilly*, 25 R. I. 231, 55 Atl. 688; *Kilton v. Providence Tool Co.*, 22 R. I. 605, 48 Atl. 1039; *Allen v. Arnold*, 18 R. I. 809.

Vermont. *Dauchy v. Brown*, 24 Vt. 197.

Washington. *Shuey v. Adair*, 24 Wash. 378, 24 Pac. 536.

⁴² See § 4231, *infra*.

⁴³ Where the right to enforce the liability is in the receiver, he should be permitted to do so only upon its appearing that there is a deficit in the other assets of the bank, and should recover only such an amount as is necessary to cover such deficit. *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893.

The stockholders are entitled to credit on their liability for the amount realized from the assets of an insolvent corporation by a receiver appointed to collect its assets and apply them to its debts. *Buist v. Williams*, 81 S. C. 495, 62 S. E. 859.

⁴⁴ *Albitztigui v. Guadalupe y Caloo Min. Co.*, 92 Tenn. 598, 22 S. W. 739.

⁴⁵ See § 4231, *infra*.

⁴⁶ See § 4232, *infra*.

⁴⁷ *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340; *State Sav. Ass'n v. Kellogg*, 63 Mo. 540; *Schneider v. Johnson*, 164 Mo. App. 639, 147 S. W. 538; *Bittner v. Lee*, 25 Mo. App. 559. See also cases cited in the following notes.

solvency,⁴⁸ or in case it ceases doing business leaving debts unpaid,⁴⁹ or in case the capital stock is reduced by any mode which shall render the corporation insolvent,⁵⁰ or if default is made in the payment of any debt or liability contracted by it,⁵¹ and in such cases, of course, the prescribed conditions must exist before any liability on the part of the stockholders will arise.

Under statutes making stockholders liable for corporate debts on "dissolution" of the corporation, or for debts due at the time of its dissolution, it has been held that the term "dissolution" is not used in its strict legal sense, so as to make the individual liability of stockholders dependent upon the corporation's ceasing to exist by expiration of its charter or otherwise, but that the statute contemplates a practical dissolution, and that there is such a dissolution when a corporation becomes insolvent, and goes into the hands of a receiver for the purpose of being wound up, or into bankruptcy or insolvency, or makes an assignment for the benefit of creditors, or when it loses all its property, and ceases to do business.⁵² There is a dissolution,

⁴⁸ Hall v. Hughes, 119 Md. 487, 87 Atl. 387; Hughes v. Hall, 117 Md. 547, 83 Atl. 1023; Poston v. Hull, 75 Ohio St. 502, 80 N. E. 11. See also cases cited in the following notes.

Under such a statute the liability "is to be resorted to by creditors only in case of the insolvency of the corporation." Poston v. Hull, 75 Ohio St. 502, 80 N. E. 11.

⁴⁹ In Illinois the stockholders are liable under such circumstances to the extent of the unpaid portion of their stock. Teich v. Midland Mach. Co., 177 Ill. App. 354.

⁵⁰ Connecticut Gen. St. 1888, § 1954, provided that in case of the reduction of the capital stock by any mode which shall render the corporation insolvent, the stockholders assenting thereto shall be jointly and severally liable for all debts of the corporation existing at the time of such reduction. This section was held to apply only to joint stock corporations, and not to those having special charters. Barber v. Morgan, 89 Conn. 583, Ann. Cas. 1916 E 102, 94 Atl. 984.

⁵¹ Section 196 of the Banking Law

of 1909, provides that if default is made in the payment of any debt or liability contracted by any banking corporation, the stockholders shall be individually responsible, equally and ratably for the then existing debts of the corporation, but that no stockholder shall be liable for the debts of the corporation to an amount exceeding the par value of the respective shares of stock by him held in such corporation at the time of such default. The word "default" as here used means not only a default suffered by the bank's own officials, but also includes a default resulting from the action of the superintendent of banks in taking possession of the business and assets of the corporation, although for a reason other than a default in the payment of its obligations. Richards v. Scharmann, 97 N. Y. Misc. 143, 161 N. Y. Supp. 109.

The proof was held sufficient to make out a prima facie case of default in the payment of the debts in Richards v. Schwab, 101 N. Y. Misc. 128, 167 N. Y. Supp. 535.

⁵² McDonnell v. Alabama Gold Life

within the meaning of such a statute, said the Alabama court, "when- ever the corporation becomes 'a nominal, inert body,' its property and funds gone, and it is reduced to insolvency, rendering legal remedies against it fruitless and unavailing."⁵³

It is sometimes expressly provided that suspension of its business by a corporation for a year shall be deemed a dissolution for the purpose of rendering its stockholders liable for its debts.⁵⁴ Such a pro-

Ins. Co., 85 Ala. 401, 5 So. 120; Central Agricultural & Mechanical Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120; Stoltz v. Scott, 23 Idaho 104, 129 Pac. 340; O'Kell v. Chama Valley Lands & Irrigation Co., 181 Mo. App. 466, 168 S. W. 887; Schneider v. Johnson, 164 Mo. App. 639, 147 S. W. 538; Hollingshead v. Woodward, 107 N. Y. 96, 13 N. E. 621 (distinguishing Kincaid v. Dwinelle, 59 N. Y. 548); Bradt v. Benedict, 17 N. Y. 99; Briggs v. Penniman, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273. See also Brookline Canning & Packing Co. v. Evans, 163 Mo. App. 564, 146 S. W. 828; Elliott v. Sullivan, 156 Mo. App. 496, 137 S. W. 287. And see § 4239, *infra*.

"The creditor of an insolvent corporation does not have to wait until the corporation's charter has expired, or until the corporation has been judicially dissolved, but as to him the corporation will be deemed dissolved when it has ceased to be a going concern, and has disposed of its tangible assets and there is no probability of its again attempting to carry on the business for which it was organized." Schneider v. Johnson, 164 Mo. App. 639, 147 S. W. 538.

⁵³ Central Agricultural & Mechanical Ass'n v. Alabama Gold Life Ins. Co., 70 Ala. 120.

⁵⁴ Kansas Gen. St. 1901, § 1310; Abernathy v. Loftus, 95 Kan. 87, 147 Pac. 818; Manley v. Mayer, 68 Kan. 377, 1 Ann. Cas. 825, 75 Pac. 550; Thomas v. Remington Paper Co., 67

Kan. 599, 73 Pac. 909; Jones v. Slo- necker, 66 Kan. 286, 71 Pac. 573; McHale v. Moore, 66 Kan. 267, 71 Pac. 522; Pacific Elevator Co. v. Whit- beck, 63 Kan. 102, 88 Am. St. Rep. 229, 64 Pac. 984; Brigham v. Nathan, 62 Kan. 243, 62 Pac. 319; First Nat. Bank of Atchison v. King, 60 Kan. 733, 57 Pac. 952; Sleeper v. Norris, 59 Kan. 555, 53 Pac. 757; Cottrell v. Manlove, 58 Kan. 405, 49 Pac. 519; Crocker v. Ball, 10 Kan. App. 364, 59 Pac. 691; Jones v. Edson, 10 Kan. App. 110, 62 Pac. 249; Fox v. First Nat. Bank, 9 Kan. App. 18, 57 Pac. 241; Harrison v. Remington Paper Co., 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.); Anglo-American Land, Mort- gage & Agency Co. v. Lombard, 132 Fed. 721, certiorari denied 196 U. S. 638, 49 L. Ed. 630 (mem. dec.); Seat- tle Nat. Bank v. Pratt, 103 Fed. 62. And see § 4239, *infra*.

This provision does not violate the constitutional provision requiring the subject of an act to be expressed in its title, or that forbidding the amendment of a section unless the new section contains the entire section as amended. Manley v. Mayer, 68 Kan. 377, 1 Ann. Cas. 825, 75 Pac. 550.

The first day is to be excluded and the last included in computing the time. Crocker v. Ball, 10 Kan. App. 364, 59 Pac. 691.

The merger of notes held by a cred- itor in a judgment against the corpo- ration pending his action against a stockholder under this provision does

vision applies where a corporation suspends for a year all the business for which it was created, and transacts such business only as is incidental and necessary to the final closing up of its affairs.⁵⁵ And a bank suspends business, within the meaning of such a provision, where it suspends payment, although a receiver is appointed, and afterwards pays dividends to creditors.⁵⁶ The corporation is deemed dissolved only for the purpose of enabling creditors to enforce the individual liability of the stockholders. For all other purposes it continues to be a corporation in the eyes of the law, and creditors may sue it in its corporate capacity in the same manner as before.⁵⁷

When the stockholders are made individually liable on the insolvency of the corporation, they become liable when a judgment has been recovered and an execution thereon has been returned unsatisfied, or when it is otherwise shown that it has ceased to do business, and that it has no property subject to execution, or where it has executed an assignment of all its property for the benefit of creditors, or gone into the hands of an assignee or receiver in bankruptcy or insolvency

not prevent a recovery in such action. *Thomas v. Remington Paper Co.*, 67 Kan. 596, 73 Pac. 909.

Though notes held by a corporate creditor are merged in the judgment against the corporation, they still remain competent evidence of the existence of the debt in an action against the stockholder. *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.).

The statute extends to an involuntary suspension of business by a bank where the bank commissioner takes possession of it. *Crocker v. Ball*, 10 Kan. App. 364, 59 Pac. 691.

Although not expressly repealed, this provision of the Kansas statutes necessarily became entirely inoperative on repeal of the statute authorizing suits by creditors to enforce the individual liability of stockholders. *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, 173.

⁵⁵ *Jones v. Stonecker*, 66 Kan. 286, 71 Pac. 573; *Brigham v. Nathan*, 62 Kan. 243, 62 Pac. 319; *Jones v. Edson*,

10 Kan. App. 110, 62 Pac. 249; *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, certiorari denied 196 U. S. 638, 49 L. Ed. 630 (mem. dec.); *Whitman v. Citizens' Bank of Reeding*, 110 Fed. 503. And see § 4239, *infra*.

A suspension of a part of its business only by a corporation does not bring it within the statute. *Mechanics' Sav. Bank v. Fidelity Insurance, Trust & Safe-Deposit Co.*, 91 Fed. 456.

A recital in a deed by the corporation that it was then doing business, does not estop its stockholders from asserting that it had previously suspended business within the meaning of this provision, so as to start the running of limitations in favor of stockholders. Nor will a subsequent sale of their stock and a transfer thereof on the books work such an estoppel as against the seller. *Jones v. Edson*, 10 Kan. App. 110, 62 Pac. 249.

⁵⁶ *Stebbins v. Scott*, 172 Mass. 356, 52 N. E. 535.

⁵⁷ *Whitman v. Citizens' Bank of Reeding*, 110 Fed. 503.

proceedings.⁵⁸ It is not necessary, under such a statute, that the insolvency be established by a decree of court, but it may be shown under proper allegations by proof of it as a fact.⁵⁹ But it is not enough to show merely that the property of the corporation is insufficient to pay all its debts, where it is still engaged in business, or even that it has gone into the hands of a receiver, where the receiver was appointed to continue the business, and not for the purpose of winding up the corporation because of insolvency.⁶⁰

Under a charter or statutory provision making the stockholders of a corporation individually liable for its debts on its "failure," stockholders clearly become liable when the corporation becomes insolvent and ceases to do business, or goes into the hands of a receiver, or makes an assignment for the benefit of creditors. Suspension of specie payment by a bank was held sufficient to render stockholders liable under a charter provision making them liable in case of its "failure,"⁶¹ although it continued to do a banking business for several years afterwards.⁶²

Under an insurance company's charter providing that, "in all cases of losses exceeding the means of the corporation, each stockholder shall be held liable," etc., it must be alleged and proved, in an action against a stockholder, that the losses of the company, or its liabilities, exceed its assets.⁶³

Under a bank charter providing that the stockholders shall be personally liable for the ultimate redemption of its bills and notes in proportion to the amount of stock held by them, the liability attaches

⁵⁸ *Peter v. Farrel Foundry & Machine Co.*, 53 Ohio St. 534, 42 N. E. 690; *Younglove v. Kelly Island Lime Co.*, 49 Ohio St. 663, 33 N. E. 234; *Bronson v. Schneider*, 49 Ohio St. 438, 33 N. E. 233; *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798, 24 N. E. 259; *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558.

⁵⁹ This is true under the Maryland statute providing that in the event of the insolvency of the corporation, the liability of its stockholders for the amount unpaid on their stock may be enforced by the receiver, trustee or other person winding up the affairs of the corporation. *Hall v. Hughes*, 119 Md. 487, 87 Atl. 387; *Hughes v. Hall*, 117 Md. 547, 83 Atl. 1023.

⁶⁰ *Younglove v. Kelly Island Lime Co.*, 49 Ohio St. 663, 33 N. E. 234; *Bronson v. Schneider*, 49 Ohio St. 438, 33 N. E. 233; *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798, 24 N. E. 259 (distinguishing *Hawkins v. Iron Valley Furnace Co.*, 40 Ohio St. 507).

⁶¹ *Godfrey v. Terry*, 97 U. S. 171, 24 L. Ed. 944; *Lane v. Morris*, 8 Ga. 468; *Terry v. Calnan*, 13 S. C. 220.

⁶² *Godfrey v. Terry*, 97 U. S. 171, 24 L. Ed. 944; *Terry v. Calnan*, 13 S. C. 220.

⁶³ *Blair v. Gray*, 104 U. S. 769, 26 L. Ed. 922.

when the bank refuses or ceases to redeem its bills and notes, and is notoriously and continually insolvent.⁶⁴

§ 4182. Persons liable—In general. It is clear that a person cannot be held liable for corporate debts under a charter, statutory or constitutional provision imposing such liability upon stockholders, unless he has, at the very least, at some time become a stockholder in the corporation,⁶⁵ or unless the circumstances are such as to estop him from denying that he is or was a stockholder.⁶⁶

As we have seen in former sections, neither the issue of a certificate of stock nor payment for stock is necessary to make one a stockholder, unless it is expressly so provided, and therefore, in the absence of such a provision, a person cannot escape liability as a stockholder for corporate debts by showing that no certificate of stock has been issued to him, or that he has paid nothing for his stock.⁶⁷ But to hold a person liable as a stockholder, it must appear that he was entitled to have stock issued to him.⁶⁸

Generally the liability extends to all of the stockholders, regardless of whether they acquired their stock as original subscribers, or purchased it from the corporation, or from other stockholders,⁶⁹ but under the peculiar wording of some provisions it has been held that only the original subscribers are liable.⁷⁰

⁶⁴ *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365; *Terry v. Tubman*, 92 U. S. 156, 23 L. Ed. 537.

⁶⁵ *Converse v. Stewart*, 197 Fed. 152, aff'g judgment 192 Fed. 941; *Converse v. Stewart*, 192 N. Y. 578, 85 N. E. 1107, aff'g judgment 117 N. Y. App. Div. 922, 102 N. Y. Supp. 1133.

A stockholder cannot be held to a double liability in respect to all of the stock of the corporation where he never owned it all. *Security State Bank v. Gannon*, 39 S. D. 232, 163 N. W. 1040.

In *Burton v. Richmond*, 107 Fed. 387, it was held that the defendant never became a stockholder, and hence could not be held liable.

In *Security Bank v. Gannon*, 39 S. D. 232, 163 N. W. 1040, all the parties were held to be estopped, as against creditors, to deny the validity of proceedings taken to reorganize a

bank, including transfers of stock by an executrix without an order of the probate court.

In *Neff v. Lamm*, 99 Minn. 115, 108 N. W. 849, the evidence was held to be sufficient to sustain a finding that a person was a stockholder at the time of his death.

As to the effect of a transfer of shares, see § 4196 et seq., *infra*.

⁶⁶ See § 4208, *infra*.

⁶⁷ See § 3427, *supra*.

⁶⁸ *Robinson v. Nashville Center Co-operative Creamery Ass'n*, 115 Minn. 43, 131 N. W. 856.

⁶⁹ This is true of the liability imposed upon stockholders in banks to depositors by Civ. Code 1910, § 2270. *Crawford v. Swicord*, — Ga. —, 94 S. E. 1025, rev'g 20 Ga. App. 35, 92 S. E. 394, followed in *Alexander v. Dever*, — Ga. App. —, 95 S. E. 756.

⁷⁰ See § 4183, *infra*.

A person who knowingly or voluntarily permits his name to stand on the corporate books as a stockholder is estopped as against creditors to deny that he is one.⁷¹ But a person is not liable to creditors as a stockholder merely because his name appears as a stockholder on the corporate books, unless it was placed there with his knowledge and consent, or unless he has acquiesced therein after acquiring knowledge of the facts.⁷²

A person may defeat an action to hold him liable as a stockholder, even though he may have subscribed for stock, provided he is not estopped,⁷³ by showing that his subscription was never accepted by the corporation, so that he never became a stockholder;⁷⁴ by showing that the subscription was revoked or withdrawn by him before acceptance, if he had a right to do so;⁷⁵ or that it was upon a condition precedent, which has not been performed or waived;⁷⁶ or that it was for stock in excess of the amount of authorized capital stock, or for part of an unauthorized increase of capital stock;⁷⁷ or that he never made a required payment on his subscription, where such payment is necessary to make a subscriber a stockholder;⁷⁸ or that he was induced to purchase or subscribe for the stock by fraud, provided the contract whereby he acquired it has been seasonably rescinded by him, but not otherwise.⁷⁹

If an issue of stock is absolutely void by reason of an express statutory or constitutional provision, or otherwise, the holders thereof do not become stockholders, and cannot be held liable as such for corporate debts, unless it is shown that the creditors seeking to hold them liable have been especially misled. It has been so held, for

⁷¹ See § 4184, *infra*.

⁷² See § 4184, *infra*.

⁷³ See § 4209, *infra*.

⁷⁴ See § 521 et seq., *supra*.

⁷⁵ See § 563 et seq., *supra*.

⁷⁶ See § 573 et seq., and § 693 et seq., *supra*.

⁷⁷ See § 3467, *supra*.

⁷⁸ See § 710, *supra*.

Subscribers who have never paid the ten per cent of their subscriptions necessary to make them stockholders need not be joined in a suit to enforce the stockholders' liability, to which all of the stockholders are necessary parties. *Ford v. Chase*, 118 N. Y. App. Div. 605, 103 N. Y. Supp. 30, *aff'd* 189 N. Y. 504, 81 N. E. 1164.

⁷⁹ See § 636, *supra*. And see *Farmers' State Bank of Mobridge v. Empey*, 35 S. D. 107, 150 N. W. 936.

In *Ryan v. Mt. Vernon Nat. Bank*, 224 Fed. 429, it was held that a stockholder in a national bank could not, after it failed, escape liability on the ground that he was induced to purchase his stock by fraud.

One who purchases from a national bank shares of its stock which have been previously subscribed and paid for in full may rescind the contract and have a cancellation of the note given for the price for fraud, where he has satisfied his statutory liability by paying an assessment on the stock and disclaims any intention to sue for

example, of stock issued by a corporation as collateral security,⁸⁰ and of increased stock issued by a corporation having no authority to increase its capital stock.⁸¹

Mere irregularities in subscribing for stock cannot be set up to escape liability, where the irregularities have been waived by the corporation, and the subscriber recognized as a stockholder.⁸² Nor can subscribers for stock escape liability by showing that they subscribed merely as agents or trustees for the corporation itself.⁸³

A stockholder whose shares have been validly and in good faith forfeited or sold by the corporation for nonpayment of assessments is no longer a stockholder, and is not liable for debts afterwards contracted, nor for debts previously contracted, where stockholders are only liable while they remain stockholders.⁸⁴ And stockholders of a national bank who do not consent to a renewal of its charter extending the term of its existence, and who take all the steps prescribed by the statute to withdraw from the association, cease to be stockholders and are not liable for assessments subsequently levied by the comptroller of the currency as a means of enforcing the statutory liability of the stockholders, although, through no fault of their own, the proceedings looking to their withdrawal are not completed, and their names still appear on the books of the bank as stockholders.⁸⁵

the recovery of the amount so paid. *Salter v. Williams*, 244 Fed. 126, rev'g 219 Fed. 1017.

⁸⁰ *Sturtevant v. National Foundry & Pipe Works*, 88 Fed. 613; *Andrews v. National Foundry & Pipe Works*, 76 Fed. 166.

Even though a corporation has no right to issue its stock as a pledge for the repayment of a loan, the pledgee does not for that reason become a stockholder, but the issue is a nullity. *Hanson v. Sherman*, 25 Cal. App. 169, 143 Pac. 73.

As to the right of a corporation to issue stock as collateral security, see § 3516, *supra*.

⁸¹ See § 3467, *supra*.

⁸² *Holyoke Bank v. Goodman Paper Mfg. Co.*, 9 Cush. (Mass.) 576.

As to the estoppel of subscribers to deny the validity of their subscriptions, see § 716 et seq., *supra*.

As to the estoppel of the corporation to deny the validity of subscriptions, see § 720, *supra*.

⁸³ *Allibone v. Hager*, 46 Pa. St. 48. And see § 554, *supra*, and § 4203, *infra*.

⁸⁴ *Lexington & O. R. Co. v. Bridges*, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528; *Macaulay v. Robinson*, 18 La. Ann. 619; *Mills v. Stewart*, 62 Barb. (N. Y.) 444, 41 N. Y. 384.

Compare *Dixon v. Firemen's Ins. Co.*, 11 Rob. (La.) 252.

Persons whose stock has been forfeited are not necessary parties to a suit to enforce stockholders' liability although all the stockholders are required to be joined. *Ford v. Chase*, 118 N. Y. App. Div. 605, 103 N. Y. Supp. 30, aff'd. 189 N. Y. 504, 81 N. E. 1164.

See also § 665, *supra*.

⁸⁵ They are not liable where they

The liability of a majority stockholder for acts of a corporation is not different in kind from that of any other stockholder.⁸⁶ And the liability extends to a person who owns all the stock of a corporation.⁸⁷

Where stock is held by two persons as tenants in common, neither can be held for more than half of the stockholder's liability.⁸⁸

§ 4183. — Stockholders, corporators, subscribers. The term "stockholder" as used in constitutional and statutory provisions imposing liability is generally used in the sense of an owner of shares of stock.⁸⁹ And any person sui juris who voluntarily accepts ownership of stock is a stockholder and liable as such.⁹⁰

The term "corporators" in such a statute has been construed to include all stockholders,⁹¹ although there is authority to the effect that it is not synonymous with stockholders.⁹²

Provisions making each stockholder liable to the amount of his unpaid subscription, "and for an additional amount equal to his subscription,"⁹³ or making stockholders liable "to the extent of the

give the required notice of withdrawal, and appoint their appraiser, and the bank appoints an appraiser, and they endeavor to bring about an appraisal, for the purpose of ascertaining the value of their stock, but no appraisal is had, and their names remain on the books of the bank as stockholders. *Apsey v. Kimball*, 221 U. S. 514, 55 L. Ed. 834, aff'g 164 Fed. 830, and 199 Mass. 65, 85 N. E. 91.

⁸⁶ *Liebhardt v. Wilson* (Colo.), 88 Pac. 173.

⁸⁷ *Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co.*, 116 Ky. 759, 76 S. W. 862.

⁸⁸ *Markell v. Ray*, 75 Minn. 138, 77 N. W. 78.

⁸⁹ The term stockholder as used in the constitutional provision is used in the sense of an owner of stock. Civ. Code, § 322, does not show an intention to restrict the term so as to exclude from liability any person who voluntarily accepts the ownership of stock and is sui juris. *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915 B 825, 136 Pac. 284.

⁹⁰ *Western Pac. R. Co. v. Godfrey*,

166 Cal. 346, Ann. Cas. 1915 B 825, 136 Pac. 284.

⁹¹ *Gulliver v. Roelle*, 100 Ill. 141; *Shufeldt v. Carver*, 8 Ill. App. 545.

⁹² It was so held in *Chase v. Lord*, 77 N. Y. 1, in construing a statute providing that the trustees and "corporators" should be liable for corporate debts until the whole capital stock should be paid in and a certificate filed.

⁹³ In *Reid v. De Jarnette*, 123 Ga. 787, 3 Ann. Cas. 1117, 51 S. E. 770, it was held that a provision in a special charter of a bank making each stockholder liable imposed liability only upon stockholders who became such by subscribing to the capital stock, and not upon shareholders who by way of succession from the original stockholders became owners of stock. This holding was followed in *Reid v. Beck*, 127 Ga. 117, 56 S. E. 130; *Reid v. Hearn & Green*, 127 Ga. 117, 56 S. E. 129; *Reid v. Jones*, 127 Ga. 114, 56 S. E. 128; *Reid v. De Jarnette*, 127 Ga. 114, 56 S. E. 115.

A petition alleging that the defendant was a stockholder when certain

par value of the shares of stock subscribed for by them,"⁹⁴ or imposing a liability for the debts of the corporation upon persons "who have subscribed for or agreed to take stock" in a corporation "and have not paid for the same,"⁹⁵ have been held to apply only to original subscribers to the stock of the corporation, and not to stockholders who purchased their stock from other stockholders or in the open market.

§ 4184. — Registered owners. A person who voluntarily permits his name to stand on the corporate books as a stockholder is estopped as against creditors to deny that he is one, whether it is sought to hold him liable for a balance due on the stock or for an additional statutory liability.⁹⁶ So a transferrer of stock remains liable as a stockholder if he continues to appear as a stockholder on the cor-

debts of the bank were contracted as well as at time of the failure of the bank may be amended so as to allege that he was an original subscriber for the stock. *Reid v. Jones*, 127 Ga. 114, 56 S. E. 128.

Since such a defect is an amendable one, it is cured by verdict, and a judgment against the stockholder will not be set aside because of it. *Reid v. Beck*, 127 Ga. 117, 56 S. E. 130; *Reid v. Hearn & Green*, 127 Ga. 117, 56 S. E. 129.

These decisions were based on the provisions of special charters granted prior to Acts 1893, p. 70 (Civ. Code 1910, § 2270). Stockholders of a bank incorporated since the passage of said act are subject to the liability thereby imposed whether original subscribers, or purchasers of stock from the corporation, or transferees from other stockholders. *Crawford v. Swicord*, — Ga. —, 94 S. E. 1025, rev'g 20 Ga. App. 35, 92 S. E. 394.

⁹⁴ *Jones v. Rankin*, 19 N. M. 56, 140 Pac. 1120.

⁹⁵ *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904; *Rochelle Roofing Co. v. Burley & Stevens*, 226 Mass. 349, 115 N. E. 478; *Auld v. Caunt*, 216 Mass. 381, 103 N. E. 933, construing the Maine statute. See also *Maine Trust & Banking*

Co. v. Southern Loan & Trust Co., 92 Me. 444, 43 Atl. 24.

"A fair inference to be drawn from the language of the statute is that of a transaction or contract with the corporation in accepting, subscribing for or agreeing to take stock, and not one between individuals in the purchase of stock in the open market. Had the legislature intended to make the remedy as broad as that contended for by the plaintiff, and thus render the defendant liable as a 'stockholder' upon all stock held or owned by him, regardless of the manner in which he may have obtained it, it would have been an easy matter to have so expressed its meaning." *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904, quoted in *Auld v. Caunt*, 216 Mass. 381, 103 N. E. 933.

⁹⁶ *United States. Rankin v. Fidelity Insurance, Trust & Safe Deposit Co.*, 189 U. S. 242, 47 L. Ed. 792, aff'g 103 Fed. 475; *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, aff'g 97 Fed. 983 (mem. dec.), 89 Fed. 11; *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, aff'g 97 Fed. 865, 89 Fed. 1023 (mem. dec.); *Pauly v. State Loan & Trust Co.*, 165 U. S. 606, 41 L. Ed. 844, aff'g 58 Fed. 666, 56 Fed. 430; *Williams v. Vreeland*, 244 Fed. 346; *Kenyon v.*

porate books.⁹⁷ Nor, as a rule, can a person who appears on the books as the absolute owner of stock escape liability on the ground that he holds it merely as a pledgee,⁹⁸ or merely as trustee or agent for another.⁹⁹

To render this rule applicable, however, the person sought to be charged as a stockholder must have authorized the entry or have ratified it after acquiring knowledge that it had been made.¹ As we have seen, a person cannot be made a member of a private corporation without his consent, express or implied.² And it follows that a person cannot be held liable to creditors as a stockholder merely because stock has been placed in his name on the corporate books by a

Fowler, 155 Fed. 107, aff'd 215 U. S. 593, 54 L. Ed. 341 (mem. dec.); In re Noyes Bros., 136 Fed 977; American Alkali Co. v. Kurtz, 134 Fed. 663, aff'd 138 Fed. 392.

California. Welch v. Gillelen, 147 Cal. 571, 82 Pac. 248; Hurlburt v. Arthur, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734; Wolf v. St. Louis Independent Water Co., 15 Cal. 319.

Kansas. Pine v. Western Nat. Bank, 63 Kan. 462, 65 Pac. 690; Plumb v. Bank of Enterprise, 48 Kan. 484, 29 Pac. 699.

Michigan. May v. Genesee County Sav. Bank, 120 Mich. 330, 79 N. W. 630.

Minnesota. Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

New York. Glenn v. Garth, 133 N. Y. 18, 31 N. E. 344, 30 N. E. 649.

South Carolina. Man v. Boykin, 79 S. C. 1, 128 Am. St. Rep. 870, 60 S. E. 17.

South Dakota. Farmers' State Bank of Mobridge v. Empey, 35 S. D. 107, 150 N. W. 936.

"If * * * a person voluntarily assumes the relation of stockholder, and voluntarily procures or permits his name to be recorded as such on the corporate records, he fixes his own status and is liable for the consequences. This is sometimes placed on the ground of estoppel, or of a holding out, somewhat as one who holds himself out as partner is held as such.

And there may well be an estoppel as to those who become creditors while the alleged stockholder is recorded as such with his own consent, for creditors are presumed to extend credit on the faith of the showing made upon the corporate books. But liability as a stockholder does not depend upon estoppel alone, for the liability extends to past as well as to future debts. It is proper to say of a person who voluntarily assumes the relation of stockholder that he is subject to liability because the constitution has fixed the liability of all stockholders and he is liable as long as he holds his stock and is a stockholder in fact, even though he may have a remedy for fraud by which he was induced to acquire his stock." Bartlett v. Stephens, 137 Minn. 213, 163 N. W. 288.

⁹⁷ See § 4205, *infra*.

⁹⁸ See § 4193, *infra*.

⁹⁹ See §§ 4191, 4192, *infra*.

¹ Williams v. Vreeland, 244 Fed. 346; Foote v. Anderson, 123 Fed. 659.

To make one liable to creditors by reason of the mere fact that his name appears on the corporate books as a member, although without his knowledge or assent, would be to subject him to liability, not by reason of entry into contract, but by reason of the working of a rule of evidence. Foote v. Anderson, 123 Fed. 659.

² See § 3952, *supra*.

transfer or otherwise,³ or because stock has been registered in his

3 United States. Keyser v. Hitz, 133 U. S. 138, 33 L. Ed. 531; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Williams v. Vreeland, 244 Fed. 346; Grier v. Union Nat. Life Ins. Co., 217 Fed. 287; Tibbits v. Converse, 175 Fed. 560 (where the question whether the defendant had knowledge of the transfer was held to be for the jury); Foote v. Anderson, 123 Fed. 659; Hecht, Liebmann & Co. v. Phenix Woolen Co., 121 Fed. 188; Williams v. American Nat. Bank of Arkansas City, Kansas, 85 Fed. 376; Stephens v. Follett, 43 Fed. 842; Brown v. Finn, 34 Fed. 124.

Arkansas. Bank of Midland v. Harris, 114 Ark. 344, Ann. Cas. 1916 B 1255, 170 S. W. 67.

California. Shattuck & Desmond Warehouse Co. v. Gillelen, 154 Cal. 778, 99 Pac. 348; Welch v. Gillelen, 147 Cal. 571, 82 Pac. 248; Vermont Marble Co. v. Deelee Granite Co., 135 Cal. 579, 56 L. R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057; O'Connor v. Witherby, 111 Cal. 523, 44 Pac. 227; Mudgett v. Hall, 33 Cal. 25.

Georgia. Robinson v. Lane, 19 Ga. 337.

Maine. Fowler v. Ludwig, 34 Me. 455.

Maryland. Rider v. Morrison, 54 Md. 429.

Michigan. May v. Genesee County Sav. Bank, 120 Mich. 330, 79 N. W. 630.

Missouri. Simmons v. Hill, 96 Mo. 679, 2 L. R. A. 476, 10 S. W. 61.

New York. Glenn v. Garth, 133 N. Y. 18, 31 N. E. 344, 30 N. E. 649; Richards v. Robin, 178 App. Div. 535, 165 N. Y. Supp. 780; Richards v. Ackerman, 175 App. Div. 746, 162 N. Y. Supp. 657.

Virginia. Chapman v. Virginia Real Estate Inv. Co., 96 Va. 177, 31 S. E. 74.

Where two banks are merged, and

stock in the new bank is registered in the name of one of the stockholders of the old bank, who does not know of the merger, he is not liable. Richards v. Robin, 178 N. Y. App. Div. 535, 165 N. Y. Supp. 780.

"He cannot be made a stockholder and liable to creditors of a corporation without his consent, simply because an officer of the corporation has, without authority, or in direct violation of his instructions, entered his name upon the books of the corporation as a stockholder and caused stock to be issued in his name as such. Nor does the entry of his name in the books as a stockholder preclude him from showing that in fact he was not a stockholder, and that the issuance of stock in his name was unauthorized." Shattuck & Desmond Warehouse Co. v. Gillelen, 154 Cal. 778, 99 Pac. 348; Welch v. Gillelen, 147 Cal. 571, 82 Pac. 248.

Persons whose names have been entered on the books of the corporation as stockholders must have expressly or impliedly consented to the entry in order to be bound by it. Grier v. Union Nat. Life Ins. Co., 217 Fed. 287.

One who agrees to purchase a certain number of shares, or a proportionate part in case of oversubscription, from a syndicate to which they are to be issued, but who refuses, before issuance, to take them, and refuses to accept certificates, cannot be made a shareholder by a transfer to him on the books of the corporation. Greene v. Sigua Iron Co., 76 Fed. 947.

Proof that the defendant was a shareholder of record, and did nothing to remove his name as such, makes out a prima facie case of liability, and puts the burden on him to show that the act of making him a shareholder was in the first instance unauthorized, that it was without his knowledge or consent, and that he has not since ac-

name as absolute owner instead of as pledgee,⁴ or because a certificate of stock has been issued to him,⁵ where this has been done without his knowledge or consent. But he may be held liable even under such circumstances if, after acquiring knowledge of the facts, he ratifies or acquiesces in the transaction, by acting as a stockholder or otherwise,⁶ or if he is guilty of laches in having the error in the entry cor-

quiesced in or ratified it. *Williams v. Vreeland*, 244 Fed. 346.

⁴*Shattuck & Desmond Warehouse Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348; *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248; *May v. Genesee County Sav. Bank*, 120 Mich. 330, 79 N. W. 630.

He is not liable where the entry is made on the books contrary to his instructions although the transfer to him indorsed on the back of the stock certificates was an absolute one. *Shattuck & Desmond Warehouse Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348.

Where the pledgee of bank stock requests the cashier of the bank to transfer it to him as pledgee, he is not liable though the cashier enters the transfer on the books as an absolute one. *May v. Genesee County Sav. Bank*, 120 Mich. 330, 79 N. W. 630.

The entry is presumptive merely, and not conclusive, and the person sought to be charged as a stockholder may show that it was made without his knowledge or consent. *Shattuck & Desmond Warehouse Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348; *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248.

⁵*Hecht, Liebmann & Co. v. Phenix Woolen Co.*, 121 Fed. 188; *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248.

One to whom the corporation issues stock is not liable where he refuses to accept it and returns it. *Ingraham v. Commercial Lead Co.*, 177 Fed. 341.

⁶*United States. Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531; *Williams v. Vreeland*, 244 Fed. 346; *Brown v. Allebach*, 166 Fed. 488; *Kenyon v. Fowler*, 155 Fed. 107, aff'd 215

U. S. 593, 54 L. Ed. 341 (mem. dec.); *Hecht, Liebmann & Co. v. Phenix Woolen Co.*, 121 Fed. 188.

California. Shattuck & Desmond Warehouse Co. v. Gillelen, 154 Cal. 778, 99 Pac. 348; *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248.

Georgia. Robinson v. Lane, 19 Ga. 337. See also *Hardee v. Tietjen*, 140 Ga. 527, 79 S. E. 117.

New York. Richards v. Ackerman, 175 App. Div. 746, 162 N. Y. Supp. 657.

Pennsylvania. McHose & Co. v. Wheeler, 45 Pa. St. 32.

If a transferee of bank stock joins in an application to convert the bank into a national bank, or in any other way approves, ratifies or acquiesces in the transfer, or accepts any of the benefits arising from the ownership of the stock, he becomes liable as a stockholder. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531.

He will be held liable where he accepts and assigns the certificate of stock. *Abbott v. Jack*, 136 Cal. 510, 69 Pac. 257.

He will be held liable where he knows or is chargeable with knowledge that the stock has been issued to him, as where he indorses the certificates for purposes of transfer. *O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. 227.

Where a person to whom stock is transferred on the books becomes a director and vice president and assumes the active management of the business, it will be presumed that he had knowledge of the statute which required directors to be stockholders, and also that he had acquired knowl-

rected.⁷ Whether the fact a person's name appears on the books of the corporation as a stockholder is competent evidence to show that he is one is considered in another section.⁸

§ 4185. — Unregistered stockholders. If a person is the owner of stock in a corporation, he cannot escape individual liability as a stockholder by showing that the stock has never been transferred to him on the books of the corporation,⁹ or by reason of the fact that it is registered on the books in the name of another.¹⁰ "As to such

edge of the fact that the books showed that he was a stockholder, and where he thereafter accepts and retains a dividend on the stock so standing in his name he cannot escape liability as a stockholder on the ground that the stock was placed in his name without his knowledge or consent. *Brown v. Finn*, 34 Fed. 124.

Although the name of a pledgee of stock is entered on the corporate books as a stockholder and a certificate is issued to him without authority and contrary to his express instructions, he ratifies the act of the secretary by accepting and retaining the certificate. And he will be estopped as against creditors from denying that he is a stockholder by failing to use ordinary diligence to have the mistake corrected. There is no ratification, however, where he offers the certificate to the secretary for correction, and upon refusal of the latter to correct it until the arrival of the vice president, temporarily retains it, but at all times disavows and repudiates it as not being the certificate which he had requested to have issued. *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248.

Persons who know that stock has been issued to them, and who do not disavow the acts of the corporate officers in so issuing, but acquiesce therein for many years, cannot evade liability to creditors by saying that they never paid for their stock, or by questioning the regularity of its issue.

Hecht, Liebmann & Co. v. Phenix Woolen Co., 121 Fed. 188.

In *Williams v. Vreeland*, 244 Fed. 346, the acceptance and indorsement by a wife of a dividend check payable to her husband, and her indorsement of the stock certificates of stock without knowing what they were or that they were made out in her name, was held, under the circumstances, not to amount to a ratification of the husband's act in procuring a transfer of the stock to be made to her.

7 "One whose name is placed upon the corporate books as a stockholder without authority must be extended reasonable time within which to have the erroneous entry corrected." *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248. In this case it was held that a delay of four weeks was not so unreasonable under the circumstances as to constitute laches.

In *Shattuck & Desmond Warehouse Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348, the defendant was held not to have been guilty of laches.

⁸ See § 4208, *infra*.

⁹ See § 4205, *infra*.

¹⁰ *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, *aff'd* 137 Fed. 461; *Pauley v. State Loan & Trust Co.*, 165 U. S. 606, 41 L. Ed. 844, *aff'd* 58 Fed. 666, 56 Fed. 430; *Williamson v. American Bank*, 185 Fed. 66; *American Alkali Co. v. Kurtz*, 134 Fed. 663, *aff'd* 138 Fed. 392; *Dunn v. Howe*, 107 Fed. 849, *rev'd*.

owner the law looks through subterfuges and apparent ownerships and fastens the liability upon the shareholder to whom the shares really belong."¹¹ Statutes imposing liability upon stockholders sometimes expressly provide that the term "stockholder" as used therein "shall apply not only to such persons as appear by the books of the corporation to be stockholders, but also to every owner of stock, legal or equitable, although the same may be on such books in the name of another person."¹²

Generally creditors may hold either the real or the apparent owner liable.¹³ Although, of course, they are entitled to but one

96 Fed. 160; *Wilson v. Merchants' Loan & Trust Co.*, 98 Fed. 688, judgment aff'd 183 U. S. 121, 46 L. Ed. 113; *Houghton v. Hubbell*, 91 Fed. 453; *Yardley v. Wilgus*, 56 Fed. 965; *Case v. Small*, 10 Fed. 722; *Davis v. Stevens*, 17 Blatchf. 259, Fed. Cas. No. 3,653. See *Toll v. Cobbe*, 22 Colo. App. 244, 124 Pac. 357; *Hamilton v. Eisendrath*, 185 Ill. App. 502; *May v. McQuillan*, 129 Mich. 392, 89 N. W. 45; *Fish v. Chase*, 114 Minn. 460, 131 N. W. 631; *Hunt v. Reardon*, 93 Minn. 375, 101 N. W. 606.

Where an exchange of stock for land had not been consummated, and the title to the stock had not passed, at the time of the suspension of the bank, it was held that the vendor remained liable although the stock had previously been transferred on the books, and though the exchange was afterwards completed in ignorance of the bank's failure. *May v. McQuillan*, 129 Mich. 392, 89 N. W. 45.

A receiver may sue at law to enforce the liability of the real owner of stock which stands, by his procurement, in the name of a dummy owner, and is not obliged to sue in equity. *Hamilton v. Eisendrath*, 185 Ill. App. 502.

¹¹ *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423.

¹² New York Laws 1909, c. 10, § 2 (Consol. Laws 1909, c. 2); *Richards v. Robin*, 178 N. Y. App. Div. 535, 165 N. Y. Supp. 780; *Richards v. Acker-*

man, 175 N. Y. App. Div. 746, 162 N. Y. Supp. 657; *Van Tuyl v. Robin*, 160 N. Y. App. Div. 41, 145 N. Y. Supp. 121, rev'g 80 N. Y. Misc. 360, 142 N. Y. Supp. 535, judgment aff'd 211 N. Y. 540, 105 N. E. 1101; *Wheeler v. Werner*, 140 N. Y. App. Div. 695, 125 N. Y. Supp. 637, aff'g 121 N. Y. Supp. 681; *Richards v. Schwab*, 101 N. Y. Misc. 128, 167 N. Y. Supp. 535.

The California statute provides that the term stockholder "applies not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another." Civ. Code, § 322; *Duke v. Huntington*, 130 Cal. 272, 62 Pac. 510; *Hughes Manufacturing & Lumber Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871.

The Ohio statute provides that "the term 'stockholder' * * * shall apply not only to persons who appear on the books of the corporation to be such, but also to an equitable owner of stock, although on the books it appears in the name of another." *Lloyd v. Preston*, 146 U. S. 630, 36 L. Ed. 1111; *Irvine v. Blackburn*, 198 Fed. 360, aff'd 205 Fed. 217.

¹³ *Dunn v. Howe*, 107 Fed. 849, rev'g 96 Fed. 160; *Houghton v. Hubbell*, 91 Fed. 453; *Robinson Pettit Co. v. Sapp*, 160 Ky. 445, 169 S. W. 869.

"Two persons may be liable for the same stock, the record holder under

satisfaction of the liability.¹⁴ It has been held that both may be proceeded against in separate actions at the same time,¹⁵ or may be joined as defendants in a single action,¹⁶ and that, in the latter case, the plaintiff may proceed to judgment against the record holder only.¹⁷ And it has also been held that an agreement not to further prosecute the beneficial owner in consideration of the payment by him of a certain sum in full discharge of his liability 'will not release the record owner.'¹⁸ On the other hand, it has been held that if creditors proceed against the real owner, and recover a judgment, they cannot, upon failing to collect the judgment from him, change their position and proceed against the apparent owner.¹⁹

The effect of unregistered transfers of stock,²⁰ and the liability of pledgees²¹ will be considered in subsequent sections.

§ 4186. — Holders of preferred stock. Holders of preferred stock in a corporation, when they are stockholders and not merely creditors,²² are within a statutory or constitutional provision imposing individual liability upon stockholders for corporate debts, and they cannot be exempted from such liability by any agreement with the corporation, unless by virtue of some valid statutory provision.²³

A statute which exempts preferred stockholders from liability for corporate debts does not relieve them from liability to the corporation or its receiver for unpaid subscriptions,²⁴ nor from a statutory

the statute, and the real owner under the statute and upon common-law principles,—in the one case upon statutory grounds, while not an actual stockholder, because he allows himself to be held out to the world as such; and in the other case on statutory grounds, because he is the actual stockholder." *Dunn v. Howe*, 127 Fed. 849, rev'g 96 Fed. 160.

¹⁴ *Blackburn v. Irvine*, 205 Fed. 217, aff'g 198 Fed. 360; *Dunn v. Howe*, 107 Fed. 849, rev'g 96 Fed. 160.

¹⁵ *Blackburn v. Irvine*, 205 Fed. 217, aff'g 198 Fed. 360.

¹⁶ *Richards v. Robin*, 178 N. Y. App. Div. 535, 165 N. Y. Supp. 780; *Wheeler v. Werner*, 140 N. Y. App. Div. 695, 125 N. Y. Supp. 637, aff'g 121 N. Y. Supp. 681.

¹⁷ *Richards v. Robin*, 178 N. Y. App.

Div. 535, 165 N. Y. Supp. 780; *Wheeler v. Werner*, 140 N. Y. App. Div. 695, 125 N. Y. Supp. 637, aff'g 121 N. Y. Supp. 681.

¹⁸ *Wheeler v. Werner*, 140 N. Y. App. Div. 695, 125 N. Y. Supp. 637, aff'g 121 N. Y. Supp. 681.

¹⁹ *Yardley v. Wilgus*, 56 Fed. 965.

²⁰ See § 4205, *infra*.

²¹ See § 4193, *infra*.

²² See § 3628, *supra*.

²³ *Railroad Co. v. Smith*, 48 Ohio St. 219, 31 N. E. 743. And see *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. —, 101 Atl. 879; *Burt v. Rattle*, 21 Ohio St. 116.

²⁴ *Kirkpatrick v. American Alkali Co.*, 140 Fed. 186; *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. —, 101 Atl. 879.

liability to creditors to the extent of the amount of any corporate capital withdrawn and refunded to them.²⁵

§ 4187. — Infants. Since a contract or purchase of property by an infant is voidable at his option, an infant who has subscribed for or purchased stock in a corporation cannot be held liable to creditors of the corporation as a stockholder unless he has expressly or impliedly affirmed the contract of subscription or purchase after attaining his majority; but he impliedly affirms the same, and becomes liable, if he acts as a stockholder or continues to hold the stock after attaining his majority.²⁶

An infant heir or devisee may be held liable to the extent of the property received by him from the decedent.²⁷

One who purchases or subscribes for stock in the name of an infant becomes himself liable as a stockholder to creditors of the corporation,²⁸ and his liability is not affected by the fact that, after the insolvency of the corporation and an assessment against him, but before an action is commenced by the receiver to collect the assessment, the infant becomes of age, and affirms the subscription or purchase.²⁹

§ 4188. — Married women; community property. A married woman may take and hold stock in a corporation, even when her common-law disability to contract has not been removed by statute, and, if she does so, she is subject to a statutory or constitutional provision imposing upon stockholders individual liability for corporate debts, as the statute or constitution imposes the liability.³⁰

²⁵ American Steel & Wire Co. v. Eddy, 130 Mich. 266, 89 N. W. 952.

²³ Aldrich v. Bingham, 131 Fed. 363; Clark v. Ogilvie, 111 Ky. 181, 63 S. W. 429.

As to the right of an infant to subscribe for stock and his liability on his subscription generally, see § 546, *supra*.

As to the liability of an infant to creditors for a balance due on his subscription, see § 4108, *supra*.

As to the effect of a transfer of stock to an infant on the liability of the transferrer, see § 4203, *infra*.

²⁷ Markell v. Ray, 75 Minn. 138, 77 N. W. 788.

²⁸ Foster v. Chase, 75 Fed. 797; Roman v. Fry, 5 J. J. Marsh (Ky.) 634;

Castleman v. Holmes, 4 J. J. Marsh (Ky.) 1; Kerr v. Urie, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493, 37 Atl. 789; Weston's Case, 5 Ch. App. 614; Richardson's Case, L. R. 19 Eq. 588.

In California it is expressly provided by the statute imposing liability upon stockholders that the term stockholder as therein used shall apply "to every person who has advanced the installments or purchase-money of stock in the name of a minor, so long as the latter remains a minor." Civ. Code, § 322; Robinson v. Rispin, 33 Cal. App. 536, 165 Pac. 979.

²⁹ Foster v. Wilson, 75 Fed. 797.

³⁰ Simmons v. Dent, 16 Mo. App.

The statutes of the various states govern in determining the right of a married woman to own stock in a national bank,³¹ but if the laws of the state where the bank is domiciled do not incapacitate her from becoming the owner of the stock, then her liability as a stockholder is governed by the National Banking Law, and she will be held to be liable, since that law makes no exception in favor of married women.³² And since the liability of stockholders under that law, while in a sense contractual, does not arise wholly out of contract,

288; *In re Reciprocity Bank*, 22 N. Y. 9; *Smathers v. Western Carolina Bank*, 155 N. C. 283, Ann. Cas. 1912 C 398, 71 S. E. 345; *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497. See also *National Commercial Bank v. McDonnell*, 92 Ala. 387, 9 So. 149.

"The liability of stockholders is statutory, and attaches by virtue of the statute to the owners of the stock. There is no exemption as to married women. A married woman incurs liability by virtue of the statute as owner of the stock, and not by contract. * * * Married women, consequently, are liable out of their individual estate just as they are for debts contracted for necessities or for the support of the family, or to obtain money to pay ante-nuptial debts, as to which execution would be issued against and collected out of her individual property as if she were a feme sole." *Smathers v. Western Carolina Bank*, 155 N. C. 283, Ann. Cas. 1912 C 398, 71 S. E. 345.

A married woman would also be liable even if the liability were contractual, where the disability of married women to contract is imposed by statute and not by the constitution, since the latter statute would not apply to a case where the statute imposes liability on all owners of stock without exempting married women. *Smathers v. Western Carolina Bank*, 155 N. C. 283, Ann. Cas. 1912 C 398, 71 S. E. 345.

As to the right of a married woman

to subscribe for stock and her liability on her subscription, see §§ 547 and 4108, *supra*.

³¹ *Christopher v. Norwell*, 201 U. S. 216, 50 L. Ed. 732, 5 Ann. Cas. 740, *aff'g* 134 Fed. 842; *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531; *Bundy v. Cocke*, 128 U. S. 185, 32 L. Ed. 397; *Robinson v. Turrentine*, 59 Fed. 554; *In re First Nat. Bank of St. Albans*, 49 Fed. 120; *Witters v. Sowles*, 32 Fed. 767; *Id.* 35 Fed. 640, 1 L. R. A. 64; *Hobart v. Johnson*, 8 Fed. 493; *Kerr v. Urie*, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493, 37 Atl. 789. See also *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531; *Keyser v. Milton*, 228 Fed. 594, *certiorari denied* 241 U. S. 661, 60 L. Ed. 1226 (mem. dec.).

Where a transfer of stock to a married woman in Maryland gives her title to it under the laws of that state, she is liable regardless of whether or not married women are capable of contracting under the laws of the state of the corporation's domicile. *Kerr v. Urie*, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493, 37 Atl. 789.

³² *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, 5 Ann. Cas. 740, *aff'g* 134 Fed. 842; *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531; *Bundy v. Cocke*, 128 U. S. 185, 32 L. Ed. 397; *Keyser v. Milton*, 228 Fed. 594, *certiorari denied* 241 U. S. 661, 60 L. Ed. 1226 (mem. dec.); *Robinson v. Turrentine*, 59 Fed. 554; *In re First Nat. Bank of St. Albans*, 49 Fed. 120; *Witters v. Sowles*, 32 Fed. 767; *Id.* 35

but is rather a liability imposed by the statute,³³ it may be enforced against a married woman even in a state where her common-law disability to contract has not been removed by the statute, provided she has acquired a valid title to the stock under its laws.³⁴ She may be sued at law, at least where the assessment is for the full amount of the liability,³⁵ or in equity where her separate property cannot be reached in an action at law.³⁶ And a judgment recovered against her may be enforced by execution against her separate property in the absence of any provision in the state statutes to the contrary.³⁷

In states where the community property system prevails, if the husband subscribes for stock for the benefit of the community, the liability may be enforced against the community property.³⁸ And the presumption is that a contract of subscription made by him during marriage was made for the benefit of the community.³⁹

§ 4189. — Other corporations. Whether a corporation which has subscribed for or purchased stock in another corporation incurs a statutory liability for corporate debts depends, first, upon whether the subscription or purchase was ultra vires or not, and, second, if it was ultra vires, upon whether it cannot repudiate the subscription, and set up such a defense as against creditors of the other corporation. If a corporation has the power to take and hold stock in another corporation, and does so, it is clearly liable to creditors of the other corporation to the same extent as any other stockholder. This can admit of no question.⁴⁰

Fed. 640, 1 L. R. A. 640; *Anderson v. Line*, 14 Fed. 405; *Hobart v. Johnson*, 8 Fed. 493.

³³ See § 4176, *supra*.

³⁴ *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, 5 Ann. Cas. 740, *aff'g* 134 Fed. 842; *Keyser v. Milton*, 228 Fed. 594, *certiorari denied* 241 U. S. 661, 60 L. Ed. 1226 (mem. dec.); *Robinson v. Turrentine*, 59 Fed. 554; *In re First Nat. Bank of St. Albans*, 49 Fed. 120; *Witters v. Sowles*, 32 Fed. 767; *Id.* 35 Fed. 640, 1 L. R. A. 64. See also *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531.

³⁵ *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531; *Robinson v. Turrentine*, 59 Fed. 554; *Witters v. Sowles*, 32 Fed. 767. See also § 4225, *infra*.

³⁶ *Bundy v. Cocke*, 128 U. S. 185, 32 L. Ed. 397.

³⁷ *In re First Nat. Bank of St. Albans*, 49 Fed. 120; *Witters v. Sowles*, 32 Fed. 767.

It may be so enforced in Florida. *Keyser v. Milton*, 228 Fed. 594, *certiorari denied* 241 U. S. 661, 60 L. Ed. 1226 (mem. dec.).

³⁸ *Johns v. Clothier*, 78 Wash. 602, 139 Pac. 755; *Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536.

³⁹ *Johns v. Clothier*, 78 Wash. 602, 139 Pac. 755.

⁴⁰ *United States National Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Citizens' State Bank of Noblesville v. Hawkins*, 71 Fed. 369.

California. Kennedy v. California

In some jurisdictions, as was shown at length in a former chapter, it is held that, when a corporation enters into an ultra vires contract, and receives the benefit of the contract, it cannot set up the defense of ultra vires to escape liability thereon; or, to state the doctrine generally, that this defense "should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong."⁴¹ And in these jurisdictions, a corporation which has made an ultra vires subscription for or purchase of stock in another corporation, and has received and held the stock, cannot be allowed to set up its want of power to take and hold the stock for the purpose of escaping liability as a stockholder to creditors.⁴² In other jurisdictions, on the other hand, it is held that, when a corporation enters into a contract which is altogether beyond its powers, the contract is absolutely void, that the corporation, although it may be liable quasi ex contractu for what it may have received under such a contract, cannot be held liable on the contract itself, and that it is not estopped to set up the defense of ultra vires to escape liability on the contract by reason of the fact that the other party has executed the same on his part, and that it has received the consideration.⁴³ And in some of these jurisdictions it has been held that, when a corporation is not authorized by its charter to subscribe for or purchase stock in another corporation for any purpose, so that

Sav. Bank, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039.

Kentucky. Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co., 116 Ky. 759, 76 S. W. 862.

Ohio. Smith v. Newark, S. & S. R. Co., 4 Ohio Cir. Dec. 356, judgment aff'd 54 Ohio St. 562, 44 N. E. 240; Marriott v. Columbus, S. & H. R. Co., 16 Ohio Dec. (N. P.) 135.

England. In re Asiatic Banking Corporation, 4 Ch. App. 252.

This is true of a holding company which owns all the stock of another corporation. Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co., 116 Ky. 759, 76 S. W. 862.

As to the power of a corporation to take and hold stock in another corporation, see § 1116 et seq., and § 548, supra.

⁴¹ See Chap. 37, supra.

⁴² Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713; Holmes & Griggs Mfg. Co. v. Holmes & Westsell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831.

It is estopped where it has held the stock and received dividends thereon for a number of years, with knowledge of all its stockholders. Hunt v. Hauser Malting Co., 95 Minn. 206, 103 N. W. 1032; Hunt v. Hauser Malting Co., 90 Minn. 282, 96 N. W. 85. This is particularly true where it has also participated in the reorganization of the corporation. Hunt v. Hauser Malting Co., 90 Minn. 282, 96 N. W. 85.

⁴³ See Chap. 37, supra.

its taking and holding stock is altogether beyond its powers, and it does subscribe for or purchase stock, and receives and holds the same until the other corporation becomes insolvent, it may nevertheless set up its want of power to defeat an action against it to enforce a statutory liability to creditors.⁴⁴ Even in these jurisdictions, however, it is held that, if a corporation has the power, under some circumstances, to acquire and hold stock in another corporation, and it exceeds its powers by acquiring and holding stock for an unauthorized purpose, it cannot set up the ultra vires character of the transaction to escape liability as a stockholder to creditors.⁴⁵ But the fact that it has authority to accept stock as security for a pre-existing debt does not authorize it to accept stock in a reorganized corporation in satisfaction of a claim against the original corporation, or render it liable as a stockholder in case it does so.⁴⁶

A judgment against a corporation in the courts of its domicile holding it liable as a stockholder in another corporation is conclusive on its stockholders, and a stockholder cannot collaterally attack it on the ground that the corporation had no power to subscribe for the

⁴⁴ First Nat. Bank v. Converse, 200 U. S. 425, 50 L. Ed. 537; Robinson v. Southern Nat. Bank of New York, 180 U. S. 295, 45 L. Ed. 536, aff'g 94 Fed. 964; First Nat. Bank v. Hawkins, 174 U. S. 364, 43 L. Ed. 1007, rev'g 79 Fed. 51; California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. Ed. 198, rev'g 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039; Converse v. Gardner Governor Co., 174 Fed. 30; Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047; Golden v. Cervenka, 278 Ill. 409, 116 N. E. 273; Converse v. Emerson, Talcott & Co., 242 Ill. 619, 90 N. E. 269; White v. Commercial & Farmers' Bank, 66 S. C. 491, 97 Am. St. Rep. 803, 45 S. E. 94. See also Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 50 L. Ed. 1036.

Since an Illinois corporation cannot hold stock in another corporation, and since a foreign corporation can exercise no powers in that state which could not be lawfully exercised by a domestic corporation, a foreign corporation licensed to do business in that

state cannot be held liable as a stockholder of a domestic corporation, although its charter authorizes it to hold stock in other corporations. Golden v. Cervenka, 278 Ill. 409, 116 N. E. 273.

⁴⁵ Germania Nat. Bank of New Orleans v. Case, 99 U. S. 628, 25 L. Ed. 448; Citizens' State Bank of Noblesville v. Hawkins, 71 Fed. 369; Kennedy v. California Sav. Bank, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039, as construed in the later case of Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

The case of Kennedy v. California Sav. Bank, *supra*, was reversed by the Supreme Court of the United States, the case having involved the liability of stockholders in a national bank; but the reversal, of course, does not affect the decision as applied to stockholders in other corporations than national banks.

⁴⁶ First Nat. Bank v. Converse, 200 U. S. 425, 50 L. Ed. 537; Converse v. Gardner Governor Co., 174 Fed. 30.

stock of another corporation in a suit in a federal court in another state to enforce his statutory liability.⁴⁷

One who purchases stock of a national bank from the bank itself is not relieved from liability because the bank held it in violation of the statute providing that no national bank shall be the purchaser or holder of any of its own stock.⁴⁸

§ 4190. — Partners. When stock is owned by a partnership, the partners are clearly liable for corporate debts to the same extent as any other stockholders.⁴⁹ When stock is owned by a partnership, and a statute making stockholders liable for corporate debts allows execution upon a judgment against the corporation to be levied upon the individual property of the stockholders, execution may be levied upon the individual property of a member of the partnership.⁵⁰

Members of a firm who subscribe for stock in its name are personally liable where the firm is not bound.⁵¹ And the same is true of a partner who subscribes for stock in his own name, although for the benefit of himself and his copartner. He is not a trustee as to the interest of his copartner, within the meaning of a statute providing that one who holds stock as trustee shall not be individually liable as a stockholder for the debts of the corporation.⁵²

§ 4191. — Real and apparent owner; trustees, agents, executors, etc.—General rules. The general rule is that the person who appears on the books of the corporation is liable as a stockholder to creditors, although he may not be the real owner of the stock. Thus, as we shall hereafter see, a transferrer of stock remains liable as a stock-

⁴⁷ *Martin v. Wilson*, 120 Fed. 202.

⁴⁸ *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, aff'g 97 Fed. 865, 89 Fed. 1023 (mem. dec.), followed in *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, aff'g 97 Fed. 983 (mem. dec.), 89 Fed. 11.

⁴⁹ *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

A firm is properly treated as a stockholder where the stock stands in its name. *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

As to enforcing liability against the estate of a deceased partner, where stock was owned by a partnership, see *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

As to subscriptions by partners and liability thereon, see § 555, *supra*.

⁵⁰ *Bray's Adm'r v. Seligman's Adm'r*, 75 Mo. 31.

⁵¹ Where a certificate of incorporation named "W. R.'s Sons" as the holder of stock, and was signed by two of the three sons of W. R. who constituted the firm of W. R.'s Sons, it was held that those who signed were the holders of the stock and liable as such. *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

⁵² *Stover v. Flack*, 41 Barb. (N. Y.) 162, aff'd 30 N. Y. 64.

holder if he continues to appear as a stockholder on the books.⁵³ And so it is of a pledgee of stock, if he appears on the books as the absolute owner.⁵⁴ And in the absence of provision to the contrary, a person who appears on the books of a corporation as a stockholder is liable to creditors under a charter, statutory or constitutional provision imposing individual liability upon stockholders, although he may in fact hold the stock merely as trustee or agent, and may in fact have no beneficial interest therein.⁵⁵ As a rule, under such circumstances, the creditors may hold either the real or the apparent owner, although of course there can be but one satisfaction of the liability.⁵⁶

It has been held that a person is liable as a stockholder, although

⁵³ See § 4205, *infra*.

⁵⁴ See § 4193, *infra*.

⁵⁵ **United States.** Blackburn v. Irvine, 205 Fed. 217, *aff'g* 198 Fed. 360; Dunn v. Howe, 107 Fed. 849, *rev'g* 96 Fed. 160; Welles v. Larrabee, 36 Fed. 866. See also Houghton v. Hubbell, 91 Fed. 453.

California. Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; Wolf v. St. Louis Independent Water Co., 15 Cal. 319; Hughes Manufacturing & Lumber Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871.

Illinois. Golden v. Cervenka, 278 Ill. 409, 116 N. E. 273; Sherwood v. Illinois Trust & Savings Bank, 195 Ill. 112, 88 Am. St. Rep. 183, 62 N. E. 835.

Maryland. Kerr v. Urie, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493, 37 Atl. 789; McKim v. Glenn, 66 Md. 479, 8 Atl. 130.

Massachusetts. Grew v. Breed, 10 Metc. 569; Crease v. Babcock, 10 Metc. 525.

New York. United States Trust Co. v. United States Fire Ins. Co., 18 N. Y. 199; Richards v. Robin, 178 App. Div. 535, 165 N. Y. Supp. 780; Wheeler v. Werner, 140 App. Div. 695, 125 N. Y. Supp. 637, *aff'g* 121 N. Y. Supp. 681; Mann v. Currie, 2 Barb. 294; Adderly v. Storm, 6 Hill 624.

Ohio. Marriott v. Columbus, S. & H. R. Co., 16 Ohio Dec. (N. P.) 135.

Pennsylvania. Kirschler v. Wainwright, 255 Pa. 525, L. R. A. 1917 E 393, 100 Atl. 484; Converse v. Paret, 228 Pa. 156, 30 L. R. A. (N. S.) 1092, 77 Atl. 429.

This is true of a person in whose name the stock has been put for the convenience of his employer. Richards v. Robin, 178 N. Y. App. Div. 535, 165 N. Y. Supp. 780.

And of brokers in whose name stock is registered, though they hold it for the benefit of their customers. Golden v. Cervenka, 278 Ill. 409, 116 N. E. 273; Kirschler v. Wainwright, 255 Pa. 525, L. R. A. 1917 E 393, 100 Atl. 484.

And a person who appears on the books of a corporation as a stockholder, and who has acted as an officer, cannot escape liability by showing that the stock was transferred to him merely for the purpose of qualifying him to become an officer, and that he holds it in trust for another. Wolf v. St. Louis Independent Water Co., 15 Cal. 319.

The liability in such cases is based, not upon ownership, but upon estoppel to deny ownership. Hughes Manufacturing & Lumber Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871.

As to subscriptions by agents and trustees and the liability thereon, see §§ 553, 554, *supra*.

⁵⁶ See § 4185, *supra*.

it appears on the books that he holds the stock as trustee,⁵⁷ but there is also authority to the contrary.⁵⁸

An agent for the owner of the stock who procures it to be transferred on the books of the corporation to a third person cannot be held liable as a stockholder where he never subscribed or agreed to pay for the stock and it was never registered in his name.⁵⁹

A person holding in trust an estate consisting in part of corporate stock, when not personally liable, is bound to contribute from the trust property in his hands.⁶⁰

§ 4192. — Statutory provisions. In some jurisdictions it is expressly provided by statute that persons holding stock in a representative capacity, as trustee, executor, guardian, etc., shall not be personally liable as stockholders, but that the person or estate represented shall be liable.⁶¹ And the federal statute contains such a provision with respect to stockholders in national banks.⁶²

⁵⁷ *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378, 69 Atl. 771; *Grew v. Breed*, 10 Mete. (Mass.) 569.

The addition of the word "trustee" is only descriptio personæ. *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378, 69 Atl. 771.

⁵⁸ *Welles v. Larrabee*, 36 Fed. 866; *Adderly v. Storm*, 6 Hill (N. Y.) 628.

⁵⁹ *American Alkali Co. v. Kurtz*, 138 Fed. 392, aff'g 134 Fed. 663.

⁶⁰ *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497. And see *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864.

⁶¹ *California*. *Hurlburt v. Arthur*, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734; *Borland v. Nevada Bank of San Francisco*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737; *La Habra Oil Co. v. Francis*, — Cal. App. —, 169 Pac. 401; *Union Sav. Bank of San Jose v. Willard*, 4 Cal. App. 690, 88 Pac. 1098.

Colorado. *Adams v. Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642.

Illinois. *Sherwood v. Illinois Trust & Savings Bank*, 195 Ill. 112, 88 Am. St. Rep. 183, 62 N. E. 835. The pro-

vision of the general corporation law to this effect does not apply to banks. *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

Maine. *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378, 69 Atl. 771, holding that the statute did not apply to a case where the liability had become fixed before it took effect.

Michigan. *May v. Genesee County Sav. Bank*, 120 Mich. 330, 79 N. W. 630.

Minnesota. *Markell v. Ray*, 75 Minn. 138, 77 N. W. 788; *Converse v. Paret*, 228 Pa. 156, 30 L. R. A. (N. S.) 1092, 77 Atl. 429.

New York. *Stover v. Flack*, 41 Barb. 162, aff'd 30 N. Y. 64.

North Carolina. *Smathers v. Western Carolina Bank*, 155 N. C. 283, Ann. Cas. 1912 C 398, 71 S. E. 345.

An executor who has authority under the will to take stock in his name as executor is exempted from personal liability by such a provision. *Markell v. Ray*, 75 Minn. 138, 77 N. W. 788.

⁶² *United States*. *Williams v. Cobb*, 242 U. S. 307, 61 L. Ed. 325, aff'g 219

But in order to protect such persons from personal liability under such a provision it must appear on the corporate books that the holding is in such capacity.⁶³ So it has been held, that such a provision does not exempt one who subscribes for stock in his own name, although for the benefit of another;⁶⁴ that an executor is individually liable where stock stands in his own name on the corporate books without anything to indicate that he holds it as executor,⁶⁵ and that a partner subscribing for stock for the benefit of himself and his co-partner, but in his own name individually, is not a trustee, within the meaning of such a statute.⁶⁶

The exemption of trustees by the federal statute relating to national banks is not confined to trustees of express trusts under deeds, wills or

Fed. 663; *Rankin v. Miller*, 207 Fed. 602; *Fowler v. Gowing*, 165 Fed. 891, aff'g 152 Fed. 801; *Hampton v. Foster*, 127 Fed. 468; *Brown v. Ellis*, 103 Fed. 834; *Lucas v. Coe*, 86 Fed. 972; *Zimmerman v. Carpenter*, 86 Fed. 747; *Parker v. Robinson*, 71 Fed. 256; *Irons v. Manufacturers Nat. Bank*, 21 Fed. 197.

Illinois. *Mortimer v. Potter*, 213 Ill. 178, 72 N. E. 817, aff'g 114 Ill. App. 422.

Kentucky. *Clark v. Ogilvie*, 111 Ky. 181, 63 S. W. 429.

Minnesota. *Dent v. Matteson*, 70 Minn. 519, 73 N. W. 416.

Wyoming. *In re Beard's Estate*, 7 Wyo. 104, 38 L. R. A. 860, 75 Am. St. Rep. 882, 50 Pac. 226.

A guardian of a minor is not personally liable, although he holds the legal title to the stock, nor is the ward personally liable, but the liability is confined to the estate. *Clark v. Ogilvie*, 111 Ky. 181, 63 S. W. 429.

An administrator is not personally liable where the stock has never been transferred to him on the books. *In re Bingham*, 127 N. Y. 296, 27 N. E. 1055, modifying judgment 57 Hun (N. Y.) 586, 10 N. Y. Supp. 325.

An executrix may be held liable as such on stock issued in the name of the estate in lieu of stock belonging to the testator, which was surren-

dered to the bank on a reduction of its capital stock. *Brown v. Ellis*, 103 Fed. 834.

A transfer to a trustee of stock in which he has no right to invest the trust funds is merely voidable, and may be accepted or rejected by the cestui que trust. If rejected, it would seem that the trustee would hold the stock in his personal right and would be personally liable thereon. *Williams v. Cobb*, 219 Fed. 663, judgment aff'd 242 U. S. 308, 61 L. Ed. 325.

California. See *Hurlburt v. Arthur*, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734.

Colorado. See *Adams v. Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642.

Illinois. *Sherwood v. Illinois Trust & Savings Bank*, 195 Ill. 112, 88 Am. St. Rep. 183, 62 N. E. 835.

Maryland. *Kerr v. Urie*, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493, 37 Atl. 789.

Minnesota. *Converse v. Paret*, 228 Pa. 156, 30 L. R. A. (N. S.) 1092, 77 Atl. 429.

⁶⁴ *Stover v. Flack*, 41 Barb. (N. Y.) 162, aff'd 30 N. Y. 64.

⁶⁵ *Converse v. Paret*, 228 Pa. 156, 30 L. R. A. (N. S.) 1092, 77 Atl. 429, construing the Minnesota statute.

⁶⁶ *Stover v. Flack*, 41 Barb. (N. Y.) 162, aff'd 30 N. Y. 64.

orders of court, but extends to everyone holding stock in such a bank as trustee.⁶⁷ So it applies to one who purchases stock with the proceeds of property which he had previously bought with his own money, and to which he had taken title as trustee for his children, where such stock stands in his name simply as trustee.⁶⁸ It does not relieve executors from personal liability, as for a devastavit, for distributing national bank stock, when they know that the bank is insolvent, or have notice of facts sufficient to put them on inquiry, without requiring refunding bonds or other security from the distributees.⁶⁹

The fact that the trustee is financially responsible and the cestui que trust irresponsible,⁷⁰ or that the trust estate is wiped out of existence, so far as value or financial obligation is concerned, by the failure of the bank,⁷¹ is no reason or justification for looking to the trustee personally.

This provision of the National Bank Act is purely supplementary and is intended only to relieve the classes of persons therein named from execution against their individual assets, and it does not qualify the general rule of liability under the act.⁷² Hence such persons are to be regarded as stockholders when they hold the legal title to the stock, and judgment may properly be rendered against them as such.⁷³ And the provision making the estate in the hands of such a person liable cannot be held to give a right to enforce this liability of a trust estate by an action at law against the trustee where it would not otherwise exist.⁷⁴

⁶⁷ *Fowler v. Gowing*, 165 Fed. 891, aff'g 152 Fed. 801; *Lucas v. Coe*, 86 Fed. 972.

Where a father, who held a fund in trust for the benefit of his infant son, gave it to the defendant and requested him to invest it for the son's benefit, and the defendant did so, taking title in his name "as trustee" it was held that he was not personally liable. *Lucas v. Coe*, 86 Fed. 972.

⁶⁸ *Fowler v. Gowing*, 165 Fed. 891, aff'g 152 Fed. 801.

⁶⁹ *Rankin v. Miller*, 207 Fed. 602; *Potter v. Mortimer*, 114 Ill. App. 422, judgment aff'd 213 Ill. 178, 72 N. E. 817.

⁷⁰ *Lucas v. Coe*, 86 Fed. 972.

⁷¹ *Fowler v. Gowing*, 152 Fed. 801, aff'd 165 Fed. 891.

⁷² *Hampton v. Foster*, 127 Fed. 468; *Parker v. Robinson*, 71 Fed. 256; *Irons v. Manufacturers Nat. Bank*, 21 Fed. 197.

⁷³ *Parker v. Robinson*, 71 Fed. 256. See also *Hampton v. Foster*, 127 Fed. 468.

⁷⁴ The liability of a trust estate for an assessment on shares of stock of an insolvent national bank held by the trustee cannot be determined in such an action, where the solution of the question hangs upon the power of the trustee to purchase the stock for the estate under the terms of the trust. *Hampton v. Foster*, 127 Fed. 468.

The fact that one to whom stock is issued "as trustee" for his wife voted it and was president of the cor-

§ 4193. — **Pledges.** In the absence of statutory provision to the contrary, a person who appears on the books of a corporation as a stockholder is liable as such to creditors, although the stock may have been transferred to him merely as collateral security.⁷⁵ This is true of a person who appears on the books of a national bank as a stockholder.⁷⁶ And it is true, although the debt for which the stock was pledged has been paid, if there has been no retransfer on the books of the corporation.⁷⁷ "For this rule several reasons are given. One

poration is no evidence of fraud. *Smathers v. Western Carolina Bank*, 155 N. C. 283, Ann. Cas. 1912 C 398, 71 S. E. 345.

75 United States. *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 28 L. Ed. 478; *Germania Nat. Bank of New Orleans v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Williamson v. American Bank*, 185 Fed. 66; *In re Noyes Bros.*, 136 Fed. 977.

Alabama. *National Commercial Bank v. McDonnell*, 92 Ala. 387, 9 So. 149.

California. *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776.

Colorado. *Adams v. Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642.

Connecticut. *Ball Elec. Light Co. v. Child*, 68 Conn. 522, 37 Atl. 391.

Georgia. *Chatham Bank of Savannah v. Brobston*, 99 Ga. 801, 27 S. E. 790.

Illinois. *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273; *Wheelock v. Kost*, 77 Ill. 296.

Iowa. *Tuthill Spring Co. v. Smith*, 90 Iowa 331, 57 N. W. 853; *Hale v. Walker*, 31 Iowa 344, 7 Am. Rep. 137.

Maine. *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378, 69 Atl. 771; *In re Noyes Bros.*, 136 Fed. 977.

Maryland. *Magruder v. Colston*, 44 Md. 349, 22 Am. Rep. 47.

Massachusetts. *Holyoke Bank v.*

Burnham, 11 Cush. 183; *Johnson v. Somerville Dyeing & Bleaching Co.*, 15 Gray 216; *Grew v. Breed*, 10 Mete. 569; *Crease v. Babcock*, 10 Mete. 525.

Minnesota. *Marshall Field & Co. v. Evans, Johnson, Sloane & Co.*, 106 Minn. 85, 19 L. R. A. (N. S.) 249, 118 N. W. 55; *State v. Bank of New England*, 70 Minn. 398, 68 Am. St. Rep. 538, 73 N. W. 153; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Hamilton v. Levison*, 198 Fed. 444.

Missouri. *Erskine v. Loewenstein*, 82 Mo. 301, aff'g 11 Mo. App. 595; *Bagley v. Tyler*, 43 Mo. App. 195.

New York. *Johnson v. Underhill*, 52 N. Y. 203; *United States Trust Co. v. United States Fire Ins. Co.*, 18 N. Y. 199; *Rosevelt v. Brown*, 11 N. Y. 148; *Adderly v. Storm*, 6 Hill 624.

North Dakota. See *In re Argus Printing Co.*, 1 N. D. 435, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

Pennsylvania. *Aultman's Appeal*, 98 Pa. St. 505.

Wisconsin. *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335.

76 Rankin v. Fidelity Insurance, Trust & Safe Deposit Co., 189 U. S. 242, 47 L. Ed. 792, aff'g 108 Fed. 475; *Pauly v. State Loan & Trust Co.*, 165 U. S. 606, 41 L. Ed. 844, aff'g 58 Fed. 666, 56 Fed. 430; *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 28 L. Ed. 478; *Germania Nat. Bank of New Orleans v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Magruder v. Colston*, 44 Md. 349, 22 Am. Rep. 47.

77 Bowden v. Farmers' & Mer-

is, that he [the pledgee] is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder." ⁷⁸

A person to whom a certificate of stock has been transferred as collateral security is not liable as a stockholder if the stock has not been transferred to him at all on the books of the corporation,⁷⁹ or if it

chants' Bank of Baltimore, 1 Hughes 307, Fed. Cas. No. 1,714; Johnson v. Somerville Dyeing & Bleaching Co., 15 Gray (Mass.) 216; Erskine v. Loewenstein, 82 Mo. 301, aff'g 11 Mo. App. 595.

⁷⁸ Germania Nat. Bank of New Orleans v. Case, 99 U. S. 628, 25 L. Ed. 448, quoted with approval in Pauly v. State Loan & Trust Co., 165 U. S. 606, 41 L. Ed. 844, aff'g 58 Fed. 666, 56 Fed. 430.

"One reason for this rule, perhaps the best one, is that a party so holding himself out to the public as the general owner of the stock is estopped from denying his liability to creditors who have not been advised to the contrary by the stock record of the corporation." Marshall Field & Co. v. Evans, Johnson, Sloane & Co., 106 Minn. 85, 19 L. R. A. (N. S.) 249, 118 N. W. 55.

"Where the pledgee of stock represents himself to the creditors of the corporation as stockholder, and where the creditors, relying upon that representation, have acted upon it to their hurt, he is held estopped as against them, though his true status was known to the corporation. By somewhat artificial reasoning, the books of the corporation have been deemed to be a representation of the ownership of its stock, and

if, with his consent, a person is therein described as stockholder, he is deemed to have joined in the representation. By another legal fiction, all creditors of the corporation are presumed to have become so in reliance upon the representations contained in the corporation's books. Hence any one who appears on the corporate books as stockholder has been held to be estopped, as against any and all creditors, from disputing the individual liability which by statute attaches to the stockholder. A pledgee may be bound by this estoppel as well as any other person. He is not held liable as pledgee, but his status as pledgee does not protect him from that liability which attaches to other persons not stockholders. If he has permitted himself to appear on the corporation's books as the unqualified holder of its stock, he is held individually liable in some jurisdictions where individual liability ordinarily attaches to the pledgor." In re Noyes Bros., 136 Fed. 977.

The pledgee is estopped to deny his liability. Frater v. Old Nat. Bank of Providence, Rhode Island, 101 Fed. 391, aff'g 86 Fed. 1006.

⁷⁹ Ohio Valley Nat. Bank v. Hulitt, 204 U. S. 162, 51 L. Ed. 423, aff'g 137 Fed. 461; Robinson v. Southern Nat. Bank, 180 U. S. 295, 45 L. Ed. 536,

has been transferred to him in terms, not as absolute owner, but as pledgee merely.⁸⁰ "It has never, to our knowledge," said Chief Justice Waite in the Supreme Court of the United States, "been held that a mere pledgee of stock is chargeable where he is not registered as owner."⁸¹ Nor can the pledgee of national bank stock be held liable if the stock is not registered in his name although the registered stockholder is an irresponsible person of his choice.⁸²

In some jurisdictions it is expressly provided by statute that persons holding stock merely as collateral security shall not be liable as stockholders, but that the pledgor shall be liable.⁸³ Statutes of this

aff'g 94 Fed. 964; *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 28 L. Ed. 478; *Williamson v. American Bank*, 185 Fed. 66; *Wilson v. Merchants' Loan & Trust Co. of Chicago*, 98 Fed. 688, judgment aff'd 183 U. S. 121, 46 L. Ed. 113; *Welles v. Larrabee*, 36 Fed. 866, 2 L. R. A. 471; *Henkle v. Salem Mfg. Co.*, 39 Ohio St. 547.

The mere fact that the pledgee sells the stock under the pledge and bids it in at a nominal price does not render him liable, where it is never transferred to him on the books, and he subsequently waives his rights as purchaser and continues to hold it as pledgee. *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, aff'g 94 Fed. 964.

⁸⁰ *Rankin v. Fidelity Insurance, Trust & Safe Deposit Co.*, 189 U. S. 242, 47 L. Ed. 792, aff'g 108 Fed. 475; *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, aff'g 73 Minn. 170, 75 N. W. 1041; *Pauly v. State Loan & Trust Co.*, 165 U. S. 606, 41 L. Ed. 844, aff'g 58 Fed. 666, 56 Fed. 430; *Frater v. Old Nat. Bank of Providence, Rhode Island*, 101 Fed. 391, aff'g 86 Fed. 1006; *Beal v. Essex Sav. Bank*, 67 Fed. 816; *Hurlburt v. Arthur*, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734; *Borland v. Nevada Bank of San Francisco*, 99 Cal. 89, 37 Am. St. Rep. 22, 33 Pac. 737; *Marshall Field & Co. v. Evans, Johnson, Sloane & Co.*, 106 Minn. 85, 19 L. R. A. (N. S.) 249, 118

N. W. 55. See also *Hamilton v. Levi-son*, 198 Fed. 444.

⁸¹ *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 28 L. Ed. 478, quoted with approval in *Pauly v. State Loan & Trust Co.*, 165 U. S. 606, 41 L. Ed. 844, aff'g 58 Fed. 666, 56 Fed. 430.

⁸² *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, aff'g 137 Fed. 461; *Rankin v. Fidelity Insurance, Trust & Safe Deposit Co.*, 189 U. S. 242, 47 L. Ed. 792, aff'g 108 Fed. 475; *Pauly v. State Loan & Trust Co.*, 165 U. S. 606, 41 L. Ed. 844, aff'g 58 Fed. 666, 56 Fed. 430; *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 28 L. Ed. 478; *Hayes v. Fidelity Insurance, Trust & Safe Deposit Co.*, 105 Fed. 160; *Wilson v. Merchants' Loan & Trust Co. of Chicago*, 98 Fed. 688, judgment aff'd 183 U. S. 121, 46 L. Ed. 113; *National Park Bank of New York v. Harmon*, 79 Fed. 891, aff'd 172 U. S. 644, 43 L. Ed. 1182 (mem. dec.). See also *Williamson v. American Bank*, 185 Fed. 66.

The creditors are not injured under such circumstances, since they could not hold the pledgee liable if the stock was registered in his name as pledgee. *Rankin v. Fidelity Insurance, Trust & Safe Deposit Co.*, 189 U. S. 242, 47 L. Ed. 792, aff'g 108 Fed. 475.

⁸³ *California*. *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248; *Hurlburt v. Arthur*, 140 Cal. 103, 98 Am. St. Rep.

character apply to and exempt persons holding unsubscribed stock issued by the corporation to them as collateral security.⁸⁴ And, under such a statute, a person who holds stock merely as collateral security does not become liable to creditors as a stockholder because he votes the stock at corporate meetings.⁸⁵

Under such a provision it has been held that a person who has taken a transfer of stock absolute on its face may escape liability to creditors by showing that the transfer was in fact as collateral security merely; even though it is registered in his name on the corporate books as the absolute owner.⁸⁶ But it is generally held that in order

17, 73 Pac. 734; *Borland v. Nevada Bank of San Francisco*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737; *La Habra Oil Co. v. Francis*, — Cal. App. —, 169 Pac. 401.

Colorado. *Adams v. Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642.

Illinois. The provision of the general corporation law of Illinois to this effect does not apply to stock in banks. *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

Iowa. *Tierney v. Ledden*, 143 Iowa 286, 21 Ann. Cas. 105, 121 N. W. 1050.

Maine. *In re Noyes Bros.*, 136 Fed. 977, construing the Maine statute.

Maryland. *Matthews v. Albert*, 24 Md. 527.

Massachusetts. *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563.

Michigan. *May v. Genesee County Sav. Bank*, 120 Mich. 330, 79 N. W. 630.

Missouri. *Colonial Trust Co. v. McMillan*, 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933; *Union Sav. Ass'n v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776, 15 S. W. 630; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359, construing the Missouri statute.

New York. Laws 1909, c. 10, § 2 (Consol. Laws 1909, § 2), relating to the liability of stockholders in banks, as amended by Laws 1910, c. 126. *McMahon v. Macy*, 51 N. Y. 155; *Van Tuyl v. Robin*, 160 App. Div. 41, 145

N. Y. Supp. 121, rev'g 80 Misc. 360, 142 N. Y. Supp. 535, judgment aff'd 211 N. Y. 540, 105 N. E. 1101; *Richards v. Schwab*, 101 Misc. 128, 167 N. Y. Supp. 535.

Washington. *Johnstone v. Black*, 59 Wash. 144, 109 Pac. 367.

⁸⁴*Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Tierney v. Ledden*, 143 Iowa 286, 21 Ann. Cas. 105, 121 N. W. 1050; *Union Sav. Ass'n v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776, 15 S. W. 630, overruling *Fisher v. Seligman*, 75 Mo. 13; *Griswold v. Seligman*, 72 Mo. 110.

⁸⁵*Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Union Sav. Ass'n v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776, 15 S. W. 630.

⁸⁶*Tierney v. Ledden*, 143 Iowa 286, 21 Ann. Cas. 105, 121 N. W. 1050; *Colonial Trust Co. v. McMillan*, 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933; *Johnstone v. Black*, 59 Wash. 144, 109 Pac. 367.

In *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359, which is sometimes cited as supporting this rule, the court quotes from *McMahon v. Macy*, supra, and apparently concurs in the conclusion there reached, but the books showed that the stock was "held in escrow" by the pledgees, and the court says that this clearly showed an intent that the stock was not to be regarded as their stock, but that it was held by them merely as security.

to relieve the pledgee from liability under such a provision it must appear on the corporate books that he holds the stock as collateral security, and that he is liable if he permits his name to appear on the books as its absolute owner.⁸⁷ And in some jurisdictions this is the rule by express provision of the statute.⁸⁸

The stock was unissued stock which had been pledged by the corporation to the defendant, and it appeared that the creditor seeking to charge the pledgees had actual notice of the manner in which the stock was held, and that he had derived a benefit from the transaction, and that if the stock had not been issued to the defendant it would have remained in the treasury of the corporation, and hence the plaintiff would have been no better or worse off. *Union Sav. Ass'n v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776, 15 S. W. 630, grew out of practically the same transaction as *Burgess v. Seligman*, and the entry in the books was the same.

In *Matthews v. Albert*, 24 Md. 527, where the pledgee was held not to be liable, the stock was issued directly to him by the corporation as security for a loan to it, and the fact that it was issued as collateral security was indorsed on the face of the certificate by the president of the corporation. It does not appear what, if any, entries were made on the corporate books.

In *Colonial Trust Co. v. McMillan*, 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933, which was an action at law by a judgment creditor of a corporation to subject the amount unpaid on alleged watered stock to the payment of his claim, the court held, on the authority of the *Seligman* cases and *McMahon v. Macy*, and *Matthews v. Albert*, *supra*, that if the defendant held the stock as collateral security only, the fact that the stock was placed in his name on the books of the company and that a certificate was is-

sued directly to him, was not alone sufficient to characterize him as a stockholder.

See also *Hurlburt v. Arthur*, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734, and *Adams v. Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642, where some of the foregoing cases are commented upon.

87 United States. *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419.

California. *Hurlburt v. Arthur*, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734.

Colorado. *Adams v. Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642.

Michigan. See *May v. Genesee County Sav. Bank*, 120 Mich. 330, 79 N. W. 630.

New York. *Van Tuyl v. Robin*, 160 App. Div. 41, 145 N. Y. Supp. 121, rev'g 80 Misc. 360, 142 N. Y. Supp. 535, judgment aff'd 211 N. Y. 540, 105 N. E. 1101, construing Laws 1909, c. 10, § 2 (Consol. Laws 1909, c. 2), relating to the liability of stockholders in banks; *Richards v. Schwab*, 101 Misc. 128, 167 N. Y. Supp. 535. The contrary was held to be true in *McMahon v. Macy*, 51 N. Y. 155, under § 11 of the General Railroad Act of 1850 containing substantially the same provision.

88 Shattuck & Desmond Warehouse Co. v. Gillen, 154 Cal. 778, 99 Pac. 348; *Hurlburt v. Arthur*, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734, construing Civ. Code, § 322; *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563. See also *Borland v. Nevada Bank of San Francisco*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737.

"The form of entry in the books of the corporation is deemed important, because it is treated as a statement of the facts on which individual liability depends, made publicly and authoritatively by the person whose name appears therein."⁸⁹ But in order to relieve a pledgee from liability it is not essential that any particular words be used to indicate the character of his holding in making the entry on the corporate books.⁹⁰ "Entries of this character must be liberally construed with reference to well understood business methods,"⁹¹ and are sufficient to relieve the pledgee from liability as they fairly advise creditors of the conditions and terms upon which the stock is held.⁹²

The form of the certificate is unimportant and may be disregarded,⁹³

The Maine statute provides that the pledgee shall not be liable "unless he appears on the books of the corporation as the absolute owner of the stock." *In re Noyes Bros.*, 136 Fed. 977.

⁸⁹ *In re Noyes Bros.*, 136 Fed. 977.

⁹⁰ *In re Noyes Bros.*, 136 Fed. 977.

⁹¹ *Marshall Field & Co. v. Evans, Johnson, Sloane & Co.*, 106 Minn. 85, 19 L. R. A. (N. S.) 249, 118 N. W. 55.

⁹² *In re Noyes Bros.*, 136 Fed. 977; *Marshall Field & Co. v. Evans, Johnson, Sloane & Co.*, 106 Minn. 85, 19 L. R. A. (N. S.) 249, 118 N. W. 55.

An entry "Issued for Collateral Security for note of even date for \$5,000.00," followed by a statement as to the number of the certificate, the number of shares and the name and address of the person to whom issued, was held to be sufficient. *Marshall Field & Co. v. Evans, Johnson, Sloane & Co.*, 106 Minn. 85, 19 L. R. A. (N. S.) 249, 118 N. W. 55.

Entries, "Note 5 years given. Stock as collateral due 1907," "Jan. 23, 1902, 3 years note—Due Jan. 23, 1905," and "For 3 years—collateral note given," have been held sufficient to show that the stock was held in pledge. *In re Noyes Bros.*, 136 Fed. 977.

Where stock certificates are issued to, and the stock is registered in the

name of, "W. L. Gassaway, cashier," this sufficiently indicates that he holds the stock in a representative capacity, and the bank of which he is the cashier may show that he holds the stock for it as pledgee, and that it is owned by a third person. *Williamson v. American Bank*, 185 Fed. 66.

Where the shares stood in the name of "F. A. Cranston, cashier Old National Bank, Providence, R. I.," it was held that both the bank and the cashier individually could show that the stock was held by the bank as collateral security merely. *Frater v. Old Nat. Bank of Providence, Rhode Island*, 101 Fed. 391, aff'g 86 Fed. 1006.

"Held in escrow" is sufficient where unsubscribed stock is issued by the corporation as collateral security. *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Union Sav. Ass'n v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776, 15 S. W. 630.

See also *Borland v. Nevada Bank of San Francisco*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737, where the stock was registered in the name of a third person "as trustee."

⁹³ *In re Noyes Bros.*, 136 Fed. 977; *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248; *May v. Genesee County Sav. Bank*, 120 Mich. 330, 79 N. W. 630. See also *Colonial Trust Co. v. McMil-*

since "the creditor will not be presumed to rely upon papers of which, as a whole, he cannot possibly have knowledge."⁹⁴

Of course, to render the pledgee liable on the ground that his name appears on the corporate books as the absolute owner, it must appear that the entry was made in that manner with his knowledge and consent; unless, after acquiring knowledge of the facts, he expressly or impliedly ratifies the unauthorized acts of the corporate officers in making it.⁹⁵

§ 4194. — Assignees in insolvency or bankruptcy. An assignee for the benefit of creditors is not bound to accept stock of an insolvent corporation, which has ceased to do business, though included in the property assigned, but, on the contrary, is bound to refuse to accept it, and hence he does not become a stockholder by virtue of such an assignment and is not subject to liability as such.⁹⁶ Nor are assignees in bankruptcy or insolvency of an insolvent stockholder personally liable, as stockholders, either at law or for contribution in equity, to creditors of the corporation, although they may have attended meetings of the corporation, and acted as stockholders.⁹⁷

The effect of a discharge in bankruptcy or insolvency of an insolvent stockholder on his liability, and the right to prove a claim therefor against his estate will be considered in a subsequent section.⁹⁸

§ 4195. — Estates of deceased stockholders; distributees. If the individual liability of stockholders for corporate debts is contractual in its nature, it will survive the death of a stockholder and may be enforced against his estate,⁹⁹ unless the statute creating it provides a

lan, 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933.

In *Burgess v. Seligman*, 107 U. S. 20, and *Union Sav. Ass'n v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776, 15 S. W. 630, the pledgee was held not to be liable, although the certificate was absolute on its face.

⁹⁴ *In re Noyes Bros.*, 136 Fed. 977.

"The certificate is no notice to creditors of the bank. It is the record of stockholders kept in the bank, upon which depositors and other creditors rely. A transfer absolute on its face may always be shown to be an assignment as collateral security." *May v. Genesee County Sav. Bank*, 120 Mich. 330, 79 N. W. 630.

⁹⁵ See § 4184, *supra*.

⁹⁶ *Graham v. Platt*, 28 Colo. 421, 65 Pac. 30; *Hill v. Graham*, 11 Colo. App. 536, 53 Pac. 1060.

⁹⁷ *American File Co. v. Garrett*, 110 U. S. 288, 28 L. Ed. 149; *Gray v. Coffin*, 9 Cush. (Mass.) 192.

⁹⁸ See § 4264, *infra*.

⁹⁹ *United States. Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, *aff'g* 73 Minn. 170, 75 N. W. 1041; *Bundy v. Cocke*, 128 U. S. 185, 32 L. Ed. 397; *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864; *Schwartz v. Loftus*, 216 Fed. 320; *Rankin v. Miller*, 207 Fed. 602; *Spargo v. Converse*, 191 Fed. 823, *aff'g* 184 Fed. 324; *Earle v. Rogers*, 105 Fed. 208; *Tourtelot v. Finke*,

special and exclusive remedy for its enforcement of such a character

87 Fed. 840; *Baker v. Beach*, 85 Fed. 836; *Zimmerman v. Carpenter*, 84 Fed. 747; *Witters v. Sowles*, 32 Fed. 771; *Irons v. Manufacturers Nat. Bank*, 21 Fed. 197.

California. *Lininger v. Botsford*, 32 Cal. App. 386, 163 Pac. 63; *Miller & Lux v. Katz*, 10 Cal. App. 576, 102 Pac. 946; *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62 (California statute).

Connecticut. *Davis v. Weed*, 44 Conn. 569.

Illinois. *Mortimer v. Potter*, 213 Ill. 178, 72 N. E. 817, aff'g 114 Ill. App. 422.

Kansas. *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915 B 797, Ann. Cas. 1913 A 378, 119 Pac. 74; *Mechanics' Sav. Bank v. Fidelity Insurance, Trust & Safe-Deposit Co.*, 87 Fed. 113 (under Kansas statute).

Maine. *Johnson v. Libby*, 111 Me. 204, Ann. Cas. 1916 C 681, 88 Atl. 647.

Massachusetts. *Grew v. Breed*, 10 Mete. 569.

Michigan. In re *Warren's Estate*, 52 Mich. 557, 18 N. W. 356.

Minnesota. *Neff v. Lamm*, 99 Minn. 115, 108 N. W. 849; *Willoughby v. St. Paul German Ins. Co.*, 80 Minn. 432, 83 N. W. 377; *Markell v. Ray*, 75 Minn. 138, 77 N. W. 788; *Nolan v. Hazen*, 44 Minn. 478, 47 N. W. 155.

Missouri. *Marks v. Hardy*, 86 Mo. 232; *Manville v. Edgar*, 8 Mo. App. 324.

New York. *Cochran v. Wiechers*, 119 N. Y. 399, 7 L. R. A. 553, 23 N. E. 803; *Chase v. Lord*, 77 N. Y. 1; *Bailey v. Hollister*, 26 N. Y. 112; *Mahoney v. Bernhard*, 27 Misc. 339, 58 N. Y. Supp. 748, aff'd 45 App. Div. 499, 63 N. Y. Supp. 642, 169 N. Y. 589, 62 N. E. 1097; *Diven v. Duncan*, 41 Barb. 520.

Rhode Island. *New England Commercial Bank v. Newport Steam Factory*, 6 R. I. 154, 75 Am. Dec. 688.

Vermont. *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

Wisconsin. *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875; *Gianella v. Bigelow*, 96 Wis. 185, 71 N. W. 111.

Wyoming. In re *Beard's Estate*, 7 Wyo. 104, 38 L. R. A. 860, 75 Am. St. Rep. 882, 50 Pac. 226.

The conditional liability of a deceased stockholder of a national bank attaches to his estate in the hands of his executors, and becomes a charge or lien thereon from the date when the bank suspends and is declared insolvent, if not from the time of the qualification of the executors. This charge or lien, in the absence of superior countervailing rights or equities, is to be regarded and enforced equally as the individual responsibility of living stockholders. *Rankin v. Miller*, 207 Fed. 602.

The estate in the hands of the executors or trustees of a deceased stockholder is liable to the same extent that the deceased would have been. *Zimmerman v. Carpenter*, 84 Fed. 747; *Mortimer v. Potter*, 213 Ill. 178, 72 N. E. 817, aff'g 114 Ill. App. 422.

Under the Minnesota statute making it the duty of the assignee or receiver of a corporation to institute and maintain an action or actions against stockholders who fail to pay assessments on their stock, a receiver may collect an assessment on the stock of a deceased stockholder by filing a claim against his estate in the probate court. Such a proceeding is an action within the meaning of the statute. *Neff v. Lamm*, 99 Minn. 115, 108 N. W. 849.

As to enforcing liability against the estate of a deceased partner, where stock was owned by the partnership, see *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

As to whether the liability is contractual or penal, see § 4176, supra.

As to the personal liability of the

that it cannot be availed of against the estate.¹ And this is true although the executor or administrator never had actual, physical possession of the stock,² and though it has never been registered in his name on the books of the corporation.³

If the liability is penal it does not survive, and cannot be enforced against a stockholder's estate after his death.⁴ Nor will the estate be liable as a stockholder if executors invest in the stock of a corporation without authority,⁵ nor where the stock has been transferred by the executors and the transfer duly registered. A transfer upon the corporate books of stock belonging to the estate by executors to themselves as trustees is not void, but merely voidable, even though the trustees have no authority to hold stock of the kind in question. Such a transfer passes the title, and hence, until it is set aside, neither the estate of the decedent nor those to whom it has been distributed can be held liable in respect to the stock so transferred.⁶

If the liability survives, it may be enforced against the heirs, devisees or legatees of a deceased stockholder to the extent of the property inherited by or devised to them and received by them from the estate,⁷ after the property of the estate in the hands of the executor

executor or administrator, see §§ 4191, 4192, *supra*.

As to the applicability of the statutes of nonclaim, see §§ 4241, 4242, *infra*.

¹ See § 4217, *infra*.

² *Miller & Lux v. Katz*, 10 Cal. App. 576, 102 Pac. 946.

³ *Gianella v. Bigelow*, 96 Wis. 185, 71 N. W. 111.

⁴ *Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146; *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14; *Moies v. Sprague*, 9 R. I. 541.

As to whether the liability is contractual or penal, see § 4176, *supra*.

⁵ *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273; *Diven v. Lee*, 36 N. Y. 302.

⁶ *Williams v. Cobb*, 242 U. S. 307, 61 L. Ed. 325, aff'g 219 Fed. 663.

⁷ *United States. Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, aff'g 73 Minn. 170, 75 N. W. 1041; *Bundy v. Cocke*, 128 U. S. 185, 32 L. Ed. 397; *Rankin v. Herod*, 140 Fed. 661; *Rankin v. Big Rapids*, 133 Fed. 670; *Hale*

v. Coffin, 120 Fed. 470, aff'g 114 Fed. 567. But see *Rankin v. Miller*, 207 Fed. 602.

Illinois. *Mortimer v. Potter*, 213 Ill. 178, 72 N. E. 817, aff'g 114 Ill. App. 422.

Kansas. *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915 B 797, Ann. Cas. 1913 A 378, 119 Pac. 74.

Maine. *Johnson v. Libby*, 111 Me. 204, Ann. Cas. 1916 C 681, 88 Atl. 647.

Minnesota. *Willoughby v. St. Paul German Ins. Co.*, 80 Minn. 432, 83 N. W. 377; *Markell v. Ray*, 75 Minn. 138, 77 N. W. 788; *Dent v. Matteson*, 73 Minn. 170, 75 N. W. 1041, aff'd 176 U. S. 521, 44 L. Ed. 571; *Dent v. Matteson*, 70 Minn. 519, 73 N. W. 416.

Nebraska. *Brinkworth v. Hazlett*, 64 Neb. 592, 90 N. W. 537.

New York. *Richards v. Gill*, 138 App. Div. 75, 122 N. Y. Supp. 620.

Vermont. *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

"Creditors have a prior right of satisfaction, and if the estates of such deceased stockholders have been re-

or administrator has been exhausted.⁸ But a legatee, devisee or heir cannot be held liable in respect to stock purchased by the executor or administrator unless the estate is liable.⁹ A legatee of stock, who does not renounce the legacy, but who receives and accepts the stock on distribution of the estate, is to be regarded as the owner thereof from the date of the death of his testator, and hence is liable as such for his proportion of the corporate debts contracted after the testator's death, but before distribution of the estate.¹⁰ One who holds stock as life tenant under the will of the original subscriber is liable where it has been transferred to him by the executors of the estate.¹¹

The liability of the testator as a stockholder must be established before such liability can be enforced against his estate,¹² or his heir or devisee,¹³ and this can be done only in a suit to which his personal representative is a party.¹⁴ A judgment establishing such liability in

ceived by heirs at law or legatees, the assets may be followed into whosoever hands they come." *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

The commencement of a creditor's suit to enforce the statutory liability of stockholders in an insolvent corporation is not equivalent to the allowance or establishment of a claim against the heirs or devisees of a deceased stockholder within the meaning of a statute requiring actions to charge heirs or devisees on a claim against the decedent to be commenced within "one year from the time the claim is allowed or established." *Markell v. Ray*, 75 Minn. 138, 77 N. W. 788.

The widow and heirs of a shareholder in a national bank, to whom the probate court allots the shares of stock in indivision, in proportion to their interests in the estate, but who let the stock stand in the name of the deceased without any notice of their title to it, are liable to assessment as stockholders on the insolvency of the corporation. *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, aff'g 73 Minn. 170, 75 N. W. 1041.

The proper and complete remedy of a receiver of a national bank to en-

force such a liability is in a court of equity, where, only, ample and complete justice can be done to all parties interested. *Mortimer v. Potter*, 213 Ill. 178, 72 N. E. 817, aff'g 114 Ill. App. 422.

A bill for this purpose should be filed within a reasonable time after the claim has matured, and unreasonable delay will constitute laches which will bar the suit. *Rankin v. Big Rapids*, 133 Fed. 670.

⁸ *Witters v. Sowles*, 32 Fed. 767.

⁹ *Williams v. Cobb*, 242 U. S. 307, 61 L. Ed. 325, aff'g 219 Fed. 663.

¹⁰ *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, Ann. Cas. 1915 B 825, 136 Pac. 284.

¹¹ *Alexander v. Dever*, — Ga. App. —, 95 S. E. 756.

¹² *Schwartz v. Loftus*, 216 Fed. 320.

¹³ *Richards v. Gill*, 138 N. Y. App. Div. 75, 122 N. Y. Supp. 620.

In Nebraska the claim must have been allowed or established against the estate before it can be enforced against an heir or devisee. *Brinkworth v. Hazlett*, 64 Neb. 592, 90 N. W. 537.

¹⁴ *Schwartz v. Loftus*, 216 Fed. 320. See also *Brinkworth v. Hazlett*, 64 Neb. 592, 90 N. W. 537.

a suit against the executrix of the testator as such does not bind her individually in an action subsequently brought to charge her as devisee.¹⁵

Heirs and devisees are not necessary parties to enforce the liability against the estate,¹⁶ nor are they proper parties to a suit in equity to enforce the liability of all of the stockholders, where there has been no distribution.¹⁷

The pendency of probate proceedings does not prevent the maintenance of such an action in a court of general jurisdiction.¹⁸

§ 4196. — Effect of transfers of stock—In general. There has been much difficulty in construing charter, statutory and constitutional provisions for the purpose of determining the effect of transfers of stock upon the individual liability of stockholders, and the decisions on the question are conflicting. Under provisions simply making "the stockholders" of a corporation liable for its debts, some of the courts have held that individual liability for a debt attaches to those persons, and to those persons only, who were stockholders at the time the debt was contracted,—that persons who have become stockholders since the debt was contracted are not liable, and that persons who were stockholders at the time it was contracted are not relieved from liability by the fact that they have since transferred their stock, and ceased to be stockholders.¹⁹ In an Indiana case, in which this construction was adopted, it was said: "The holder of stock in the corporation has a voice in conducting the affairs of the

¹⁵ *Richards v. Gill*, 138 N. Y. App. Div. 75, 122 N. Y. Supp. 620.

¹⁶ *Miller & Lux v. Katz*, 10 Cal. App. 576, 102 Pac. 946. See also § 4228, *infra*.

¹⁷ See § 4228, *infra*.

¹⁸ *Miller & Lux v. Katz*, 10 Cal. App. 576, 102 Pac. 946.

¹⁹ *Indiana*. *Reeder v. Maranda*, 66 Ind. 485; *Williams v. Hanna*, 40 Ind. 535.

Maryland. *Weber v. Fickey*, 47 Md. 196; *Emmert v. Smith*, 40 Md. 123; *Norris v. Wrenschall*, 34 Md. 492; *Norris v. Johnson*, 34 Md. 485. The extent of the liability is measured by the amount of stock held by the stockholders when the debts are contracted, and stockholders are not

liable for debts contracted before they became such. *Murphy v. Wheatley*, 102 Md. 501, 63 Atl. 62.

Michigan. See *Macomber v. Wright*, 108 Mich. 109, 65 N. W. 610; *Voight v. Dregge*, 97 Mich. 322, 56 N. W. 557.

New Hampshire. *Chesley v. Pierce*, 32 N. H. 388.

New York. *Phillips v. Therasson*, 11 Hun 141; *Young v. New York & L. Steamship Co.*, 10 Abb. Pr. 229; *Tracy v. Yates*, 18 Barb. 152; *Moss v. McCullough*, 7 Barb. 279; *Harger v. McCullough*, 2 Den. 119; *Moss v. Oakley*, 2 Hill 265; *Judson v. Rossie Galena Co.*, 9 Paige 598, 38 Am. Dec. 569. But see *McCullough v. Moss*, 5 Den. 567.

corporation, so far, at least, as the selection of its officers is concerned, and has the means of knowing the situation of its affairs and business, and he should not be permitted to avoid his liability for the debts of the corporation by transferring his stock to another person. On the other hand, the purchaser of stock who has previously had no connection with the corporation, has not the means of knowing very definitely the amount of debts owed by the corporation. He may know the market value of the stock, but this furnishes no very safe criterion by which to determine the amount of indebtedness. The creditor, if he looks to the individual liability of the stockholders at all, looks to those who are stockholders at the time he lends his credit, and to those he should be content to look for the collection of his debt."²⁰ And in a New York case it was said, as the reason for this construction: "A man who purchases stock, and comes into a corporation after it has been engaged in business, may often be deceived in relation to the number and magnitude of its debts. But while he is a stockholder, he can know something about the extent of obligation contracted by the company, and is not wholly without the means of exerting an influence over those who manage its concerns. And as to those who may deal with the corporation, they bestow their labor, or part with their property on the credit of those who are known to be stockholders."²¹

In some jurisdictions all those who are stockholders at the time when the action or proceeding to enforce the liability is commenced are liable, even though the debts sought to be enforced against them were contracted before they became stockholders.²² And under some statutes the liability has been held to be confined to those who are

Tennessee. See *Jackson v. Meek*, 87 Tenn. 69, 10 Am. St. Rep. 620, 9 S. W. 225.

²⁰ *Williams v. Hanna*, 40 Ind. 535.

²¹ *Moss v. Oakley*, 2 Hill (N. Y.) 265.

²² *Bartlett v. Stephens*, 137 Minn. 213, 163 N. W. 288; *First Nat. Bank of Winona v. Winona Plow Co.*, 58 Minn. 167, 59 N. W. 997; *Olson v. Cook*, 57 Minn. 552, 59 N. W. 635; *Gebhard v. Eastman & Gibson*, 7 Minn. 50; *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176; *Dauchy v. Brown*, 24 Vt. 197.

Under a special charter merely making the stockholders liable, it was

held that those who were stockholders at the time of the default were liable regardless of whether they acquired their stock before or after the contracts, debts and engagements upon which the corporation defaulted were entered into. *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 19 L. R. A. (N. S.) 428, 129 Am. St. Rep. 378, 69 Atl. 771.

In *Chatham Bank v. Brobston*, 99 Ga. 801, 27 S. E. 790, and *Brobston v. Downing*, 95 Ga. 505, 22 S. E. 277, it was held that the liability of stockholders of a bank organized under a special charter extended to debts created before they acquired the stock.

stockholders at that time, and not to extend to persons who have previously transferred their shares although they were stockholders when the debt was contracted.²³

In some of the states, charter or statutory provisions that "all" the members or stockholders of a corporation shall be individually liable for its debts have been construed as rendering liable all who were stockholders or members when the debt was contracted, although they may have since transferred their stock, and also all who are stockholders or members when an action is commenced to enforce the liability, although they may not have been members when the debt was contracted; and in other states the courts have so construed statutes or charters not using the word "all," but simply making stockholders or members liable.²⁴ Where this construction has been

²³ *Middleton Bank v. Magill*, 5 Conn. 28; *Cleveland v. Burnham*, 55 Wis. 598, 13 N. W. 677, 680. Compare *Deming v. Bull*, 10 Conn. 409.

This was held to be true under *Maine St. 1836, c. 200*, which was afterwards repealed. *Longley v. Little*, 26 Me. 162.

A charter provision that "the individual property of the stockholders at the time of suits shall be liable for the ultimate payment of the debts of the company in proportion to the amount of stock owned by each stockholder" renders liable only the individual property of those who are stockholders at the time that suits are brought against the company by its creditors, and stockholders who have transferred their stock prior to the filing of such suits are not liable. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

Under a constitutional provision that in all cases each stockholder of a corporation shall be individually liable in a certain amount for its debts, and a statutory provision that, if any execution shall have been issued against the property and effects of a corporation, and if there cannot be found property whereon to levy the same, then it may be issued, on motion, against any of the stockholders to

the extent of their liability, it has been held that the liability attached to those who were stockholders at the time the execution was issued, and not to those who had in good faith transferred their stock, although they were stockholders when the debt was contracted. *Van Demark v. Barons*, 52 Kan. 779, 35 Pac. 798; *Rhode Island Mortgage & Trust Co. v. Moulton*, 82 Fed. 979 (Kansas statute); *Miller v. Great Republic Ins. Co.*, 50 Mo. 55; *McClaren v. Francis*, 43 Mo. 452; *Bagley v. Tyler*, 43 Mo. App. 195; *Simmons v. Dent*, 16 Mo. App. 288.

In *Skrainka v. Allen*, 76 Mo. 384, rev'g 7 Mo. App. 434, it was held that the liability of a stockholder was measured by the number of shares held by him at the time of the return of the execution against the corporation unsatisfied, and not by the number held by him at the time of the motion for execution against him.

In *Brown v. Trail*, 89 Fed. 641, it was held that under the Kansas statute the liability attaches to all those who are stockholders when the execution against the corporation is returned nulla bona.

²⁴ *Illinois*. *Sprague v. National Bank of America*, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N.

given, a person is not liable for debts contracted before he became a stockholder, if he has ceased to be a stockholder before commencement of the action to enforce the liability.²⁵

Stockholders have been held not to be liable in respect to debts or liabilities contracted or accruing before they became such under provisions making each stockholder liable for all the corporate liabilities accruing while he remains a stockholder,²⁶ or for a proportionate amount of all the corporate debts and liabilities contracted or incurred during the time he was a stockholder.²⁷ And it has been held

E. 19; *Root v. Sinnock*, 120 Ill. 350, 60 Am. Rep. 558, 11 N. E. 339.

Massachusetts. *Holyoke Bank v. Burnham*, 11 Cush. 183; *Johnson v. Somerville Dyeing & Bleaching Co.*, 15 Gray 216; *Curtis v. Harlow*, 12 Metc. 3. Compare *Leland v. Marsh*, 16 Mass. 389, and *Bond v. Appleton*, 8 Mass. 472, 5 Am. Dec. 111.

New York. *Freeland v. McCullough*, 1 Den. 414, 43 Am. Dec. 685. But see the cases in note 19, *supra*.

Ohio. *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11; *Wick Nat. Bank v. Union Nat. Bank*, 62 Ohio St. 446, 78 Am. St. Rep. 734, 57 N. E. 320; *Peter v. Union Mfg. Co.*, 56 Ohio St. 181, 46 N. E. 894; *Boice v. Hodge*, 51 Ohio St. 236, 46 Am. St. Rep. 569, 37 N. E. 265; *Railroad Co. v. Smith*, 48 Ohio St. 219, 31 N. E. 743; *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798, 24 N. E. 259; *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637; *Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. 435; *Bonewitz v. Van Wert County Bank*, 41 Ohio St. 78; *Wheeler v. Faurot*, 37 Ohio St. 26; *Brown v. Hitchcock*, 36 Ohio St. 667; *Wehrman v. Reakirt*, 1 Cine. R. 230.

Rhode Island. *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497.

"The liability of stockholders in favor of a creditor attaches at the time the debt of the corporation attaches, and is not necessarily discharged by a transfer of the stock, but the assignee of the stock is held

to indemnify the assignor on account of such liability. And, in a suit by creditors, the then existing stockholders are severally chargeable with the payment of such liability. If, by reason of insolvency, the amount due from any stockholder who has received his stock by assignment is not collectible, the assignors of his stock up to the time the liability attached may be charged with the deficiency." *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11.

"The rule that the owners of stock who are such at the time of the commencement of the suit to enforce liability are liable for the debts of the corporation is not varied in favor of a particular stockholder by the fact that his stock may have been issued to him by the company after the creation of the debts." *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11.

²⁵ *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183; *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497.

²⁶ *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273, distinguishing *Thebus v. Smiley*, 110 Ill. 316, and *Root v. Sinnock*, 120 Ill. 350, 60 Am. Rep. 558, 11 N. E. 339, on the ground that in those cases a special charter made the stockholders liable to the amount of their stock for all the debts of the corporation.

²⁷ *Danielson v. Yoakum*, 116 Cal. 382, 48 Pac. 322; *Larrabee v. Baldwin*, 35 Cal. 155. See also *Bidwell v. Babcock*, 87 Cal. 29, 25 Pac. 752.

that under a provision making stockholders liable "for all liabilities accruing while they are such stockholders," a stockholder remains liable for a debt so accruing although he has transferred his shares, although the statute further provides that the transferee of stock "shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder" thereof.²⁸

Provisions imposing liability upon the stockholders of a bank which refuses or neglects to pay its bills on demand,²⁹ or which fails to pay over, on demand, public funds deposited therein,³⁰ have been held to impose liability only upon those persons who were stockholders at the time of the default. And a provision imposing liability on the stockholders of every bank for the benefit of its depositors has been held to render liable those who are stockholders when the bank suspends payment, without regard to when the deposits were made.³¹

It has been held that a person cannot escape a liability imposed upon persons who organize a corporation and transact business in its name before the minimum capital stock is subscribed by transferring his stock, and that one who purchases stock from a person who has assisted in violating the statute is not liable for the penalty thereby imposed in order to satisfy debts contracted in the name of the corporation either prior or subsequently to the purchase of the stock.³²

§ 4197. — Time when debt was contracted; renewal or change in character of debt. Although a person may not be a stockholder in a corporation at the time it enters into a contract, he may be liable for an indebtedness incurred by the corporation under the contract

²⁸ *Dunn v. Bank of Union*, 74 W. Va. 594, L. R. A. 1915 B 168, 82 S. E. 758.

²⁹ Under a charter providing that, if the bank should refuse or neglect to pay its bills on demand, "the original stockholders, their successors, assigns, and the members of the said corporation," should be jointly and severally liable to the holder, it was held that only such of the original stockholders, their successors and assigns, as were members of the corporation at the time the payment of its bills was refused were liable. *Bond v. Appleton*, 8 Mass. 472, 5 Am. Dec. 111.

³⁰ Under a statute making the stockholders of a bank liable for pub-

lie funds deposited therein in case the same are not paid over to the person entitled to receive them "on demand," it has been held that persons who, in good faith, have transferred their shares prior to the time when default in payment of a deposit is made are not liable. *Bank of Midland v. Harris*, 114 Ark. 344, Ann. Cas. 1916 B 1255, 170 S. W. 67; *Warren v. Nix*, 97 Ark. 374, 135 S. W. 896.

³¹ Those who are then stockholders are liable to those who are then depositors. *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

³² *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13.

after he became a stockholder. Thus, where a statute made the stockholders of a corporation liable for all debts contracted by it, a person who was not a stockholder when the corporation entered into a contract was held liable for instalments which became due under the contract after he became, and while he continued, a stockholder.³³ On the other hand, a person is not necessarily liable for a debt incurred by a corporation after he ceases to be a stockholder, although under a contract entered into while he was a stockholder. Where a statute made stockholders of a corporation liable for "debts" contracted by it, a person who was a stockholder when the corporation leased premises was held not liable for the rent of a quarter which commenced after he disposed of his stock.³⁴

A liability accrues, within the meaning of a provision making stockholders liable for liabilities of the corporation "accruing" while they remain stockholders, when it is incurred,³⁵ rather than when it matures,³⁶ or when a judgment based thereon is recovered against the corporation.³⁷ Similarly a liability on a contract is "incurred," within the meaning of such a statute, when the contract is entered into, rather than when it is performed. So, under a provision making a stockholder liable for a proportionate part of all "debts and liabilities contracted or incurred during the time he was a stockholder," it has been held that a person who becomes a stockholder after a corporation enters into a contract to purchase goods and before they are delivered is not liable on the failure of the corporation to pay for them.³⁸ It has also been held that, where stockholders are made liable for "dues from the corporation," liability on a corporate contract arises when the contract is made, and that a person who is a stockholder at that time is liable for goods delivered under it after he has transferred his stock;³⁹ and also that a statute providing that

³³ *McMaster v. Davidson*, 29 Hun (N. Y.) 542.

³⁴ *Bordman v. Osborn*, 23 Pick. (Mass.) 295.

³⁵ *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273; *Boor v. Tolman*, 113 Ill. App. 322.

"To accrue, as defined by lexicographers, means to 'come into existence,' 'to become vested.' " Where one loans money to a bank and receives a certificate of deposit therefor, the debt comes into existence and becomes vested when the money is deposited with the bank and ac-

cepted by it as a loan for its benefit. *Dunn v. Bank of Union*, 74 W. Va. 594, L. R. A. 1915 B 168, 82 S. E. 758.

³⁶ *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

³⁷ *Boor v. Tolman*, 113 Ill. App. 322. See also *Brown v. Hitchcock*, 36 Ohio St. 667.

³⁸ *Coulter Dry Goods Co. v. Wentworth*, 171 Cal. 500, 153 Pac. 939, overruling *Johnson v. Bank of Lake*, 125 Cal. 6, 73 Am. St. Rep. 17, 57 Pac. 664.

See also § 4239, *infra*.

³⁹ Where milk was furnished a

no transfer of stock shall operate as a release of any "liability existing at the time of such transfer" covers a liability under a contract existing when the transfer is made, although it has not yet matured.⁴⁰

It has been held that, since a debt is merged in a judgment recovered therefor, a person who is a stockholder at the time a corporation contracts a debt, but who ceases to be a stockholder before a judgment is recovered against the corporation on the debt, is not liable on the judgment, although he was liable on the original debt.⁴¹ But, on the other hand, it has been held that obtaining a judgment on a debt does not make it a new debt, so as to render liable a person who took a transfer of stock after the original debt was contracted.⁴²

When a debt due from a corporation is settled by giving a note therefor, and a new note is given when the note becomes due, the original liability is extinguished, in the absence of evidence of a contrary intent, and the date of the second note is the time when the debt is incurred for the purpose of determining who are liable as stockholders.⁴³ But if the taking of a note for an existing debt is not a payment of the debt, it does not release from liability a person who was a stockholder when the debt was contracted, but who has transferred his stock, in those jurisdictions in which stockholders remain liable for existing debts notwithstanding a transfer of their stock. In such a case, however, the liability is on the original debt, and not on the note.⁴⁴ Similarly, where the issuance of certificates

dairy company under a contract to furnish for one year, at a stipulated price, not less than a certain quantity of milk daily, to be paid for monthly, stockholders of the company at the time the contract was made, who transferred their stock to insolvent persons, were held to be liable for milk delivered under the contract after the transfer, although all the milk delivered prior to the transfer was duly paid for. *Herrick v. Wardwell*, 58 Ohio St. 294, 50 N. E. 903.

⁴⁰ Under such a provision a stockholder is liable for instalments of rent becoming due after a transfer of shares under a lease made prior to such transfer. *Hyatt v. Anderson's Trustee*, 25 Ky. L. Rep. 132, 74 S. W. 1094.

⁴¹ *Mason v. Cheshire Iron Works*, 4 Allen (Mass.) 398; *Handrahan v.*

Cheshire Iron Works, 4 Allen (Mass.) 396.

⁴² *Larrabee v. Baldwin*, 35 Cal. 155. See also § 4263, *infra*.

⁴³ *Milliken v. Whitehouse*, 49 Me. 527. And see *Wheeler v. Faurot*, 37 Ohio St. 26; *Taylor v. West Liberty Wheel Co.*, 6 Ohio Dec. 947, 9 Am. L. Rec. 28. See also § 4239, *infra*.

⁴⁴ *Winona Wagon Co. v. Bull*, 108 Cal. 1, 40 Pac. 1077; *Hyatt v. Anderson's Trustee*, 25 Ky. L. Rep. 132, 74 S. W. 1094; *Way v. Mooers*, 135 Minn. 339, 160 N. W. 1014. See also *Hyman v. Coleman*, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62; *Dunn v. Bank of Union*, 74 W. Va. 594, L. R. A. 1915 B 168, 82 S. E. 758.

The fact that corporate notes are renewed, or corporate accounts are closed by the giving of notes, after a transfer of stock, does not affect the

of deposit by a reorganized bank as evidence of its debts and their acceptance by its creditors does not operate as a payment of such debts, stockholders of the old bank who do not take part in the reorganization are not thereby relieved from liability.⁴⁵ Whether the giving of a new note or contract for the payment of money in place of an old one which is overdue operates as a payment and discharge of the old debt is always a question of intention, to be determined from all the facts and circumstances surrounding the transaction.⁴⁶ Under a provision making stockholders liable for debts contracted "during the time they hold stock," those who are stockholders at the time a note is given for a pre-existing debt are liable on the note, and not those who were stockholders when the original debt was contracted, but who have transferred their stock before the giving of the note.⁴⁷ It has been held that when certificates of deposit issued by a bank are renewed, the old certificates being surrendered, and new ones issued, and a part of the principal being paid in some cases, and interest in others, the new certificates are new contracts for the purpose of determining the liability of stockholders.⁴⁸ But there is also authority to the contrary.⁴⁹

A person is not liable on a note executed by a corporation while he

liability of the transferrer, since such transactions are merely a change of the evidence of the debt. *Hyatt v. Anderson's Trustee*, 25 Ky. L. Rep. 132, 74 S. W. 1094.

A note given for an antecedent debt does not discharge the debt unless expressly given and received as absolute payment, and the burden of proving that it was so given and received is on the party asserting it, the presumption being to the contrary. *Way v. Mooers*, 135 Minn. 339, 160 N. W. 1014.

⁴⁵ *Willius v. Mann*, 91 Minn. 494, 98 N. W. 341, 867; *Hunt v. Roosen*, 87 Minn. 68, 91 N. W. 259.

In *Willius v. Mann*, 91 Minn. 494, 98 N. W. 341, 867, the issuance by a reorganized bank of certificates of deposit as evidence of its debts, and their acceptance by the creditors was held not to operate as a payment of the debts and not to discharge the old stockholders from liability for their payment.

⁴⁶ *Willius v. Mann*, 91 Minn. 494, 98 N. W. 341, 867.

⁴⁷ *Castleman v. Holmes*, 4 J. J. Marsh. (Ky.) 1.

⁴⁸ *Seymour v. Bank of Minnesota*, 79 Minn. 211, 81 N. W. 1059.

⁴⁹ *Dunn v. Bank of Union*, 74 W. Va. 594, L. R. A. 1915 B 168, 82 S. E. 758. In this case, in reversing a holding that the renewal of certificates of deposit given for a loan, accompanied by the payment of interest due on the old ones, operated as a novation of the indebtedness, and hence that the stockholders liable were those who were such on the date of such renewal, the court said: "The certificates originally issued * * * were mere evidences of indebtedness then contracted. In other words, the certificates were, in effect, the notes of the bank, payable to each plaintiff. Although renewed by the subsequent issuance of other certificates, * * * the original liability was not extinguished and a new liability created,

was a stockholder, but not discounted⁴ or delivered until after he transferred his stock, although the note is dated as of the time of its execution.⁵⁰

The debts represented by bonds issued by a corporation are to be treated as having been contracted at the time the bonds were issued, although the proceeds may have been applied in paying existing debts of the corporation.⁵¹ And when, by statute, a transferrer of stock remains liable for all liabilities of the corporation created prior to the transfer, he is liable upon bonds issued by the corporation prior to the transfer, although not maturing until afterwards.⁵²

In jurisdictions where the payment of a corporate debt by a surety extinguishes the debt and gives rise to a new liability in favor of the surety and against the corporation and its stockholders, the date of such payment is the time when the debt is incurred.⁵³

Under a statute making stockholders of banks liable for public funds deposited therein in case the bank fails to pay over the same "on demand," the liability arises when default in the payment is made, and only those who are stockholders at the time of such default are liable.⁵⁴

Questions as to when the liability of the stockholders attaches also arise in applying the statute of limitations, and the sections dealing with that subject should be consulted.⁵⁵

§ 4198. — Debts contracted or paid after transfer. In the absence of a statutory or charter provision to the contrary, a person who has been a stockholder in a corporation is not in any jurisdiction liable for debts contracted by the corporation after he parted with his stock,⁵⁶ unless he has permitted the stock to remain in his name

any more than a new note pays an antecedent debt, though reduced to judgment, unless the parties so intended or agreed, the burden of showing such intention and agreement resting always upon him who claims the benefit of the discharge. Where these conditions are left in a state of uncertainty or doubt, a renewal, in whatever form presented, is not a payment."

⁵⁰ *Close v. Brady*, 4 N. Y. Misc. 474, 24 N. Y. Supp. 567.

⁵¹ *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497.

⁵² *White v. Green*, 105 Iowa 176, 74 N. W. 928.

⁵³ *Yule v. Bishop*, 133 Cal. 574, 65 Pac. 1094, 62 Pac. 68; *Wills v. Woolner*, 21 Cal. App. 528, 132 Pac. 283.

⁵⁴ *Bank of Midland v. Harris*, 114 Ark. 344, Ann. Cas. 1916 B 1255, 170 S. W. 67; *Warren v. Nix*, 97 Ark. 374, 135 S. W. 896.

⁵⁵ See also § 4239, *infra*.

⁵⁶ *United States. McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419; *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532; *Hamilton v. Titus*, 185 Fed. 140; *Ricaud v. Wilmington Savings & Trust Co.*, 70 Fed. 424; *Johnson v. Laffin*, 5 Dill. 65, Fed. Cas. No. 7,393.

Arkansas. Bank of Midland v.

on the books of the corporation.⁵⁷ And this has been held to be true although the transfer is made with knowledge that the corporation is insolvent and to persons financially irresponsible.⁵⁸

A provision that the stockholder's individual liability "shall continue for one year after any transfer or sale" of his stock, does not make him liable for debts contracted within a year after a transfer, but merely postpones the novation of the parties resulting from the transfer for a year.⁵⁹

It has been held that a provision requiring a stockholder who transfers his stock to publish notice of the transfer in order to exempt himself from liability does not render him liable for debts contracted after such transfer where he fails to give the required notice.⁶⁰ But

Harris, 114 Ark. 344, Ann. Cas. 1916 B 1255, 170 S. W. 67.

California. Yule v. Bishop, 133 Cal. 574, 62 Pac. 68, 65 Pac. 1094.

Maryland. Hall v. Hughes, 119 Md. 487, 87 Atl. 387; Emmert v. Smith, 40 Md. 123; Matthews v. Albert, 24 Md. 527.

Massachusetts. Bordman v. Osborn, 25 Pick. 295.

Minnesota. Willius v. Mann, 91 Minn. 494, 98 N. W. 341, 867; Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069; Id. 62 Minn. 152, 64 N. W. 145; Hamilton v. Titus, 185 Fed. 140.

New York. Chemical Nat. Bank v. Colwell, 132 N. Y. 250, 39 N. E. 644.

Ohio. Poston v. Hull, 75 Ohio St. 502, 80 N. E. 11; Wick Nat. Bank v. Union Nat. Bank, 62 Ohio St. 446, 78 Am. St. Rep. 734, 57 N. E. 320; Peter v. Union Mfg. Co., 56 Ohio St. 181, 46 N. E. 894; Harpold v. Stobart, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637; Taylor v. West Liberty Wheel Co., 6 Ohio Dec. 947.

Where the charter makes stockholders individually liable for all contracts and debts of the corporation to the extent of the amount of their stock therein "at the time the debt was created," a stockholder is not liable for debts contracted after he transfers his stock. Brunswick Ter-

minal Co. v. National Bank of Baltimore, 192 U. S. 386, 48 L. Ed. 491, aff'g 112 Fed. 812.

The transferrer is relieved from liability for debts accruing after the transfer where the statute provides that stockholders shall be liable "for all liabilities accruing while they are such stockholders," and that the transferee "shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder." Dunn v. Bank of Union, 74 W. Va. 594, L. R. A. 1915 B 168, 82 S. E. 758.

⁵⁷ See § 4205, *infra*.

⁵⁸ McDonald v. Dewey, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419.

⁵⁹ Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069; Id. 62 Minn. 152, 64 N. W. 145.

⁶⁰ A provision that the transferrer shall be exempt from liability unless he receives a written notice from a creditor, within a specified time after such transfer, or his intention to hold him liable, and provided he publishes notice of such transfer for a specified length of time, is not intended to impose a liability, but to exempt from an existing liability, and hence a stockholder is not liable for a debt contracted after he transfers his stock although he fails to give such notice. Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626, overruling Chatham Bank

there is also authority which holds to a contrary view.⁶¹

It has been held that a transferrer is liable for debts incurred by the corporation after the transfer, under a statute imposing liability upon persons who organize a corporation and transact business in its name before the minimum capital stock has been subscribed.⁶²

The transferrer is not liable for debts which existed at the time of the transfer, but have since been paid.⁶³

§ 4199. — Statutory regulations. Sometimes the statutes contain an express provision as to the effect of a bona fide transfer on the liability of the parties, and thus leave no room for doubt as to the meaning. So it is sometimes expressly provided that the transferrer shall be relieved from liability, and that the transferee shall become liable in his stead.⁶⁴ The National Bank Act, for example, expressly

of *Savannah v. Brobston*, 99 Ga. 801, 27 S. E. 790, and *Brobston v. Downing*, 95 Ga. 505, 22 S. E. 277.

In *Brunswick Terminal Co. v. National Bank of Baltimore*, 192 U. S. 386, 48 L. Ed. 491, aff'g 112 Fed. 812, the Supreme Court of the United States refused to follow the holdings of the Georgia court in *Chatham Bank of Savannah v. Brobston* and *Brobston v. Downing*, supra, with respect to the Georgia statute there involved, on the ground that those cases left the question an open one in that state.

The present statute dispenses with the necessity for publishing notice of the transfer, and exempts the transferrer from liability unless the corporation fails within six months from the date of the transfer. 2 Park's Ann. Code 1914, § 2247.

⁶¹ Under a statute providing that each stockholder of a corporation should be liable to double the amount of stock held or owned by him, and for three months after giving notice of transfer, it was held that a stockholder was liable for all debts incurred while he was a stockholder, and for all debts incurred within three months after his giving notice of a transfer of his stock. *Hull v. Burtis*,

90 Ill. 213; *Fuller v. Ledden*, 87 Ill. 310.

⁶² *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13.

⁶³ *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069.

He is liable only to the extent of the residue remaining unpaid of the corporate debts owing at the time of the transfer. *Boston v. Hull*, 75 Ohio St. 502, 80 N. E. 11.

⁶⁴ New York Banking Law, § 53 (Laws 1892, c. 689, p. 1869); *Persons v. Gardner*, 113 N. Y. App. Div. 597, 98 N. Y. Supp. 807, aff'd 188 N. Y. 571, 80 N. E. 1118.

Ohio Rev. St. 1890, § 3258, as amended by Act of April 29, 1902, and Act of April 24, 1904, relieves from liability stockholders who transfer their stock in good faith prior to the time when the debts and liabilities of the corporation become enforceable against them. *Irvine v. Baker*, 225 Fed. 834; *Blackburn v. Irvine*, 205 Fed. 217, aff'g 198 Fed. 360. The debts of the corporation become enforceable against the stockholders within the meaning of this provision, when the corporation becomes insolvent, rather than when an assessment is levied on the stockholders, although

provides that, in the case of a transfer of shares, the transferee shall succeed to all the liabilities of the transferor, and under this provision a bona fide and complete transfer of shares relieves the transferor from any further liability, even for debts contracted before the transfer, and the transferee becomes liable.⁶⁵

On the other hand, a statute sometimes expressly provides⁶⁶ that a transfer of stock shall not relieve the transferor from liability for

such an assessment is necessary before their liability can be enforced. Hence a stockholder is not relieved from liability by a transfer made after such insolvency occurs although before the making of the assessment. *Irvine v. Baker*, 225 Fed. 834.

See Pennsylvania Act of June 24, 1895 (P. L. 258). *Morris v. Dunbar*, 177 Fed. 159.

⁶⁵ *Whitney v. Butler*, 118 U. S. 655, 30 L. Ed. 266; *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532; *Sykes v. Holloway*, 81 Fed. 432; *Johnson v. Laffin*, 5 Dill. 65, Fed. Cas. No. 7,393; *Jackson v. Freeman*, 20 Ga. App. 767, 93 S. E. 284.

⁶⁶ *California*. Civ. Code, § 322, provides that the liability of a stockholder for debts contracted during the time he was a stockholder shall not be released by any subsequent transfer of the stock. *Danielson v. Yoakum*, 116 Cal. 382, 48 Pac. 322; *Kiefhaber Lumber Co. v. Newport Lumber Co.*, 15 Cal. App. 37, 113 Pac. 691.

Illinois. The statute providing that stockholders shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by them further provides that no assignor of stock shall be released from any such indebtedness by reason of any assignment of stock, but shall remain liable therefor jointly with the assignee until the said stock is fully paid, and that every assignee or transferee of stock shall be liable to the company for the amount unpaid thereon, to the extent and in the same manner as if

he had been the original subscriber. 2 J. & A. Ann. St. 1913, ¶ 2425; *Moore v. United States One Stave Barrel Co.*, 238 Ill. 544, 87 N. E. 536, aff'g 141 Ill. App. 104; *Footo v. Illinois Trust & Savings Bank*, 194 Ill. 600, 62 N. E. 834, aff'g 93 Ill. App. 39; *Higgins v. Illinois Trust & Savings Bank*, 193 Ill. 394, 61 N. E. 1024, aff'g 96 Ill. App. 29; *Florsheim v. Illinois Trust & Savings Bank*, 192 Ill. 382, 61 N. E. 491, aff'g 93 Ill. App. 297; *First Nat. Bank of Peoria v. Peoria Watch Co.*, 191 Ill. 128, 60 N. E. 859, aff'g 93 Ill. App. 502; *Sprague v. National Bank of America*, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, aff'g 66 Ill. App. 320; *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330; *Leman v. Teter*, 169 Ill. App. 503; *Rogan v. Illinois Trust & Savings Bank*, 93 Ill. App. 39, aff'd 194 Ill. 600, 62 N. E. 834; *Schroeder v. Edwards*, 267 Mo. 459, 184 S. W. 108; *Meyer v. Ruby-Trust Mining & Milling Co.*, 192 Mo. 162, 90 S. W. 821, construing the Illinois statute. The obligation created by this provision "is that the stock shall be paid for, and it rests upon the original subscriber and every subsequent assignee until payment is made," and the liability of the original subscriber ceases whenever the stock has been paid for by any subsequent assignee. So where a subscriber fails to pay for his stock and surrenders it to the corporation, which releases him from liability and then sells the stock to other parties, who pay for it in full, creditors cannot

debts previously contracted, or that he shall remain liable for debts

hold him liable in the subscription. *First Nat. Bank of Peoria v. Peoria Watch Co.*, 191 Ill. 128, 60 N. E. 859, aff'g 93 Ill. App. 502.

Iowa. The statute provides that a transfer of stock shall not exempt the person making it from any liability of the corporation created prior thereto, and this applies to the liability imposed by statute to corporate creditors, after the corporate assets have been exhausted, to the amount remaining due on stock. *White v. Green*, 105 Iowa 176, 74 N. W. 928.

Minnesota. The statute provides that a transfer shall not exempt the person making it from any liabilities of the corporation which were created prior to such transfer. Gen. St. 1913, § 6177. Earlier statutes contained similar provisions. *Way v. Mooers*, 135 Minn. 339, 160 N. W. 1014; *Tiffany v. Giesen*, 96 Minn. 488, 105 N. W. 901; *Gunnison v. United States Inv. Co.*, 70 Minn. 292, 73 N. W. 149; *Selig v. Hamilton*, 234 U. S. 652, 58 L. Ed. 1518, Ann. Cas. 1917 A 104, aff'g 195 Fed. 153. In the case of bank stock, the statute provides that the liability of the transferrer shall continue for one year after the entry of the transfer. See this section, *infra*.

Nebraska. Const. art. 11 b, § 4, provides that after the assets of the corporation shall have been exhausted the original subscribers shall be individually liable to the extent of their unpaid subscriptions, and that the liability for the unpaid subscription shall follow the stock. Under this provision an original subscriber cannot escape liability for the amount remaining unpaid upon his subscription by parting with his stock, and the transferee becomes cumulatively liable with him therefor. *Commercial Nat. Bank of Omaha v. Gibson*, 37 Neb. 750, 56 N. W. 616. The effect of

this provision is not to create a new obligation or liability on the part of the subscriber, but, in case of a sale of the stock, to modify his old contract to pay on the call of the board of directors into a guaranty to pay the debts of the corporation, to the amount of the unpaid subscription, after the corporate property has been exhausted. This guaranty, like the original contract, is an agreement with, and the property of the corporation, held by it to pay its debts. It passes to the receiver or other proper representative of the corporation, and may be enforced by him. The surrender by the original subscriber of his certificates of stock, the issue of new certificates to the purchaser, and the substitution of the secured notes of the latter for the unpaid part of the subscription in place of the notes of the former, do not evidence a rescission of the contract, or relieve the original subscriber from the effect of the constitutional provision. *Wyman v. Bowman*, 127 Fed. 257.

Oregon. The statute provides that all sales of stock shall subject the "purchaser to the payment of any unpaid balance due, or to become due, on such stock; but, if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser." B. & C. Comp. § 5065; *Lord's Ore. Laws*, § 6696; *Macbeth v. Banfield*, 45 Ore. 553, 106 Am. St. Rep. 670, 78 Pac. 693; *Ladd & Bush v. Cartwright*, 7 Ore. 329. Under this provision the transferrer is liable only to existing creditors, and not to subsequent ones. *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320.

Virginia. The statute formerly provided in respect to unpaid subscriptions that the assignor and the assignee should be severally liable for

previously incurred for a specified length of time after the transfer; ⁶⁷

any instalments which had accrued or which might thereafter accrue. Code 1887, § 1130; *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920; *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. 129; *Priest v. Glenn*, 51 Fed. 400; *Glenn v. Scott*, 28 Fed. 804; *Morris v. Glenn*, 87 Ala. 628, 7 So. 90; *Hambleton v. Glenn*, 72 Md. 331, 20 Atl. 115; *McKim v. Glenn*, 66 Md. 479, 8 Atl. 130; *Glenn v. Hunt*, 120 Mo. 330, 25 S. W. 181. This provision was repealed by Laws 1904, p. 370, and the statute now provides that in case of an assignment with the consent of the corporation before the subscription has been paid in full, the assignor shall be no longer liable, but the assignee shall be liable for any instalments which have accrued or which shall thereafter accrue.

67 Kentucky. St. § 547, imposing a liability on stockholders to creditors for the amount unpaid on their stock provides that "no transfer of stock shall operate as a release of any such liability existing at the time of such transfer: Provided, the action to enforce such liability shall be commenced within two years from the time of transfer." *Fidelity & Columbia Trust Co. v. Edelen*, 176 Ky. 376, 195 S. W. 447; *Boulware-Allen Shoe Co.'s Trustee v. Morris*, 168 Ky. 426, 182 S. W. 225. The same provision was found in St. 1899, § 547, imposing a double liability on stockholders. *Hyatt v. Anderson's Trustee*, 25 Ky. L. Rep. 132, 74 S. W. 1094. In *Hyatt v. Anderson's Trustee*, 25 Ky. L. Rep. 132, 74 S. W. 1094, it was held that creditors who did not commence suit, or file their claims before the commissioner, within two years after a transfer, were not entitled to hold the transferrer liable, although another creditor commenced suit within that time for the benefit

of himself and all other creditors, where no order permitting such creditor to sue in that manner was made within the two years, and especially in view of the fact that the liability under the Kentucky statute is several, and no creditor has any interest in the liability of a stockholder to any other creditor. In *Boulware-Allen Shoe Co.'s Trustee v. Morris*, 168 Ky. 426, 182 S. W. 225, it was held that where a stockholder in a solvent corporation sells his stock in good faith, and delivers it to the corporation which returns his note given for half of the subscription price remaining unpaid, and in lieu thereof accepts the note of the purchaser, the seller is relieved from liability to creditors on the subsequent insolvency of the corporation, although the corporation, by mistake, issues only half of the stock to the purchaser.

Maine. St. 1836, c. 200, which was afterwards repealed, provided that, "in case of deficiency of attachable corporate property or estate, the individual property, rights and credits of any stockholder shall be liable, to the amount of his stock, for all debts of the corporation contracted prior to the transfer thereof, for the term of one year after the record of the transfer in the books of the corporation, and for the term of six months after judgment recovered against said corporation in any suit commenced within the year aforesaid." *Longley v. Little*, 26 Me. 162.

Minnesota. The statute provides that the liability of stockholders in banks shall continue for one year after the entry of the transfer. R. L. 1905, § 2985; Gen. St. 1913, § 6350; *Northwestern Trust Co. v. Bradbury*, 112 Minn. 76, 127 N. W. 386; *Hunt v. Doran*, 92 Minn. 423, 100 N. W. 222; *Hunt v. Seeger*, 91 Minn. 264, 98 N.

or that he shall be exempted from liability unless the corpora-

W. 91; *Hunt v. Roosen*, 87 Minn. 68, 91 N. W. 259. "The provision of R. L. 1905, § 2985, to the effect that 'the liability * * * shall continue for one year after the entry of such transfer' means that the creditor's cause of action must accrue within one year after the transfer; or in other words, the contingent liability of the stockholder to respond for the debts of the corporation upon its insolvency must become absolute by the occurrence of such insolvency within the year next after the recorded transfer of his stock, but if such cause of action does so accrue within the year it may be enforced at any time within the general statute of limitations of six years." *Northwestern Trust Co. v. Bradbury*, 112 Minn. 76, 127 N. W. 386. Under ordinary circumstances the novation will be complete by operation of law at the end of the year, and the transferrer will be discharged from further responsibility. But if within the year conditions arise or exist which authorize the commencement of an action to enforce the stockholder's liability, the transferrer may be held liable in such action for his proportion of the corporate debts contracted before the transfer. *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Id.* 62 Minn. 152, 64 N. W. 145. The liability continues no longer than a year after the sale, and proceedings to enforce the same must be brought within that time, or the right of action will be barred and the stockholder absolutely discharged. If within the year the corporation becomes insolvent and proceedings are commenced to sequester its property, the right of the creditors to enforce the transferrer's liability is complete, and the right may be enforced at any time within six years thereafter. If the sequestration proceeding is not commenced within a year, the transferrer is not liable. *Hunt v. Doran*, 92 Minn. 423, 100 N. W. 222. The statute is one of limitation, and the rules and principles applicable to that subject generally apply. *Hunt v. Roosen*, 87 Minn. 68, 91 N. W. 259. Where an insolvent bank is reorganized, the time for enforcing the liability of the transferrer is extended to a period of one year after the time fixed for the payment of the corporate debts by the plan and order of reorganization. *Hunt v. Roosen*, 87 Minn. 68, 91 N. W. 259. So where sequestration proceedings were commenced against an insolvent bank within a year after a transfer, but the bank was reorganized, and its assets were turned over to the new bank by the receiver, pursuant to an order of court made with the consent of the creditors, and the receiver was discharged, and the reorganized bank thereafter failed and new sequestration proceedings were instituted against it, and a new receiver was appointed, more than a year after the transfer, it was held that the transferrer was not liable. *Hunt v. Doran*, 92 Minn. 423, 100 N. W. 222. That this provision does not render the transferrer liable for debts contracted after the transfer, see § 4198, *supra*.

Mississippi. The statute provides that the liability of a stockholder for corporate debts contracted during his ownership of the stock, to the amount of his unpaid subscription, shall continue for one year after the sale or transfer of his stock. *Allen v. Edwards*, 93 Miss. 719, 47 So. 382; *Kruger v. Hanover Nat. Bank*, 72 Miss. 462, 16 So. 351. In view of the further provision of the statute that the stock shall be transferable by the indorsement and delivery of the stock certificate, and registration of the transfer

tion fails within a specified time after the date of the transfer.⁶⁸

Under a provision that the amount of the liability may be "recovered of the stockholders who were such when the debt was contracted or the loss or damage sustained, or of any subsequent stockholder," both the vendor of stock, who owned it when the debt sought to be enforced against the stockholders was contracted, and his vendee are liable.⁶⁹

Statutes sometimes require a stockholder who transfers his stock to publish notice of the transfer in order to relieve himself from liability to creditors.⁷⁰

on the books of the corporation, the year does not begin to run until a transfer is registered. *Kruger v. Hanover Nat. Bank*, 72 Miss. 462, 16 So. 351.

South Dakota. The constitutional provision imposing a double liability on the stockholders of banks provides that it shall continue for one year after any sale or transfer of the stock. Const. art. 18, § 3; *Security State Bank v. Gannon*, 39 S. D. 232, 163 N. W. 1040; *Farmers' State Bank of Mobridge v. Empey*, 35 S. D. 107, 150 N. W. 936.

Wisconsin. The statute provides that the liability shall continue for six months after the transfer. *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875. In order to hold the transferrer liable under this provision, an action to enforce such liability must be brought against him within six months after the transfer. And the commencement of a creditor's suit to wind up the affairs of the corporation to which the transferrer is not a party will not prevent the running of the statute as to him. *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875.

⁶⁸ The Georgia Code (2 Park's Ann. Code 1914, § 2247) provides that a stockholder shall be exempted from individual liability imposed by the corporate charter by a transfer of his stock, unless the corporation shall fail within six months from the date of

such transfer. *Citizens' Bank v. J. M. Kent Co.*, 142 Ga. 115, 82 S. E. 513; *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626. See also *Brunswick Terminal Co. v. National Bank of Baltimore*, 192 U. S. 386, 48 L. Ed. 491, aff'g 112 Fed. 812.

This provision imposes no liability, and if the charter imposes none, a stockholder who has transferred his stock is not liable although the corporation fails within six months after the transfer. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

⁶⁹ *Mosler Safe Co. v. Guardian Trust Co.*, 208 N. Y. 524, 101 N. E. 786, modifying and aff'g judgment 153 N. Y. App. Div. 117, 138 N. Y. Supp. 298.

⁷⁰ The statutes of Georgia formerly contained such a requirement. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626; *Mason v. Force*, 30 Ga. 99; *Robinson v. Beall*, 26 Ga. 17; *Force v. Dahlonga Tanning & Leather Manufacturing Co.*, 22 Ga. 86; *Thornton v. Lane*, 11 Ga. 459; *Lane v. Morris*, 8 Ga. 468; *Brunswick Terminal Co. v. National Bank of Baltimore*, 192 U. S. 386, 48 L. Ed. 491, aff'g 112 Fed. 812. The present statute dispenses with the necessity for publishing notice of the transfer, and exempts the transferrer from liability unless the corporation fails within six months from the date of the transfer. 2 Park's Ann. Code 1914, § 2247.

The special charters considered in

Statutes imposing liability on the transferrer, being in derogation of the common law, are to be strictly construed, and persons seeking to take advantage of them must bring themselves within their provisions.⁷¹

§ 4200. — Transfer by stockholder who has satisfied liability.

When a stockholder has paid a creditor the full amount of his liability, and been thereby discharged from any further liability,⁷² one to whom he transfers his stock incurs no liability.⁷³

§ 4201. — Transfers to escape liability or which are merely colorable. If a transfer is made in good faith and to a responsible person, it is none the less effectual to relieve the transferrer from liability because it is made for the purpose of escaping liability.⁷⁴ This is true, for example, of a sale of pledged stock by the pledgee, under an authority contained in the pledge,⁷⁵ and of a retransfer of stock by the vendee thereof to the vendor pursuant to an agreement by the latter to repurchase it contained in the original contract of sale.⁷⁶ Nor, where the transfer is made in good faith, is the transferrer liable because of subsequent transactions between the transferee and the corporation whereby it is sought to shield the transferee from liability.⁷⁷

But a transfer for the purpose of escaping liability will not relieve the transferrer, if it is merely colorable, and he remains the beneficial owner.⁷⁸ Nor, as a rule, will a fraudulent transfer made

Hull v. Burtis, 90 Ill. 213, and Fuller v. Ledden, 87 Ill. 310, contained provisions to this effect.

As to whether such a provision renders the transferrer liable for debts contracted after the transfer where he fails to give the required notice, see § 4198, *supra*.

⁷¹ Fidelity & Columbia Trust Co. v. Edelen, 176 Ky. 376, 195 S. W. 447.

⁷² See § 4260, *infra*.

⁷³ Thebus v. Smiley, 110 Ill. 316.

⁷⁴ Magruder v. Colston, 44 Md. 349, 22 Am. Rep. 47; Holyoke Bank v. Burnham, 11 Cush. (Mass.) 183; Miller v. Great Republic Ins. Co., 50 Mo. 55; Simmons v. Dent, 16 Mo. App. 288.

⁷⁵ Magruder v. Colston, 44 Md. 349, 22 Am. Rep. 47.

⁷⁶ Holyoke Bank v. Burnham, 11 Cush. (Mass.) 183.

⁷⁷ Hall & Farley v. Alabama Terminal & Improvement Co., 173 Ala. 398, 56 So. 235.

⁷⁸ **United States.** McDonald v. Dewey, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419; Rankin v. Fidelity Insurance, Trust & Safe Deposit Co., 189 U. S. 242, 47 L. Ed. 792, *aff'g* 108 Fed. 475; Earle v. Carson, 188 U. S. 42, 47 L. Ed. 373, *aff'g* 107 Fed. 639, 60 L. R. A. 266; Matteson v. Dent, 176 U. S. 521, 44 L. Ed. 571, *aff'g* 73 Minn. 170, 75 N. W. 1041; Pauly v. State Loan & Trust Co., 165 U. S. 606, 41 L. Ed. 844, *aff'g* 58 Fed. 666, 56 Fed. 430; Anderson v. Philadelphia Warehouse Co., 111 U. S. 479, 28 L. Ed.

with knowledge of the insolvency of the corporation and for the purpose of escaping liability relieve a stockholder from liability to existing creditors.⁷⁹ And it has been held that a transfer without consideration made when the company is in debt and insolvent is presumptively fraudulent, and the burden is on the transferrer to show the contrary.⁸⁰ But it has been held that a stockholder is relieved from liability to subsequent creditors by a transfer of his stock, regardless of the good faith of the transaction, provided there is an actual assignment consummated according to the terms of the statute.⁸¹ And

478; *Germania Nat. Bank of New Orleans v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, certiorari denied 196 U. S. 638, 49 L. Ed. 630 (mem. dec.); *Sykes v. Holloway*, 81 Fed. 432. See also *Johnson v. Laffin*, 5 Dill. 65; Fed. Cas. No. 7393, aff'd 103 U. S. 800, 26 L. Ed. 532.

Illinois. *Hamilton v. Eisendrath*, 185 Ill. App. 502; *Tuttle v. National Bank of Republic*, 48 Ill. App. 481.

Michigan. *May v. Ullrich*, 132 Mich. 6, 92 N. W. 493; *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

Minnesota. *Pioneer Fuel Co. v. St. Peter Street Improvement Co.*, 64 Minn. 386, 67 N. W. 217.

Ohio. *Peter v. Union Mfg. Co.*, 56 Ohio St. 181, 46 N. E. 894.

Vermont. *Dauchy v. Brown*, 24 Vt. 197.

England. *Hyam's Case*, 1 De G. F. & J. 75.

A transfer to a dummy while the corporation is insolvent, without consideration and for the purpose of avoiding the transferrer's liability, is void as to creditors. *Lamson v. Hutchings*, 118 Fed. 321, certiorari denied 189 U. S. 514, 47 L. Ed. 924 (mem. dec.).

⁷⁹ *Steed v. Henry*, 120 Ark. 583, 180 S. W. 508; *Bank of Midland v. Harris*, 114 Ark. 344, Ann. Cas. 1916 B 1255, 170 S. W. 67.

"Such sale and transfer would not be made in good faith if at the time such stockholder knew that the bank was then insolvent, or if he made such sale for the purpose of escaping such liability." *Warren v. Nix*, 97 Ark. 374, 135 S. W. 896.

A fraudulent transfer of stock made, with intent to avoid the statutory liability and to defraud creditors may be attacked by cross-bill in a creditors' suit if it has not been attacked by the plaintiff or the receiver. *Benedum v. First Citizens' Bank*, 72 W. Va. 124, 78 S. E. 656.

Where a transfer is set up as a defense to an action at law in a federal court, it is competent for plaintiff to prove that the transfer was fraudulent and for the purpose of escaping liability. *Lamson v. Hutchings*, 118 Fed. 321, certiorari denied 189 U. S. 514, 47 L. Ed. 924 (mem. dec.).

In a suit by a receiver of a national bank to set aside a transfer as fraudulent, the burden is on him to show fraud. *Sykes v. Holloway*, 81 Fed. 432.

A transfer under such circumstances to a person who is insolvent and who is known to the transferrer to be insolvent, will not relieve him from liability. See § 4202, *infra*.

⁸⁰ *McConey v. Belton Oil & Gas Co.*, 97 Minn. 190, 106 N. W. 900.

⁸¹ *Bank of Midland v. Harris*, 114 Ark. 344, Ann. Cas. 1916 B 1255, 170 S. W. 67.

also that he is relieved from liability although the transfer was fraudulent, if the transferee is solvent and financially able to respond.⁸²

A stockholder in a bank cannot relieve himself from liability by transferring his stock after the bank has suspended.⁸³

§ 4202. — Transfers to persons who are insolvent. If a transfer is made in good faith, and not for the purpose of defeating creditors, the mere fact that the transferee is insolvent or pecuniarily irresponsible will not render the transferor liable to creditors.⁸⁴

In England it is held that a transfer of stock in a failing corporation will relieve the transferor from further liability if it is an out and out transfer, and not merely colorable, although it may be made to a person known to be insolvent and irresponsible, and for the purpose of escaping liability;⁸⁵ but in this country the weight of authority is to the contrary. In most jurisdictions in which the question has arisen it has been held that, when a corporation is in failing circumstances, a transfer of stock for the purpose of escaping liability to creditors, to a person who is known to be insolvent, or who, for any other reason, is irresponsible, is a fraud upon creditors of the corporation, and void as to them, and will not relieve the transferor from liability for the balance due on his stock or from an additional statutory liability.⁸⁶ And the transferor is not relieved from liability

⁸² See § 4202, *infra*.

⁸³ *May v. McQuillan*, 129 Mich. 392, 89 N. W. 45.

A stockholder in a national bank is not relieved of liability by a transfer made after the bank has become insolvent and has closed its doors, although no assessment has been made by the comptroller of the currency. *Graham v. Platt*, 28 Colo. 421, 65 Pac. 30; *Hill v. Graham*, 11 Colo. App. 536, 53 Pac. 1060.

Where a stockholder makes an assignment for the benefit of his creditors under such circumstances, an assessment subsequently made is a valid claim against his estate, regardless of whether the assignee does or does not accept the assignment. *Graham v. Platt*, 28 Colo. 421, 65 Pac. 30.

⁸⁴ *Sykes v. Holloway*, 81 Fed. 432; *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696; *Miller v. Great Republic Ins. Co.*, 50 Mo. 55.

See also *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11.

⁸⁵ *Master's Case*, 7 Ch. App. 292; *Harrison's Case*, 6 Ch. App. 286; *Weston's Case*, 4 Ch. App. 20; *De Pass's Case*, 4 De G. & J. 544; *Costello's Case*, 2 De G. F. & J. 302. See also *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419.

⁸⁶ **United States.** *Lamson v. Hutchings*, 118 Fed. 321, certiorari denied 189 U. S. 514, 47 L. Ed. 924 (mem. dec.).

Alabama. *Henderson v. Mayfield Woolen Mills*, 153 Ala. 625, 45 So. 211; *Central Agricultural & Mechanical Ass'n v. Alabama Gold Life Ins. Co.*, 70 Ala. 120.

California. *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858; *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319; *National Carriage Mfg. Co. v. Story & Isham Commercial Co.*, 111 Cal. 531, 44 Pac. 157.

under such circumstances by showing a full or partial consideration for the transfer as between himself and the transferee,⁸⁷ or by the fact that the transferee is accepted by the corporation as a stockholder, and the transfer is registered on the corporate books.⁸⁸ This is the well-settled rule under the National Bank Act, provided the transferer knew or ought to have known of the insolvency of the bank when the transfer was made.⁸⁹ And the same principle applies when

Connecticut. *Paine v. Stewart*, 33 Conn. 517.

Iowa. *Wishard v. Hansen*, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691.

Kentucky. See *Fidelity & Columbia Trust Co. v. Edelen*, 176 Ky. 376, 195 S. W. 447.

Louisiana. *Mandion v. Firemen's Ins. Co.*, 11 Rob. 177.

Maryland. *Rider v. Morrison*, 54 Md. 429.

Massachusetts. *Marcy v. Clark* 17 Mass. 330.

Michigan. *Utica Fire Alarm Tel. Co. v. Waggoner Watchman Clock Co.*, 166 Mich. 618, 132 N. W. 502; *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

Missouri. *Provident Sav. Inst. v. Jackson Place Skating & Bathing Rink*, 52 Mo. 557; *McClaren v. Francis*, 43 Mo. 452; *Banta v. Hubbell*, 167 Mo. App. 38, 150 S. W. 1089; *Tredway v. St. Louis Commercial Agency*, 13 Mo. App. 582.

New York. *Veiller v. Brown*, 18 Hun 571; *Nathan v. Whitlock*, 9 Paige 152.

Ohio. *Herrick v. Wardwell*, 58 Ohio St. 294, 50 N. E. 903; *Peter v. Union Mfg. Co.*, 56 Ohio St. 181, 46 N. E. 894; *Rider v. Fritchey*, 49 Ohio St. 285, 15 L. R. A. 513, 30 N. E. 692; *Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. 435.

Pennsylvania. *Burt v. Real Estate Exchange*, 175 Pa. St. 619, 52 Am. St. Rep. 858, 34 Atl. 923; *Aultman's Appeal*, 98 Pa. St. 505.

Texas. *Rich v. Park*, — Tex. Civ.

App. —, 177 S. W. 184; *Nenney v. Waddill*, 6 Tex. Civ. App. 244, 25 S. W. 308.

Vermont. *Dauchy v. Brown*, 24 Vt. 197.

And see § 4201, *supra*.

“A transfer of shares in a failing corporation, made by the transferer with the purpose of escaping his liability as a shareholder, to a person who from any cause is incapable of responding in respect of such liability, is void as to creditors of the company and as to other shareholders, although as between the transferer and the transferee the transfer may be out and out.” *Aultman's Appeal*, 98 Pa. St. 505, quoted with approval in *Burt v. Real Estate Exchange*, 175 Pa. St. 619, 52 Am. St. Rep. 858, 34 Atl. 923.

“When a corporation possesses assets substantially in excess of its liabilities to creditors, is not embarrassed by the demands of creditors, and is a going concern, apparently endowed with sufficient resources and vitality to continue its business indefinitely and successfully, it is not insolvent so far as creditors are concerned, though its capital stock be impaired.” *Banta v. Hubbell*, 167 Mo. App. 38, 150 S. W. 1089.

⁸⁷ *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419.

⁸⁸ *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858.

⁸⁹ *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419; *Earle v. Carson*, 188 U. S. 42, 47 L. Ed. 373, aff'g 107 Fed. 639, 60 L. R. A.

a person purchases stock in a corporation, and, for the purpose of escaping liability as a stockholder, has the same transferred on the books of the corporation directly from the seller to an irresponsible person. In such a case, he is himself liable to creditors, on insolvency of the corporation, as the actual owner of the stock.⁹⁰

The gist of the liability in cases of this kind is fraud.⁹¹ The fact that the transfer was made to an insolvent person is evidence of a fraudulent intent,⁹² as is the fact that he knew that the transferee was insolvent.⁹³

In order to hold the transferrer liable it must appear that the cor-

266; *Pauly v. State Loan & Trust Co.*, 165 U. S. 606, 41 L. Ed. 844, aff'g 58 Fed. 666, 56 Fed. 430; *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386; *Germania Nat. Bank of New Orleans v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Fowler v. Crouse*, 175 Fed. 646; *Baker v. Reeves*, 85 Fed. 837; *Sykes v. Holloway*, 81 Fed. 432; *Foster v. Lincoln's Ex'r*, 79 Fed. 170; *Cox v. Montague*, 78 Fed. 845; *Bowden v. Santos*, 1 Hughes 158, Fed. Cas. No. 1,716. See also *Schofield v. Twining*, 127 Fed. 486; *Stuart v. Hayden*, 72 Fed. 402, aff'd 169 U. S. 1, 42 L. Ed. 639.

A receiver of a national bank may maintain a suit in equity to set aside a transfer of stock alleged to have been fraudulently made for the purpose of avoiding liability and for a judgment against the transferrer for the amount of the assessment. *Hedlund v. Dewey*, 105 Fed. 541.

The transferee is also liable. *Baker v. Reeves*, 85 Fed. 837.

⁹⁰ *Davis v. Stevens*, 17 Blatchf. 259, Fed. Cas. No. 3,653; *Case v. Small*, 4 Woods 78, 10 Fed. 722.

That a pledgee of shares of stock in a national bank, who in good faith and with no fraudulent intent takes the security for his benefit in the name of an irresponsible trustee, and who exercises none of the rights of a stockholder, incurs no liability as a stockholder to creditors, although his avowed purpose may have been to

avoid any liability as a stockholder see § 4193, supra.

⁹¹ *Fowler v. Crouse*, 175 Fed. 646.

The question is whether the transfer was fraudulent as to creditors. *Miller v. Great Republic Ins. Co.*, 50 Mo. 55.

The question is one of fraudulent intent on the part of the transferrer, and such an intent may be inferred from circumstances. *Banta v. Hubbell*, 167 Mo. App. 38, 150 S. W. 1089.

"The gist of the liability is the fraud implied in selling, with notice of the insolvency of the bank and with intent to evade the double liability imposed upon the stockholder by the National Banking Act. In short, the question of liability is largely determinable by the presence or absence of an intent to evade liability." *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419.

⁹² *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419; *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

The pecuniary condition of the transferee is material upon the question whether the transfer was bona fide or colorable. *Sykes v. Holloway*, 81 Fed. 432.

⁹³ The fact that he knew of the insolvency of the transferee is very strong evidence of fraud. *Miller v. Great Republic Ins. Co.*, 50 Mo. 55.

Knowledge on the part of the trans-

poration was insolvent at the time of the transfer; that he knew or ought to have known of such insolvency at that time; that he made the transfer for the purpose of avoiding liability, and that the transferee was unable to respond to such liability.⁹⁴ He does not remain liable merely because the corporation is insolvent when the transfer is made if he does not know of its insolvency;⁹⁵ and this is true even though he does know that the transferee is insolvent.⁹⁶ Nor

ferrer that the transferee is insolvent is material on the question of fraudulent intent. *Utica Fire Alarm Tel. Co. v. Waggoner Watchman Clock Co.*, 166 Mich. 618, 132 N. W. 502.

⁹⁴ *Fowler v. Crouse*, 175 Fed. 646.

The burden is on the party attacking the transfer to show, either by direct or circumstantial evidence, that, at the time of the transfer, both the corporation and the transferee were insolvent, and that the transferrer knew that such was the case. *Banta v. Hubbell*, 167 Mo. App. 38, 150 S. W. 1089.

"If the corporation was insolvent at the time of the transfer and the transferrers knew it, and if the transferee was insolvent and the transferrers knew it, the inference of a guilty intent would be the only one such facts would permit. But, if any one of these elements is lacking, the others, at most, can be given no greater effect than that of raising a debatable issue of fact. Thus if the corporation in fact is insolvent, but the transferee is solvent and may be compelled to discharge the unpaid liability, the transfer should not be held fraudulent, since it could not in any way impair the integrity of the trust fund. On the other hand, if the transferee be insolvent and the corporation in fact be solvent and liable, to hold the transfer void could be done only by wholly ignoring the question of intent as well as the right of the owner of property to sell it if he chooses. And, further, if both the corporation and the transferee in fact

are insolvent, but in appearance and reputation belie that fact, and the transferrer is ignorant of the true condition, and innocently acts on the presumption that either is solvent, it would be most unjust to hold him guilty of a fraud, when no fraud was intended, and he was actuated by the bona fide purpose of selling his property." *Banta v. Hubbell*, 167 Mo. App. 38, 150 S. W. 1089.

⁹⁵ *Fowler v. Crouse*, 175 Fed. 646; *Banta v. Hubbell*, 167 Mo. App. 38, 150 S. W. 1089.

⁹⁶ This is the rule in respect to transfers of national bank stock. *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419; *Earle v. Carson*, 188 U. S. 42, 47 L. Ed. 373, aff'g 107 Fed. 639, 60 L. R. A. 266; *Sykes v. Holloway*, 81 Fed. 432. See also *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

In *Earle v. Carson*, 188 U. S. 42, 47 L. Ed. 373, aff'g 107 Fed. 639, 60 L. R. A. 266, in reply to a contention that the transferrer remained liable if the bank, at the time of the transfer, was insolvent in the sense that its assets, if liquidated, would not discharge its liabilities, whether he knew of that fact or not, Mr. Justice White said: "If the proposition were sustained it would thus come to pass that the power of stockholders to freely transfer their stock like any other personal property would be burdened with a restriction arising from the unknown insolvency of the bank, whilst such limitation would not apply to any other contract concerning the property

does he remain liable although the transfer was made fraudulently and with intent to evade liability, if it appears that the transferee is solvent and responsible to the amount necessary to satisfy the claims of creditors, so that they were not damnified by the change of ownership.⁹⁷ But where the transferrer seeks to escape liability on the ground that the transferee was financially able to respond, he has

or affairs of the bank. This would be to hold that the statute had conferred the lesser freedom of contract where it was its avowed purpose to give the greater. It would besides require us to say that a limitation resulting from unknown insolvency was made effective upon a stockholder in transferring his stock when such restriction was not made operative on the bank and its officers when they entered into contracts. But this would cause the unknown insolvency to restrict the power of the person less likely to be aware of its existence and to cause it not to be controlling where knowledge was most apt to obtain. Taking into view the whole act, the provision conferring the power to transfer stock; the one already referred to which avoids contracts made in contemplation of insolvency; the authority conferred upon the comptroller to constantly test the condition of a national bank; the right given him to suspend the business of such bank when the exigencies of its situation require it, and the double liability imposed on the registered stockholders, we think it results that the power to transfer stock, like other personal property, is not limited by the mere fact that at the time of the transfer the bank, which was a going concern, was insolvent in the sense that its assets, if liquidated, would not discharge its liabilities, unless it be shown that the seller was aware of the fact and had sold his stock to avoid the double liability which was impending."

Where the complainant fails to

show knowledge of the bank's insolvency or a fraudulent intent on the part of the defendant, the latter is not liable although he fails to show that the transferee is financially responsible. *Fowler v. Crouse*, 175 Fed. 646.

To hold the transferrer liable he need not have had actual knowledge of the insolvency of the bank at the time of the transfer, but it is sufficient if he had reason to apprehend its failure, and made the transfer to relieve himself from liability. *Cox v. Montague*, 78 Fed. 845. See also *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419.

Although a stockholder in a state bank may transfer his stock when the bank is in a failing condition, he cannot after its insolvency be held liable, in the absence of proof of bad faith and that he knew of the bank's condition, and the burden of proof as to this is on a creditor or receiver seeking to hold him liable. *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

⁹⁷ *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419.

"It is not necessary to show that they were persons of responsibility equal to that of the original stockholder. It is sufficient that they were responsible to an amount called for by the necessities of the case—in other words, in an amount sufficient to indicate that the creditors of the bank were not damnified by the change of ownership." *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419.

the burden of affirmatively showing that fact.⁹⁸ And the burden is also on him to show that an insolvent transferee subsequently transferred the stock to a person financially responsible.⁹⁹

§ 4203. — Transfers to persons not legally liable as stockholders. In order to relieve the transferrer from his statutory liability or from liability for the balance due on his stock, the transfer must not only be made to a person legally capable of holding the stock transferred, but also to one who is legally capable of assuming the obligations of a stockholder, and who is not at liberty to repudiate them.¹ So a person who transfers stock to an infant will remain liable to creditors unless the infant has in the meantime attained his majority and ratified the transfer, even though the corporation was solvent when the transfer was made.² Nor can a stockholder escape liability by a transfer to the corporation,³ or to a third person as

⁹⁸ *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419 (distinguishing *Stuart v. Hayden*, 169 U. S. 1, 42 L. Ed. 639); *Fowler v. Crouse*, 175 Fed. 646.

⁹⁹ *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858.

¹ **United States.** In re Grand Rapids Furniture Agency, 209 Fed. 483; *Aldrich v. Bingham*, 131 Fed. 363. See also *Johnson v. Laffin*, 5 Dill. 65, Fed. Cas. No. 7,393, aff'd 103 U. S. 800, 26 L. Ed. 532.

California. *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319.

Iowa. *Wishard v. Hansen*, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691.

Maryland. *Rider v. Morrison*, 54 Md. 429.

Michigan. See *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

New York. In re Reciprocity Bank, 22 N. Y. 9; *Nathan v. Whitlock*, 9 Paige 152.

Pennsylvania. *Burt v. Real Estate Exchange*, 175 Pa. St. 619, 52 Am. St. Rep. 858, 34 Atl. 923; *Aultman's Appeal*, 98 Pa. St. 505.

England. *Capper's Case*, 3 Ch. App. 458.

² *Aldrich v. Bingham*, 131 Fed. 363; *Foster v. Lincoln's Ex'r*, 79 Fed. 170; *Symon's Case*, 5 Ch. App. 298; *Mann's Case*, 3 Ch. App. 459, note; *Capper's Case*, 3 Ch. App. 458; *Castello's Case*, L. R. 8 Eq. 504. See also *Johnson v. Laffin*, 5 Dill. 65, Fed. Cas. No. 7,393, aff'd 103 U. S. 800, 26 L. Ed. 532.

This is true in the case of national bank stock although the bank acquiesces in and records the transfer, since the liability is statutory and cannot be waived by the officers of the bank. *Aldrich v. Bingham*, 131 Fed. 363.

A transfer of his stock by a stockholder in a national bank to his minor children, when, although perhaps not supposing the bank to be actually insolvent, he had reason to suspect its unsoundness, and with the intent that, if all came out well, the children should have the stock, does not relieve him from liability to creditors. *Foster v. Lincoln's Ex'r*, 79 Fed. 170.

As to the liability of infants, see § 4187, *supra*.

³ **United States.** In re Grand Rapids Furniture Agency, 209 Fed. 483; *Glenn v. Scott*, 28 Fed. 804; *Johnson v. Laffin*, 5 Dill. 65, Fed. Cas. No. 7,393,

trustee for it,⁴ or to another corporation which has no power to take and hold the stock.⁵ But a stockholder is relieved from liability by surrendering his stock to the corporation, although the statute forbids it to purchase its own stock, where such stock is subsequently re-issued and sold to other persons.⁶ And a subscriber who causes the stock to be issued to a third person as trustee to be sold by him as treasury stock for the benefit of the company is entitled to credit on his subscription for the amount received by the corporation as a result of such sales.⁷

A husband does not remain liable as a stockholder after a transfer to his wife, if the transfer is made in good faith, and a married woman

aff'd 103 U. S. 800, 26 L. Ed. 532.

Georgia. *Walters v. Porter*, 3 Ga. App. 73, 59 S. E. 452.

Kansas. See *Abilene State Bank v. Strachan*, 89 Kan. 577, 46 L. R. A. (N. S.) 668, 132 Pac. 200.

Minnesota. *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069.

New York. *In re Reciprocity Bank*, 22 N. Y. 9.

Texas. *San Antonio Hardware Co. v. Sanger*, — Tex. Civ. App. —, 151 S. W. 1104.

A stockholder is not relieved from liability by a transfer of his stock to the corporation at a time when it is insolvent in consideration of a credit of a certain amount on a note which it is pledged to secure. *Fitzpatrick v. McGregor*, 133 Ga. 332, 25 L. R. A. (N. S.) 50, 65 S. E. 859.

A sale of stock to satisfy the unpaid subscription and a purchase thereof by the corporation at a time when it is insolvent is void and will not relieve the subscriber from liability. *Tiger Bros. v. Rogers Cotton Cleaner & Gin Co.*, 96 Ark. 1, 30 L. R. A. (N. S.) 694, Ann Cas. 1912 B 488, 130 S. W. 585.

A donation of bank stock to the bank by a stockholder, which is held by the bank at the date of its suspension, will not relieve the donor from liability, though made at a time when the bank was a solvent, going

concern, but he will be treated as an equitable owner for the purpose of enforcing such liability. *Barth v. Pock*, 51 Mont. 418, 155 Pac. 282.

Persons who organize a corporation and transact business in its name before the minimum capital stock has been subscribed cannot escape the resulting statutory liability to creditors by selling their stock to the corporation itself before the debts are incurred. Such an attempted sale is a device to evade liability, and is ineffective and void as to creditors. *Walters v. Porter*, 3 Ga. App. 73, 59 S. E. 452.

As to the right of a corporation to subscribe to its own stock, see § 548, *supra*.

As to the right of a corporation to acquire and holds its own stock generally, see § 1134 et seq., *supra*.

⁴*In re Grand Rapids Furniture Agency*, 209 Fed. 483.

⁵*Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, certiorari denied 196 U. S. 638, 49 L. Ed. 630 (mem. dec.).

As to the liability of other corporations, see § 4189, *supra*.

⁶*Sargent v. Waterbury*, 83 Ore. 159, 161 Pac. 443, rehearing denied 83 Ore. 159, 163 Pac. 416.

⁷*In re Grand Rapids Furniture Agency*, 209 Fed. 483.

is capable, in the particular jurisdiction, of assuming the liability of a stockholder.⁸

A person does not remain liable after a transfer of his stock because of the fact that the transferee was and is a nonresident, if the transfer was in good faith.⁹

§ 4204. — Transfers prohibited by statute. In some jurisdictions there are statutes expressly prohibiting transfers by stockholders of a corporation when it is insolvent, or in contemplation of its insolvency. It has been held that the purpose of such a provision is to prevent solvent stockholders from escaping their statutory liabilities to existing creditors of the corporation and their contractual liability to corporations not assenting to the transfer, and that it does not render a stockholder who makes an absolute bona fide sale of his stock while the corporation is a going concern liable to persons who subsequently become creditors of the corporation, although he makes the sale in the belief that the corporation will subsequently become insolvent, and for the purpose of avoiding liability.¹⁰ Under a statute providing that no person shall be liable as a stockholder "who has, in good faith and without any intent to evade his liability as a stockholder, transferred his stock, on the books of the corporation, when solvent," a transferrer of stock when the corporation is insolvent remains liable regardless of whether he knew, or had reason to know, of such insolvency or not.¹¹

It is also sometimes provided by statute that a stockholder shall be liable for all unpaid instalments on stock transferred by him for the purpose of defrauding creditors.¹²

§ 4205. — Registration of transfers. If there is no charter or statutory requirement that transfers of stock shall be registered on the books of the corporation, registration is not necessary either to relieve the transferrer from liability or to render the transferee liable.¹³ By the weight of authority, when there is a charter or

⁸ *Simmons v. Dent*, 16 Mo. App. 288.

As to the liability of married women, see § 4188, *supra*.

⁹ *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

¹⁰ *Sinclair v. Fuller*, 158 N. Y. 607, 53 N. E. 510, *aff'd* 9 N. Y. App. Div. 297, 41 N. Y. Supp. 193.

¹¹ *Persons v. Gardner*, 113 N. Y. App. Div. 597, 98 N. Y. Supp. 807, *aff'd* 188 N. Y. 571, 80 N. E. 1118.

¹² *McConey v. Belton Oil & Gas Co.*, 97 Minn. 190, 106 N. W. 900; *In re People's Livestock Ins. Co.*, 56 Minn. 130, 57 N. W. 468.

¹³ *Cutting v. Damerel*, 88 N. Y. 410; *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497.

This is true where the law does not make a transfer on the books a necessary requisite to title. *Dain Mfg. Co. v. Trumbull Seed Co.*, 95 Mo. App. 144,

statutory provision that transfers must be made or registered on the books of the corporation, an unregistered transfer, although it may be good as between the parties, is not good as against creditors, and will not relieve the transferrer from his statutory liability, or from liability for the amount remaining unpaid on his stock.¹⁴ This

69 S. W. 951, followed in *Standard Rope & Twine Co. v. Trumbull Seed Co.*, 95 Mo. App. 147, 68 S. W. 1115.

As to the necessity for registering transfers generally, see § 3789 et seq., supra.

14 United States. *Rankin v. Fidelity Insurance, Trust & Safe Deposit Co.*, 189 U. S. 242, 47 L. Ed. 792, aff'g 108 Fed. 475; *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536; *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, aff'g 73 Minn. 170, 75 N. W. 1041; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864; *Whitney v. Butler*, 118 U. S. 655, 30 L. Ed. 266; *Williams v. Vreeland*, 244 Fed. 346; *Brown v. Allebach*, 166 Fed. 488; *Kenyon v. Fowler*, 155 Fed. 107, aff'd 215 U. S. 593, 54 L. Ed. 341 (mem. dec.); *McDonald v. Dewey*, 134 Fed. 528, judgment aff'd 202 U. S. 510, 50 L. Ed. 1128, 6 L. R. A. 419; *Knickerbocker Trust Co. v. Myers*, 133 Fed. 764, judgment aff'd 139 Fed. 111, 1 L. R. A. (N. S.) 1171; *Schofield v. Twining*, 127 Fed. 486; *Giesen v. London & N. W. Mortg. Co.*, 102 Fed. 584; *Borland v. Haven*, 37 Fed. 394; *Irons v. Manufacturers' Nat. Bank*, 27 Fed. 591; *Johnson v. Laffin*, 5 Dill. 65, Fed. Cas. No. 7,393, aff'd 103 U. S. 800, 26 L. Ed. 532. See also *Blackburn v. Irvine*, 205 Fed. 217, aff'g 198 Fed. 360.

California. *Abbott v. Jack*, 136 Cal. 510, 69 Pac. 257.

Connecticut. *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905. See *Davis v. First Baptist Society*, 44 Conn. 582.

Georgia. *Freeman v. Jackson*, 146 Ga. 55, 90 S. E. 467.

Illinois. *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273; *Sherwood v. Illinois Trust & Savings Bank*, 195 Ill. 112, 88 Am. St. Rep. 183, 62 N. E. 835; *Kelly v. Killian*, 133 Ill. App. 102.

Kansas. *Abilene State Bank v. Strachan*, 89 Kan. 577, 46 L. R. A. (N. S.) 668, 132 Pac. 200; *Faulkner v. Bank of Topeka*, 77 Kan. 385, 94 Pac. 153; *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, on rehearing 76 Kan. 736, 93 Pac. 173, judgment aff'd 215 U. S. 373, 54 L. Ed. 240; *Pine v. Western Nat. Bank*, 63 Kan. 462, 65 Pac. 690; *Plumb v. Bank of Enterprise*, 48 Kan. 484, 29 Pac. 699; *Topeka Mfg. Co. v. Hale*, 39 Kan. 23, 17 Pac. 601.

Kentucky. *Robinson-Pettit Co. v. Sapp*, 160 Ky. 445, 169 S. W. 869; *Bracken v. Nicol*, 124 Ky. 628, 30 Ky. L. Rep. 864, 11 L. R. A. (N. S.) 818, 14 Ann. Cas. 896, 99 S. W. 920.

Maine. *Barron v. Burrill*, 86 Me. 72, 29 Atl. 938; *Dane v. Young*, 61 Me. 160; *Fowler v. Ludwig*, 34 Me. 455.

Maryland. See *Kerr v. Urie*, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493, 37 Atl. 789; *Magruder v. Colston*, 44 Md. 349, 22 Am. Rep. 47.

Massachusetts. *Coyle v. Taunton Safe Deposit & Trust Co.*, 216 Mass. 156, 103 N. E. 288; *Johnson v. Somerville Dyeing & Bleaching Co.*, 15 Gray 216.

Minnesota. *Hunt v. Seeger*, 91 Minn. 264, 98 N. W. 91; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721.

Mississippi. *Kruger v. Hanover Nat. Bank*, 72 Miss. 462, 16 So. 351.

Missouri. *Pullis v. Francisceus*, 43

is equally true although the corporation itself is the transferee.¹⁵ And it has also been held to be true although registration is prevented by the fact that the transfer books are closed.¹⁶ "This doctrine is based on the theory that one who permits his name to appear and remain on the books of a corporation as a shareholder is estopped, as

Mo. 469; *McClaren v. Franciscus*, 43 Mo. 452; *A. Wight Co. v. Steinke-meyer*, 6 Mo. App. 574.

New Jersey. *Hood v. McNaughton*, 54 N. J. L. 425, 24 Atl. 497.

New York. *Shellington v. Howland*, 53 N. Y. 371; *Richards v. Robin*, 178 App. Div. 535, 165 N. Y. Supp. 780; *Richards v. Robin*, 175 App. Div. 296, 162 N. Y. Supp. 12; *Van Tuyl v. Robin*, 160 App. Div. 41, 145 N. Y. Supp. 121, rev'g 80 Misc. 360, 142 N. Y. Supp. 535, judgment aff'd 211 N. Y. 540, 105 N. E. 1101; *Wheeler v. Werner*, 140 App. Div. 695, 125 N. Y. Supp. 637; *Powers v. Knapp*, 71 Hun 371, 25 N. Y. Supp. 19, 158 N. Y. 733, 53 N. E. 1131; *Cutting v. Damerel*, 23 Hun 339, rev'd 88 N. Y. 410; *Richards v. Schwab*, 101 Misc. 128, 167 N. Y. Supp. 535; *Mahoney v. Bernhard*, 27 Misc. 339, 58 N. Y. Supp. 748, aff'd 45 App. Div. 499, 63 N. Y. Supp. 642, 169 N. Y. 589, 62 N. E. 1097; *Richardson v. Abendroth*, 43 Barb. 162; *Worrall v. Judson*, 5 Barb. 210.

Ohio. *Herrick v. Wardwell*, 58 Ohio St. 294, 50 N. E. 903; *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637.

Oregon. *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320.

Pennsylvania. *Kirschler v. Wainwright*, 255 Pa. 525, L. R. A. 1917 E 393, 100 Atl. 484; *Cook v. Carpenter*, 212 Pa. 177, 61 Atl. 804; *Burt v. Real Estate Exchange*, 175 Pa. St. 619, 52 Am. St. Rep. 858, 34 Atl. 923; *Bell's Appeal*, 115 Pa. St. 88, 2 Am. St. Rep. 572, 8 Atl. 177.

South Carolina. *Man v. Boykin*, 79 S. C. 1, 128 Am. St. Rep. 830, 60 S. E. 17; *White v. Commercial & Farmers'*

Bank, 66 S. C. 491, 97 Am. St. Rep. 803, 45 S. E. 94; *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

Texas. See *Rich v. Park*, — Tex. Civ. App. —, 177 S. W. 184.

Washington. *Walton Lumber Co. v. Commonwealth Lumber Co.*, 95 Wash. 295, 163 Pac. 762.

England. As to the rule in England see *Johnson v. Laffin*, 5 Dill. 65, Fed. Cas. No. 7,393, aff'd 103 U. S. 800, 26 L. Ed. 532.

As to the necessity for registering transfers generally, see § 3789 et seq., supra.

That unregistered transfers are good as between the parties, see § 3794 et seq., supra.

¹⁵ As where bank stock is transferred to the bank in payment of an existing debt. *Abilene State Bank v. Strachan*, 89 Kan. 577, 46 L. R. A. (N. S.) 668, 132 Pac. 200.

¹⁶ *Cook v. Carpenter*, 212 Pa. 177, 61 Atl. 804.

The act under which a corporation was formed made shares transferable upon the corporate books, subject to provisions of by-laws. By the terms of the by-laws no transfer could be made while the books were closed. At a time when the books were closed the stock of a stockholder was sold at public auction and transfer could not be effected to the purchaser. In the meantime the corporation became insolvent. The court refused to release the member whose stock was so sold from liability. "It is argued by appellant," said the court, "that while this by-law may prevent the issue of a new certificate to the purchaser as

between himself and the creditors of the concern, to deny that he is a shareholder.”¹⁷ Even under this rule, shares belonging to the estate of a decedent need not be transferred on the books of the corporation to the executor or administrator, in order to establish liability for corporate debts against the estate.¹⁸

Some few courts have held that provisions for the registration of transfers on the corporate books are not intended for the protection of creditors of the corporation, and hence that the transferrer will not continue liable to such creditors merely because the transfer is not so recorded.¹⁹ In support of this rule as applied to unpaid subscriptions it has been said that “a creditor of the corporation is fully protected as to any unpaid balance due upon subscriptions, whether there has been a formal transfer or not, as the transferee would be liable and answerable if solvent, and if insolvent and the corporation was insolvent at the time of the transfer the transferrer would be

evidence of his title, such certificate is not an indispensable requirement to the change of ownership of the stock, and the corresponding rearrangement of rights between the seller and the buyer. However this may be as between the parties, it does not reach the question here which is between the stockholders of record on the company's books and the company's creditors. The insolvency of the company fixed the rights of the creditors, and the company's books are not only recognized in all the cases as the best evidence of the responsible ownership of the stock at that time but the tendency is to treat them as conclusive on that point. If the sale and the order to the company to make the transfer had been given while the books were open, we do not say that the mere neglect or even refusal of the company to make the actual entry would have been effective to prevent the release of the appellant. * * * The principle of the decisions is that the transfer must be complete and in accordance with the by-laws of the corporation to fix the liability of the transferee and re-

lease the transferrer. To begin the recognition of irregular or incomplete transfers would be to open the door to contests over colorable or disputed facts and subject the rights of creditors to endless litigation.” *Cook v. Carpenter*, 212 Pa. 177, 61 Atl. 804.

¹⁷ *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320.

That a person is estopped under such circumstances, see § 4184, *supra*.

¹⁸ *Gianella v. Bigelow*, 96 Wis. 185, 71 N. W. 111.

¹⁹ *Hall & Farley v. Alabama Terminal & Improvement Co.*, 173 Ala. 398, 56 So. 235; *Henderson v. Mayfield Woolen Mills*, 153 Ala. 625, 45 So. 211.

In *Dain Mfg. Co. v. Trumbull Seed Co.*, 95 Mo. App. 144, 69 S. W. 951, and *Standard Rope & Twine Co. v. Trumbull Seed Co.*, 95 Mo. App. 147, 68 S. W. 1115, it was held that the transferrer was not liable although there had been no transfer on the books, on the ground that the statute did not make a transfer on the books a necessary requisite to title. But see dictum to the contrary in *McClaren v. Franciscus*, 43 Mo. 452.

liable, whether the transfer was formally made and registered or not." 20

According to the weight of authority, the transferrer is relieved from liability where he has done all that could be reasonably required of him to procure a transfer on the books, although the transfer is not in fact registered, by reason of the fault or neglect of the corporate officers.²¹ But this rule will not operate to relieve from liability a transferrer who has delivered the stock to an officer of the corpora-

²⁰ *Henderson v. Mayfield Woolen Mills*, 153 Ala. 625, 45 So. 211.

²¹ *United States*. *Earle v. Carson*, 188 U. S. 42, 47 L. Ed. 373, aff'g 107 Fed. 639, 60 L. R. A. 266; *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, aff'g 73 Minn. 170, 75 N. W. 1041; *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864; *Whitney v. Butler*, 118 U. S. 655, 30 L. Ed. 266 (under the National Bank Act); *McDonald v. Dewey*, 134 Fed. 528, judgment modified 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419; *Earle v. Coyle*, 97 Fed. 410, aff'g 95 Fed. 99. See also *Aspey v. Kimball*, 221 U. S. 514, 55 L. Ed. 834, aff'g 164 Fed. 830, and 199 Mass. 65, 85 N. E. 91; *Blackburn v. Irvine*, 205 Fed. 217, aff'g 198 Fed. 360; *Schofield v. Twining*, 127 Fed. 486; *Young v. McKay*, 50 Fed. 394; *Hayes v. Shoemaker*, 39 Fed. 319; *Johnson v. Laffin*, 5 Dill. 65, Fed. Cas. No. 7,393, aff'd 103 U. S. 800, 26 L. Ed. 532.

Arkansas. *Bank of Midland v. Harris*, 114 Ark. 344, Ann. Cas. 1916 B 1255, 170 S. W. 67; *Warren v. Nix*, 97 Ark. 374, 135 S. W. 896.

Connecticut. See *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905.

Georgia. *Freeman v. Jackson*, 146 Ga. 55, 90 S. E. 467; *Jackson v. Freeman*, 20 Ga. App. 767, 93 S. E. 284.

Illinois. See *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

Kansas. See *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, 173; *Pine v. Western Nat. Bank*, 63 Kan. 462, 65 Pac. 690; *Plumb*

v. Bank of Enterprise, 48 Kan. 484, 29 Pac. 699.

Kentucky. *Weakley v. McClarty*, 136 Ky. 837, 136 Am. St. Rep. 279, 125 S. W. 265; *Bracken v. Nicol*, 124 Ky. 628, 30 Ky. L. Rep. 864, 11 L. R. A. (N. S.) 818, 14 Ann. Cas. 896, 99 S. W. 920.

Michigan. See *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

Minnesota. *Hunt v. Seeger*, 91 Minn. 264, 98 N. W. 91. See also *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721.

New York. *Richards v. Robin*, 178 App. Div. 535, 165 N. Y. Supp. 780. See also *Chemical Nat. Bank v. Colwell*, 132 N. Y. 250, 30 N. E. 644, rev'g 16 Daly 28; *Richards v. Schwab*, 101 Misc. 128, 167 N. Y. Supp. 535.

Oregon. See *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320.

Tennessee. *Cox v. Elmendorf*, 97 Tenn. 518, 37 S. W. 387.

Washington. See *Walton Lumber Co. v. Commonwealth Lumber Co.*, 95 Wash. 295, 163 Pac. 762.

This is equally true, although the transferrer is a director of the corporation. *Bracken v. Nicol*, 124 Ky. 628, 30 Ky. L. Rep. 864, 11 L. R. A. (N. S.) 818, 14 Ann. Cas. 896, 99 S. W. 920.

"All that can be required of the assigning stockholder is the absence of any reason to doubt the good faith or intention of the bank officer, who promises to enter the transfer." *Hunt v. Seeger*, 91 Minn. 264, 98 N. W. 91.

tion as a vendee, and not for the purpose of having the transfer registered.²² Nor will it relieve the transferrer where the corporate officers are justified in refusing to register the transfer, as where the stock has never been delivered as between the parties;²³ or the transferee has never accepted or assented to the transfer.²⁴ In some jurisdictions it is held that there must be an actual transfer on the cor-

It is sufficient if the transferrer of bank stock delivers it to the cashier of the bank, properly indorsed, with the understanding, express or implied, that the latter will do what is necessary to effectuate a legal transfer on the books. An express direction to the officer to register the transfer need not be shown if it appears that he knew that such was the intention and understanding. *Weakley v. McClarty*, 136 Ky. 837, 136 Am. St. Rep. 279, 125 S. W. 265.

So he is relieved from liability where he asks the manager of the bank to whom he has sold the stock whether it has been transferred on the books and is informed by him that it has been. *Richards v. Robin*, 178 N. Y. App. Div. 535, 165 N. Y. Supp. 780.

Under such circumstances the person from whom the transferrer purchased the stock, and in whose name it still stands on the books is released. *Richards v. Robin*, 178 N. Y. App. Div. 535, 165 N. Y. Supp. 780.

The transferrer is not relieved from liability because the secretary of the corporation agrees to transfer the stock when it is delivered to him, where it is never so delivered. *Richards v. Schwab*, 101 N. Y. Misc. 128, 167 N. Y. Supp. 535.

In *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637, the transferrer was held liable where the transfer was entered in a small book at the office of the corporation, and it was then understood that the secretary would enter it in the stock book, which was at his

house, but he neglected to do so.

As to what constitutes a waiver of a notice of withdrawal from an unincorporated joint stock company or voluntary association, and of a request to transfer the withdrawing member's stock on the books, see *Bradford v. National Benefit Ass'n*, 26 App. Cas. (D. C.) 268.

See also § 3810, *supra*.

As to the effect of a failure or refusal to register transfers generally, see § 3809, *supra*.

²² *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864; *Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320.

One who sold stock to the cashier of a national bank and delivered it to him with a blank assignment, and told him to transfer it on the books was held to be liable where he did nothing further to procure a transfer and no transfer was made, and the cashier stated that his wife might want the stock. *Freeman v. Jackson*, 146 Ga. 55, 90 S. E. 467.

On a second appeal to the court of appeals in this case it was held that the evidence was sufficient to remove the uncertainty as to the purchaser referred to in the opinion on the first appeal, and to show that the seller had done all that he could have done to procure a transfer, and hence that he was relieved from liability. *Jackson v. Freeman*, 20 Ga. App. 767, 93 S. E. 284.

²³ *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905.

²⁴ *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 56 L. R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057.

porate books to relieve the transferrer from liability, and that it is not sufficient that he has done all that a careful and prudent man could do to procure such a transfer, since he could have compelled the corporate officers to make it by process of law.²⁵

There is some authority for saying that, when a transfer of stock is not registered on the books of the corporation, the transferee cannot be held liable;²⁶ but the weight of authority is to the contrary,²⁷ especially where the transferrer is bankrupt, and the transferee, who is the real owner of the stock, fails to have the transfer registered for

²⁵ *Man v. Boykin*, 79 S. C. 1, 128 Am. St. Rep. 830, 60 S. E. 17; *White v. Commercial & Farmers' Bank*, 66 S. C. 491, 97 Am. St. Rep. 803, 45 S. E. 94. See also *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637.

²⁶ *Marlbrough Mfg. Co. v. Smith*, 2 Conn. 579; *Topeka Mfg. Co. v. Hale*, 39 Kan. 23, 17 Pac. 601. See also *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280; *Branson v. Oregonian Ry. Co.*, 10 Ore. 278; *Cook v. Carpenter*, 212 Pa. 177, 61 Atl. 804; *Cleveland v. Burnham*, 64 Wis. 347, 25 N. W. 407.

A purchaser of stock is not liable under the Minnesota statute, where the stock has never been registered in his name, and he has never acted or held himself out as a stockholder, and has in no way interfered with the liability of his vendors. *Hamilton v. Loeb*, 186 Fed. 7, aff'g 179 Fed. 728, certiorari denied 223 U. S. 720, 56 L. Ed. 629 (mem. dec.).

²⁷ *White v. G. W. Marquardt & Sons*, 105 Iowa 145, 74 N. W. 930; *Robinson-Pettit Co. v. Sapp*, 160 Ky. 445, 169 S. W. 869; *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696; *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585; *McDowall v. Sheehan*, 129 N. Y. 200, 29 N. E. 299; *Shellington v. Howland*, 53 N. Y. 371; *Richards v. Robin*, 178 N. Y. App. Div. 535, 165 N. Y. Supp. 780; *Van Tuyl v. Robin*, 160 N. Y. App. Div. 41, 145 N. Y. Supp. 121, rev'g 80 N.

Y. Misc. 360, 142 N. Y. Supp. 535, judgment aff'd 211 N. Y. 540, 105 N. E. 1101; *Wheeler v. Werner*, 140 N. Y. App. Div. 695, 125 N. Y. Supp. 637; *Mahoney v. Bernhard*, 45 N. Y. App. Div. 499, 63 N. Y. Supp. 642, aff'g 27 N. Y. Misc. 339, 58 N. Y. Supp. 748, judgment aff'd 169 N. Y. 589, 62 N. E. 1097.

To allow the transferee to escape liability under such circumstances "would be to allow the real stockholder to profit by his own wrong, and by his failure to do what he ought to have done, to avoid the liability put upon him by the statute." *Robinson-Pettit Co. v. Sapp*, 160 Ky. 445, 169 S. W. 869.

A transferee of national bank stock to whom the bank has issued a stock certificate is liable although the stock has never been transferred to him on the corporate books. *Laing v. Burley*, 101 Ill. 591.

Where the purchaser of stock in a bank deposited it with the bank as collateral for a loan, with which the stock was purchased, but on repayment of the loan, the bank having suspended, refused to take the stock, it was held that he was the owner of the stock, and individually liable, notwithstanding the stock had never been transferred to him on the books of the bank. *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

See also § 4185, *supra*.

the express purpose of avoiding the liability;²⁸ or where the transferee takes the stock with knowledge that the transferrer has agreed not to offer it for transfer on the books for a certain length of time.²⁹ It is sometimes expressly provided by the charter, however, that only the registered owner shall be liable.³⁰

Where both the transferrer and the transferee are liable, creditors may elect which they will hold, although, of course, they are entitled to but one satisfaction of the liability.³¹

Since an unregistered transfer is good as between the parties,³² the transferrer has a right to recover from the transferee any amount he is compelled to pay by reason of his name appearing on the books of the corporation after the transfer has been made,³³ unless prevented by some special agreement between them.³⁴

A person cannot be made liable as a stockholder by a transfer of stock to him on the corporate books without his consent, unless after acquiring knowledge of the facts, he acquiesces therein.³⁵

§ 4206. — Recording transfers in public office. It has been held that the Kansas statute providing that as soon as a transfer is shown on the books of the corporation the president and secretary shall file with the secretary of state a statement of such change of ownership, and that no transfer of stock shall be valid or binding until such statement is so made, imposes upon those who owned stock at the time of its enactment and afterwards sold it, the duty, in order to relieve themselves of liability for debts of the company, of procuring a record thereof to be made in the office of the secretary of state; and

²⁸ Robinson-Pettit Co. v. Sapp, 160 Ky. 445, 169 S. W. 869.

²⁹ Gordon v. Cummings, 78 Wash. 515, 139 Pac. 489.

³⁰ Brown v. Allebach, 166 Fed. 488; Brown v. Artman, 166 Fed. 485.

Such a provision does not relieve from liability the real owner of stock which is registered in the name of another. Brown v. Artman, 166 Fed. 485.

³¹ See § 4185, supra.

³² See § 3794, supra.

³³ Illinois. Kellogg v. Stockwell, 75 Ill. 68.

Kentucky. Robinson-Pettit Co. v. Sapp, 160 Ky. 445, 169 S. W. 869.

Louisiana. Gordon v. Parker, 10

La. 56; Clinton & P. H. R. Co. v. Eason, 14 La. Ann. 816.

Maryland. Brinkley v. Hambleton, 67 Md. 169, 8 Atl. 904; Hutzler v. Lord, 64 Md. 534, 3 Atl. 891.

New York. Johnson v. Underhill, 52 N. Y. 203.

Ohio. Harpold v. Stobart, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637.

South Carolina. Man v. Boykin, 79 S. C. 1, 128 Am. St. Rep. 830, 60 S. E. 17.

See also § 3797, supra.

³⁴ Treadway v. Johnson, 33 Mo. App. 122.

³⁵ See § 4184, supra.

that, although one who sells stock under such circumstances causes a transfer thereof to be duly entered on the books of the company, thereby charging the corporate officers with a duty under the statute to cause the public record to be made, he remains liable if it is not made, in the absence of a showing that he took any steps to compel or urge the designated officers to make it, or even requested or demanded them to perform their duty in the premises.³⁶ As so construed the statute is not invalid as to persons owning stock at the time of its enactment as impairing the obligation of the contract resulting from such ownership, since it imposes no restraint upon the transfer of the stock, but relates only to the means by which transfers may be accomplished and the manner in which they may be evidenced, and is essentially a matter of method or procedure rather than one of ultimate substantial rights.³⁷

In Illinois, on the other hand, it has been held that the record by which it is determined who are stockholders for the purpose of enforcing a statutory liability is the record of the corporation itself, rather than the record of stockholders required to be kept in office of the recorder, and hence that a transferee of stock cannot escape liability because the transfer was not recorded in the recorder's office during the time he held it.³⁸ And in Arkansas it is held that it is not necessary, in order to relieve the transferrer from liability, that a certificate of the transfer be deposited in the office of the county clerk, as required by the statute.³⁹

§ 4207. — — Apportionment and distribution where both transferrer and transferee are liable. Where both the transferrer and the

³⁶ *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, on rehearing 76 Kan. 736, 93 Pac. 173, judgment aff'd 215 U. S. 373, 54 L. Ed. 240.

³⁷ *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, on rehearing 76 Kan. 736, 93 Pac. 173, judgment aff'd 215 U. S. 373, 54 L. Ed. 240.

³⁸ *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

"The record by which it is determined who are the stockholders of the bank is the record of the bank itself. The record in the recorder's office is a convenient method of giv-

ing notice to the public, and the law allows a period of ten days within which the transfer on the records of the bank may be filed for record in the recorder's office. The stockholders are held liable, not because of actual notice to any particular creditor that any particular person is a stockholder, but because the law imposes the liability, and the record in the recorder's office is for the convenience of persons dealing with the bank in ascertaining who are the stockholders." *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273.

³⁹ *Warren v. Nix*, 97 Ark. 374, 135 S. W. 896. See also § 3787, supra.

transferee are liable, some courts have held that creditors are entitled to recover severally against each, as though the liability were wholly his own, although if the liability is limited, they can have but one satisfaction.⁴⁰ So, under a provision that the amount of the liability may be "recovered of the stockholders who were such when the debt was contracted or the loss or damage sustained, or of any subsequent stockholder," it has been held that both the vendor of stock who owned it when the debt sought to be enforced against the stockholder was contracted and his vendee may be joined as defendants in a single suit, although there can be but one recovery.⁴¹

In some of the states where the transferrer is not relieved from liability by the transfer, it is held that his liability is secondary only, and that the owner of the stock at the time of the commencement of the suit or action to enforce the liability is primarily liable.⁴² Where this rule obtains, some courts have held that the liability of the present stockholders must first be exhausted before recourse is had against a former stockholder who has in good faith transferred his stock.⁴³ In other jurisdictions, however, it has been held that while, when the liability of all the stockholders is determined in a single suit, to which both the transferrers and transferees are parties, and judgment is entered against them all, the liability of the transferrers cannot be enforced until an unsuccessful effort has been made to collect from the transferees,⁴⁴ a person who has transferred his stock

⁴⁰ *Chatham Bank of Savannah v. Brobston*, 99 Ga. 801, 27 S. E. 790.

⁴¹ *Mosler Safe Co. v. Guardian Trust Co.*, 208 N. Y. 524, 101 N. E. 786, modifying and aff'g judgment 153 N. Y. App. Div. 117, 138 N. Y. Supp. 298.

⁴² *Rogan v. Illinois Trust & Savings Bank*, 93 Ill. App. 39, aff'd 194 Ill. 600, 62 N. E. 834; *Way v. Mooers*, 135 Minn. 339, 160 N. W. 1014; *Tiffany v. Giesen*, 96 Minn. 488, 105 N. W. 901; *Willius v. Mann*, 91 Minn. 494, 98 N. W. 341, 867; *Markell v. Ray*, 75 Minn. 138, 77 N. W. 788; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11; *Security State Bank v. Gannon*, 39 S. D. 232, 163 N. W. 1040.

Under this rule, "where a stockholder in good faith transfers his stock to one who afterwards becomes insolvent and is insolvent at the time

of the decree, and a sufficient fund cannot be raised by assessment upon solvent existing stockholders to satisfy all creditors, the stockholder who has thus assigned his stock is liable." *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11.

⁴³ *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11.

⁴⁴ *Willius v. Mann*, 91 Minn. 494, 98 N. W. 341, 867. See also *Tiffany v. Giesen*, 96 Minn. 488, 105 N. W. 901.

Execution should not issue against the transferrer until his transferee fails to respond to execution against him for his liability for the same stock; and it is error to enter a judgment which permits the creditors to collect twice for the same block of stock, once from the transferee, and again from the transferrer. *Harper v.*

since the indebtedness was incurred may be held liable in an independent action, without making the transferee a party.⁴⁵

"The degree in which a transferor's liability is secondary depends not on the date of his transfer, but on the number of subsequent transfers of the same block of stock."⁴⁶ Hence "the liability of each transferor of a block of stock is secondary only to the liability of the succeeding holders of the same block of stock, and not * * * secondary to the liability of all subsequent transferors of other and different blocks of stock."⁴⁷ The liability of the transferor is "for such portion only of the corporate debts existing at the time of the transfer and remaining unpaid as will be equal to the proportion which the capital stock assigned bears to the entire capital stock held by solvent stockholders within the jurisdiction liable in respect to the same debts, to be ascertained at the time judgment is rendered."⁴⁸ But although he is only liable for his proportion of the corporate indebtedness existing at the time of the transfer, he is liable for that share, and is not relieved from such liability because this amount has already been collected from others reached before him in the order of liability adopted by the court.⁴⁹ Different transferors of different blocks of stock will necessarily contribute different amounts where old debts have been paid and new ones incurred in the meantime.⁵⁰

The liability of the transferor, like that of the present stockholder,

Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

"This is in harmony with the general equity rule that, where a creditor has a remedy against two funds for the payment of his debt, the one primarily and the other secondarily liable, he may be compelled to resort to the fund first liable for its payment, and to exhaust his remedy against it before resorting to the other." *Willius v. Mann*, 91 Minn. 494, 98 N. W. 341, 867.

⁴⁵ *Tiffany v. Giesen*, 96 Minn. 488, 105 N. W. 901.

If the transferor desires to have the transferee made a party, so that execution may issue against him in the first instance, he should make an application to the court for that purpose. *Tiffany v. Giesen*, 96 Minn. 488, 105 N. W. 901.

⁴⁶ *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069.

⁴⁷ *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069.

⁴⁸ *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11. And see to the same effect *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637.

⁴⁹ *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069.

⁵⁰ *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069.

For the purpose of forming the proportion by which to ascertain what part of the indebtedness existing at the time of the transfer he should pay, "the stock (or liability) of such present, solvent stockholders, and the stock (or liability) of such solvent, contributing transferors,

is only for the payment of the balance of the indebtedness after the corporate assets have been exhausted, and he is therefore entitled, as well as other stockholders to the benefit of dividends realized from such assets, which should be deducted from such indebtedness, and interest to the date of the judgment added to the balance.⁵¹

In some jurisdictions it is held that "the fund arising from assessments on solvent existing stockholders will be applied pro rata upon all the debts of the corporation, and the funds arising from an assessment upon a person who had so assigned his stock will be applied to the residue, if any, owing to those who were creditors at the time such stock was assigned."⁵² But in other jurisdictions the amounts collected from persons who have transferred their stock are put into the common fund, and distributed ratably among all the creditors.⁵³

If the transferor remains liable, the transferee is held to indemnify him on account of such liability.⁵⁴ And it has been held that as between themselves the loss should ordinarily fall upon the successive owners in the inverse order of their ownership in point of time.⁵⁵

§ 4208. — Evidence and burden of proof. Questions as to the admissibility and sufficiency of evidence to show who are stockholders have been considered in the chapter on subscriptions to stock;⁵⁶ and the rules there laid down are generally applicable where it is sought

whose transfers are subsequent to his, stand on the same footing; but the stock (or liability) of such prior, solvent, and contributing transferors does not, for the reason * * * that each contributes only on a part of such balance of indebtedness, and therefore only a corresponding part of the stock (or liability) of each should be taken into consideration. Then the part of such balance which the particular transferor should pay is to the whole of such balance as his stock (or liability) is to the stock (or liability) of such present stockholders, plus the stock (or liability) of such subsequent stockholders, and his own stock (or liability), plus a proportionate part of the stock (or liability) of each of such prior stockholders, corresponding to the proportionate part which the indebtedness on which he must contrib-

ute is of the indebtedness on which the transferor in question must contribute." *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069.

⁵¹ *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069.

⁵² *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11; *Wick Nat. Bank v. Union Nat. Bank*, 62 Ohio St. 446, 78 Am. St. Rep. 734, 57 N. E. 320.

⁵³ *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069.

⁵⁴ *Way v. Mooers*, 135 Minn. 339, 160 N. W. 1014; *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11.

That the transferor has a right to recover from the transferee any amount he is compelled to pay by reason of a failure to register the transfer, see § 4205, *supra*.

⁵⁵ *Chatham Bank of Savannah v. Brobston*, 99 Ga. 801, 27 S. E. 790.

⁵⁶ See § 569, *supra*.

to hold persons liable for the benefit of creditors, either for a balance due on their stock or for an additional statutory liability. As we have there seen, admissions of a party against his interest inscribed upon the books and signed by him are as competent and persuasive evidence against him as though they were written elsewhere. And subscription books or papers or receipts signed by a person are admissible to show that he is a subscriber, and are generally held to be prima facie evidence of that fact.⁵⁷ The circumstances covering and controlling the issuance of stock to a person are admissible upon the issue as to whether or not he is a stockholder, provided it is accompanied by other evidence showing that the circumstances of the transaction had been communicated to him.⁵⁸

A certified list of stockholders, required by the statute to be kept on file in the office of a public official, is competent evidence for the purpose of showing who are stockholders, and is prima facie evidence of that fact.⁵⁹ The charter, or articles or certificate of incorporation are prima facie evidence that the persons named therein were members of the corporation when it was formed.⁶⁰ And a certificate of incorporation showing that a certain person subscribed for a certain number of shares of a specified par value, and paid in a certain sum less than its par value, leaving the rest unpaid, makes a prima facie case of unpaid stock in the absence of any evidence to the contrary.⁶¹

In some jurisdictions it is held that the stock books and register of transfers which do not contain the signature of the alleged stockholder are not admissible to prove his membership in the corporation unless they are supported by other evidence;⁶² but that when such

⁵⁷ See § 569, supra. See also Hardee v. Tietjen, 140 Ga. 527, 79 S. E. 117.

⁵⁸ Hanson v. Sherman, 25 Cal. App. 169, 143 Pac. 73.

⁵⁹ See § 569, supra.

⁶⁰ See § 569, supra.

⁶¹ Grindle v. Stone, 78 Me. 176, 3 Atl. 183.

⁶² Arkansas. Steed v. Henry, 120 Ark. 583, 180 S. W. 508.

Connecticut. Fish v. Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

District of Columbia. National Exp. & Transp. Co. v. Morris, 15 App. Cas. 262.

Georgia. In Howard v. Glenn, 85

Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610, it is said that the books would not be admissible where the fact that the person sought to be charged is a stockholder is not otherwise shown, but in this case there was other evidence. In Thornton v. Lane, 11 Ga. 459, the defendant admitted that he owned a certain number of shares, and the transfer books were held to be admissible to show that he owned certain other shares and to be prima facie evidence of that fact. See also Robinson v. Bealle, 20 Ga. 275; Robinson v. Lane, 19 Ga. 337.

Kansas. Girard Life Insurance, Annuity & Trust Co. v. Loving, 71 Kan. 558, 81 Pac. 200; Hinsdale Sav. Bank

relationship is proved by other competent evidence they then become admissible to aid in determining when such relationship commenced, what if anything has been paid upon the shares, and the like,⁶³ although they are not conclusive evidence of those facts.⁶⁴ In other jurisdictions, however, it is held that the stock and transfer books of the corporation standing alone are competent evidence to show that a person whose name appears thereon is a stockholder, and that they are prima facie evidence of that fact so that a person whose name appears thereon has the burden of showing that he is not a stockholder. And in some states this is the rule by express provision of the statute.⁶⁵

v. New Hampshire Banking Co., 59 Kan. 716, 68 Am. St. Rep. 391, 54 Pac. 1051.

Missouri. Guilbert v. Kessinger, 173 Mo. App. 680, 160 S. W. 17.

New Hampshire. Haynes v. Brown, 36 N. H. 545. See also Wheeler v. Walker, 45 N. H. 355.

It has been held that this is true, notwithstanding a statute providing that one "in whose name shares of stock stand on the books of the company shall be deemed the owner thereof, as regards the company," as this only estops the company from denying that such a person is a stockholder. Carey v. Williams, 79 Fed. 906; National Exp. & Transp. Co. v. Morris, 15 App. Cas. (D. C.) 262.

As against one who denies his membership "such books are hearsay of the baldest kind." Hinsdale Sav. Bank v. New Hampshire Banking Co., 59 Kan. 716, 68 Am. St. Rep. 391, 54 Pac. 1051.

The rule that the books are evidence that a person whose name appears thereon is a stockholder is certainly contrary to the ordinary rules of evidence. "By those rules, and the rules of common sense and justice, what a man writes is evidence against him, but not evidence in his favor." Lord Brougham, in Bain v. Whitehaven & F. Junct. Ry. Co., 3 H. L. Cas. 1, 22, quoted with approval in Foote v. Anderson, 123 Fed. 659.

See also § 569, *supra*.

⁶³ **Arkansas.** Steed v. Henry, 120 Ark. 583, 180 S. W. 508.

Connecticut. Fish v. Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

Georgia. Howard v. Glenn, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610; Macon & A. R. Co. v. Vason, 57 Ga. 314 (which was an action by the corporation on a subscription); Robinson v. Lane, 19 Ga. 337.

Kansas. Girard Life Insurance, Annuity & Trust Co. v. Loving, 71 Kan. 558, 81 Pac. 200; Hinsdale Sav. Bank v. New Hampshire Banking Co., 59 Kan. 716, 68 Am. St. Rep. 391, 54 Pac. 1051.

Massachusetts. See Bears v. Mabie, 198 Mass. 451, 84 N. E. 1015.

Missouri. Guilbert, v. Kessinger, 173 Mo. App. 680, 160 S. W. 17.

"When his membership is shown by other and competent evidence, then the books may be introduced to explain acts done by the defendant, to show what those acts mean and the inevitable inference to be drawn from them when they are compared in point of time, similarity and purpose with the acts of the other stockholders." Guilbert v. Kessinger, 173 Mo. App. 680, 160 S. W. 17.

See also § 569, *supra*.

⁶⁴ Fish v. Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

⁶⁵ **Alabama.** Semple v. Glenn, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46.

This has been said to be the rule in two cases decided by the United

California. Civ. Code, § 322; Welch v. Gillelen, 147 Cal. 571, 82 Pac. 248; Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 303, 22 Pac. 665; Evans v. Bailey, 66 Cal. 112, 4 Pac. 1089; People v. Robinson, 64 Cal. 373, 1 Pac. 156; People v. Hill, 16 Cal. 113; Hanson v. Sherman, 143 Cal. App. 169, 143 Pac. 73. A list of names with the heading, "Notice sent to the following," written upon the fly leaf of the corporation's stock journal, is not an entry in the books of the corporation within the meaning of the code, and is not admissible to show that a person named therein was a stockholder. Hanson v. Sherman, 25 Cal. App. 169, 143 Pac. 73.

Colorado. Adams v. Clark, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642; Zang v. Wyant, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565.

Illinois. Sherwood v. Illinois Trust & Savings Bank, 195 Ill. 112, 88 Am. St. Rep. 183, 62 N. E. 835.

Kentucky. See Louisville & N. R. Co. v. Hart County, 116 Ky. 186, 77 S. W. 361, 75 S. W. 288.

Maine. Where no transfer from the original subscriber appears on the books of the corporation, his ownership may be presumed to continue. Barron v. Burrill, 86 Me. 72, 29 Atl. 938. Under the statutes in force in July 1841 the books of the corporation were conclusive as to who were stockholders. Stanley v. Stanley, 26 Me. 191.

Maryland. Weber v. Fickey, 52 Md. 500.

Michigan. May v. McQuillan, 129 Mich. 392, 89 N. W. 45; Tilden v. Young, 39 Mich. 58. See also Porter v. Marine Sav. Bank, 186 Mich. 355, 153 N. W. 19.

Minnesota. Bartlett v. Stephens,

137 Minn. 213, 163 N. W. 288; Lindeke v. Scott County Co-operative Co., 126 Minn. 464, 148 N. W. 459; Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606; Holland v. Duluth Iron Mining & Development Co., 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50; Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 21 L. R. A. 174, 55 N. W. 547.

New York. Chapman v. Porter, 69 N. Y. 276; Hoagland v. Bell, 36 Barb. 57. See also Glenn v. Garth, 133 N. Y. 18, 31 N. E. 344, 30 N. E. 649. The books of a foreign corporation are admissible under the express provisions of New York Code Civ. Proc. §§ 755, 756. Sigua Iron Co. v. Brown, 171 N. Y. 488, 64 N. E. 194, aff'g 58 App. Div. 436, 69 N. Y. Supp. 295, 33 Misc. 50, 68 N. Y. Supp. 141.

North Carolina. Glenn v. Orr, 96 N. C. 413, 2 S. E. 538.

Ohio. Marriott v. Columbus, S. & H. R. Co., 16 Ohio Dec. (N. P.) 135.

Pennsylvania. Cook v. Carpenter, 212 Pa. 177, 61 Atl. 804. See also Moore's Estate, 211 Pa. 338, 60 Atl. 987, where the controversy was between an individual and an estate as to which owned the stock.

Rhode Island. Congdon v. Winsor, 17 R. I. 236, 21 Atl. 540.

Virginia. Vanderwerken v. Glenn, 85 Va. 9, 6 S. E. 806; Lewis' Adm'r v. Glenn, 84 Va. 947, 6 S. E. 866. (In both of these cases, however, there was other evidence that the defendant was a stockholder.)

West Virginia. South Branch Ry. Co. v. Long's Adm'r, 43 W. Va. 131, 27 S. E. 297; Pittsburgh, W. & K. R. Co. v. Applegate & Son, 21 W. Va. 172. (In both of these cases the action was brought by the corporation, and in both there was other evidence that the defendant had subscribed for the stock.)

States Supreme Court.⁶⁶ But some of the lower federal courts have refused to be bound by the statements of the Supreme Court to this effect on the ground that they were mere dicta, and have held the books to be inadmissible.⁶⁷

England. *Bain v. Whitehaven & F. Junct. Ry. Co.*, 3 H. L. Cas. 1. See also *National Exp. & Transp. Co. v. Morris*, 15 App. Cas. (D. C.) 262, as to the English rule.

The identity of a stock book in the office of a bank, containing a list of stockholders and the number of shares held by each, may be proved by a clerk in the bank having knowledge that the book was kept for such purpose, though the entries therein were not made by him and he knows nothing about the accuracy of the book. *Simmons & Kell v. Freeman*, 146 Ga. 118, 90 S. E. 965.

The books of the corporation are the best evidence of the responsible ownership of the stock when the corporation becomes insolvent, and the tendency is to treat them as conclusive on that point. *Cook v. Carpenter*, 212 Pa. 177, 61 Atl. 804.

See also § 569, *supra*.

⁶⁶ *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936; *Turnbull v. Payson*, 95 U. S. 418, 421, 24 L. Ed. 437.

In *Alsop v. Conway*, 188 Fed. 568, certiorari denied 223 U. S. 720, 56 L. Ed. 629 (mem. dec.); *Taussig v. Glenn*, 51 Fed. 409, rev'g on other grounds 47 Fed. 472; *Liggett v. Glenn*, 51 Fed. 381, rev'g on other grounds 47 Fed. 472; *Glenn v. Liggett*, 47 Fed. 472; and *Glenn v. Springs*, 26 Fed. 494, the books were held to be admissible, and to be prima facie evidence, on the authority of *Turnbull v. Payson*, *supra*. See also *Earle v. Carson*, 188 U. S. 42, 47 L. Ed. 373.

⁶⁷ *Harrison v. Remington Paper Co.*, 140 Fed. 385, 2 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, certiorari denied 199 U. S. 607, 50 L. Ed. 331 (mem. dec.);

Foote v. Anderson, 123 Fed. 659; *Sigua Iron Co. v. Greene*, 104 Fed. 854; *Id.*, 88 Fed. 207; *Carey v. Williams*, 79 Fed. 906.

In *Foote v. Anderson*, 123 Fed. 659, it is said: "Sound reasoning, an observance of the fundamental principles of evidence, and the inherent justice of such a course necessitate the conclusion that the entries of ownership of stock made by the bank in its own books, without any evidence of knowledge thereof on the part of the decedent, or any assertion or act of ownership on his part, are not evidence of ownership by him." In reference to the statement in *Turnbull v. Payson* that the books are admissible and are prima facie evidence, the court says: "An examination of that case shows that that question was not there involved. The entry in the stockbook was supported by proof that the shareholder paid 20 per cent on his stock, and a receipt signed by him for a dividend thereon was given in evidence. It was in reference to all these facts collectively the language quoted was used, for it was preceded by the statement that, 'taken as a whole, it is clear that the evidence offered was amply sufficient to warrant the jury in finding that the defendant was a stockholder as alleged,' and followed by the expression that, 'satisfactory proof having been exhibited that the company was duly incorporated and organized, it follows that the receipt of dividend upon the shares standing upon the books of the company in the name of the defendant, when taken in connection with the other evidence introduced by plaintiff, is conclusive

In the absence of a statutory provision making the books conclusive, they are at most merely *prima facie* evidence,⁶⁸ and one whose name appears there as a stockholder may always show that he never owned or subscribed for any stock, or authorized the issuance of any to him by the corporation, and that such entry was made without his knowl-

to show that the assignment of error in that regard should be overruled.' But not only was the question of the effect to be given the stockbook, when standing alone, not before that court, but, if the language used is regarded as decisive of that question, the authorities cited do not sustain it.'" After reviewing the authorities referred to, the court goes on to say: "It is true that the language noted above from *Turnbull v. Payson* was quoted in extenso in *Finn v. Brown*, 142 U. S. 56, 12 Sup. Ct. 136, 35 L. Ed. 936, but the question of the effect of the books, standing alone, was not involved in that case. There the entries in the books were supplemented by the fact that Finn was acting as cashier, and as such he was required by statute to keep a list of shareholders, and therefore he was presumed conclusively to know that such list named him as a shareholder, and that he had qualified as director, which he could not do without making an affidavit that he was a shareholder.'"

⁶⁸ **United States.** *Earle v. Carson*, 188 U. S. 42, 47 L. Ed. 373; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384.

California. *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248; *Mudgett v. Horrell*, 33 Cal. 25.

Georgia. *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610.

Michigan. *May v. McQuillan*, 129 Mich. 392, 89 N. W. 45. See also *Porter v. Marine Sav. Bank*, 186 Mich. 355, 153 N. W. 19.

Minnesota. *Bartlett v. Stephens*, 137 Minn. 213, 163 N. W. 288; *Randall Printing Co. v. Sanitas Mineral*

Water Co., 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606.

New York. *Glenn v. Garth*, 133 N. Y. 18, 31 N. E. 344, 30 N. E. 649.

Ohio. *Marriott v. Columbus, S. & H. R. Co.*, 16 Ohio Dec. (N. P.) 135.

Pennsylvania. See *Moore's Estate*, 211 Pa. 338, 60 Atl. 987, where the controversy was between an individual and an estate as to which owned the stock.

West Virginia. *Pittsburgh, W. & K. R. Co. v. Applegate & Son*, 21 W. Va. 172.

There is nothing in the California statute "which makes the entry on the books conclusive on the subject. It simply says that one shall be deemed a stockholder whose name appears on the books as such. While this language is quite broad, it must be interpreted in harmony with justice and in accordance with the rule which universally applies as to the effect which is to be given to entries in corporate books purporting to show who are the stockholders of a corporation. When the section declares that one shall be liable as a stockholder who appears upon the books to be such it means one who knowingly or voluntarily permits his name to appear thereon as a stockholder. When it so appears the presumption is that he occupies the relation to the corporation which the books indicate. The entry is, however, not conclusive, but presumptive merely. This is the general rule, and there is nothing in the terms of our section to take this case out of it.'" *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248.

See also § 569, *supra*.

edge or consent, unless, after knowledge of the unauthorized entry, he has ratified it;⁶⁹ or that he has made a bona fide sale of his stock and has done all that could be reasonably required of him to procure its transfer to the purchaser on the books.⁷⁰ Under some statutes, however, the books are made conclusive in so far as the rights of creditors are concerned.⁷¹ And it is sometimes provided that the holders of the shares of record on the books of the company at the time when a call or assessment is made and they only, shall be liable for the same.⁷² The books are also sometimes made conclusive on the question of the right to vote,⁷³ or eligibility to corporate office.⁷⁴

Entries in other books than the stock book or transfer book are not admissible to show that one is a stockholder.⁷⁵

The books of a corporation are prima facie evidence of the amount of a subscription, where the fact of subscription is not contested.⁷⁶ The unsupported statement in the minutes of the secretary will be deemed secondary to the testimony of a stockholder as to the amount of stock he held on a particular occasion. So also, where by statute the stock and transfer book are made the source from which is to be ascertained the amount of stock outstanding and by whom held, the record in the stock and transfer book will take precedence over a recital in the corporate minutes.⁷⁷

§ 4209. — Estoppel. The estoppel of persons to deny the fact or validity of alleged subscriptions to stock, or that they are stockholders, and liable as such, has been considered at some length in the chapter on subscriptions to capital stock,⁷⁸ and what is said there applies very generally when it is sought to hold a person under a statute imposing individual liability upon stockholders for the benefit of corporate creditors. Persons who have acted as stockholders, or who have held shares of stock, or who have knowingly allowed themselves to appear and be held out as stockholders, will be estopped, as against creditors seeking to enforce a statutory liability for corporate debts, to deny

⁶⁹ See § 4184, *supra*.

⁷⁰ See § 4205, *supra*.

⁷¹ This was true in Maine under the statutes in force in July 1841. *Stanley v. Stanley*, 26 Me. 191.

⁷² Such a provision in a certificate of incorporation was held to be valid in *Brown v. Morton*, 71 N. J. L. 26, 58 Atl. 95.

⁷³ See § 1665, *supra*.

⁷⁴ *State v. Leete*, 16 Nev. 242.

⁷⁵ *Hinsdale Sav. Bank v. New Hampshire Banking Co.*, 59 Kan. 716, 68 Am. St. Rep. 391, 54 Pac. 1051.

⁷⁶ *Union Sav. Bank of San Jose v. Willard*, 4 Cal. App. 690, 88 Pac. 1098; *State v. Superior Court Clarke Co.*, 45 Wash. 316, 88 Pac. 332.

⁷⁷ *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889.

⁷⁸ See § 716 et seq., *supra*.

that they were stockholders, on the ground that they never subscribed for stock, or that their subscriptions were irregular, or invalid.⁷⁹ And by acting, or continuing to act, as a stockholder, one may be estopped, as against creditors, to set up a release or discharge,⁸⁰ or nonperformance of conditions precedent on his subscription,⁸¹ or to set up that his subscription was procured by fraud,⁸² or to deny the existence of the corporation.⁸³

The estoppel of stockholders to set up that their stock was illegally issued,⁸⁴ or was part of an overissue, or an unauthorized or irregular increase of stock,⁸⁵ and the estoppel of persons who voluntarily permit their names to stand on the books of the corporation as stockholders to deny that they are stockholders as against creditors,⁸⁶ have been considered in previous sections of this chapter.

⁷⁹ See § 716, *supra*; *Heinze v. South Green Bay Land & Dock Co.*, 109 Wis. 99, 85 N. W. 145.

⁸⁰ See § 717, *supra*.

⁸¹ See §§ 599, 704, *supra*.

⁸² See §§ 633, 636, *supra*.

⁸³ See § 715, *supra*.

Stockholders in a *de facto* corporation are estopped to deny its corporate existence for the purpose of escaping liability. *Bank of Midland v. Harris*, 114 Ark. 344, Ann. Cas. 1916 B 1255, 170 S. W. 67.

A stockholder in a national bank formed by the reorganization of a state bank is not permitted to deny the legal existence or validity of the corporation in order to escape liability as a shareholder. *Aldrich v. Bingham*, 131 Fed. 363.

⁸⁴ See § 3488, *supra*.

⁸⁵ See § 3469, *supra*.

⁸⁶ See § 4184, *supra*.

[Chap. 56 is concluded in Vol. 7.]

